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McCOWEN et al. v. PEW. (Civ. 885.)

(District Court of Appeal, Third District, California. Feb. 21, 1912. Rehearing Denied by Supreme Court April 19, 1912.)

1. Specific Performance (§ 115*)—Pleading—Sufficiency.

Where an option merely granted defendant the right to purchase land at a specified price, a cross-complaint by him seeking specific performance did not show that the actual consideration moving plaintiff to give the option was an agreement by defendant to select a certain route and construct a railroad thereon, by alleging that all the facts were known to plaintiff and that the inducement and consideration moving him to contract was the encouragement of the building of said railroad.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 373; Dec. Dig. § 115.*]

2. Appeal and Error (§ 1099*)—Review—Law of the Case—Subsequent Appeal.

Where the sufficiency of a cross-complaint, attacked by objection to admitting any evidence under it, was sustained, and affirmed on appeal on sole consideration of the question whether the contract sought to be enforced under the pleadings was contrary to public policy, the decision on appeal was conclusive of the sufficiency of the complaint on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

3. Appeal and Error (§ 1099*)—Review—Law of the Case—Subsequent Appeals.

In an action to quiet title, defendants by cross-complaint sought to enforce a right under an option to purchase, and plaintiff contended that the consideration for such option was an agreement by defendants to secure the location of a railroad on a certain route and was contrary to public policy. On appeal the court decided that, "as to the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that they were made by the cross-complainant as a foundation for a claim for special damages for the cutting of timber during the life of the option, and for no other purpose, and that nowhere had defendant agreed to select any particular route to the exclusion of any other, nor had they undertaken to do anything." *Held* determinative against the objection on a subsequent appeal that the pleading setting up the contract did not disclose any legal consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

4. Appeal and Error (§ 1099*)—Review—Law of the Case—Subsequent Appeal.

In a suit to quiet title, in which defendants secured judgment on a cross-complaint seeking specific enforcement of an option to purchase, a reversal, on the sole ground that the trial court erred in the measure of compensation awarded defendants for removal of timber from the lands, was determinative against plaintiffs on a subsequent appeal of the point that there was no acceptance of the option; that objection having been urged on the first appeal but not referred to by the court in its opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370–4379; Dec. Dig. § 1099.*]

5. Vendor and Purchaser (§ 18*)—Option—Acceptance.

Where, after plaintiffs granted defendant an option to purchase 1,100 acres of land at $15 per acre, plaintiffs cut timber from the land, an acceptance of the option, with an added condition, "less the loss in value of the timber occasioned by removal," was sufficient under Civ. Code, § 3386, providing that neither party to an obligation can be compelled to specifically perform it unless the other party has performed, "or nearly so, together with full compensation for any want of entire performance."

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

6. Vendor and Purchaser (§ 18*)—Option—Consideration—Acceptance.

After acceptance of an option to purchase land, it did not affect the validity of the contract thereby completed that the option originally was without consideration and might have been withdrawn before acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George McCowen and another against J. W. Pew. From a judgment for defendant, plaintiffs appeal. Affirmed.

See, also, 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630.

H. C. McPike and Robert Duncan, for appellants. Jesse W. Lilienthal and James E. Pemberton, for respondent.

HART, J. The plaintiffs commenced this action for the purpose of securing a decree quieting their title to certain lands described in the complaint and declaring void and of no effect a certain written instrument out of which grows the claim by the defendant of an interest in or right to acquire title to the property so described. To the complaint the defendant filed an answer, wherein he sets forth and reveals the nature of his interest in said property, alleging that it grows out of and is based upon a certain agreement of option between the plaintiffs and the defendant, whereby the owners tendered and offered to the latter the option to purchase, within 12 months from the date of the execution of said agreement, the real property described therein and referred to in the complaint, which said option he accepted. The defendant also filed a cross-complaint setting up said agreement, and, among other things, alleging that, within the time limited by the agreement he, in a written notice delivered to each of the plaintiffs, signified his election to exercise the option granted to him by said agreement to purchase the property referred to therein and that he was ready, willing, and able to pay for said lands, according to the terms of said option, "upon proper compensation to said defendant and deductions from said purchase price" for certain alleged incumbrances on said lands and for the depreciation in the value thereof by reason of the alleged destruction by the plaintiffs, during the life of the option, of certain timber on said property. Upon the averments of the cross-complaint, the defendant asked for a decree specifically enforcing the agreement of sale which was the culmination of the option and its acceptance. Relief was further prayed for as to the issue involving the alleged incumbrances on the lands and the alleged destruction of the timber and the removal of the same from said property. Judgment passed for the defendant, and this appeal is taken by the plaintiffs from said judgment and the order denying them a new trial.

This is the third appeal prosecuted in this cause. The first (McCowen et al. v. Pew, 147 Cal. 299, 81 Pac. 958) involved the sole question whether, full performance of the contract of sale being impossible because of the breach thereof by the vendors in cutting and removing timber from the lands which are the subject of said contract, the compensation to which the vendee was entitled for the depreciation in the value of the property by reason of the cutting and removal of such timber should be based upon the value of the timber so removed at the time the defendant gave notice of his election to exercise the option or upon the value of said timber, if it had remained standing on the land, at the time of the near completion of a railroad with a special view to the construction of which the defendant, so it is alleged, sought and secured the option to purchase said lands. The evidence showed that said railroad was about completed at the time of the trial, and the trial court based its valuation of the timber so removed as of that time, had it then been standing on the land, and found for the defendant accordingly. Upon the ground that the trial court erred in its ruling upon that question, the Supreme Court reversed the judgment and order and returned the cause to the court below for retrial. The second trial of the case resulted in a judgment for the plaintiffs granting them the relief prayed for in their complaint. The defendant appealed from said judgment and the order refusing him a new trial, and the cause was again reversed and remanded for trial de novo. The opinion of the Supreme Court on the last-mentioned appeal is reported in 153 Cal. 735 et seq., 96 Pac. 893, 21 L. R. A. 800, 15 Ann. Cas. 630. The points there urged for a reversal and decided in said opinion will be particularly noticed in connection with the consideration of the points urged here for a reversal of the judgment.

Before proceeding to a consideration of the points made by the appellants, however, it will perhaps be more conformable to an orderly course to briefly recite the facts of this protracted litigation. In doing so, we conceive that we can do no better than to state them in the language of the Supreme Court, in the case reported in 147 Cal. 300, 81 Pac. 962, as follows: "The plaintiffs were the owners of a tract of land containing about 1,160 acres, and on October 16, 1899, they and the defendant Pew executed an agreement whereby they granted to Pew the option, during the ensuing 12 months, to acquire from the plaintiffs the land in question, for the sum of $15 per acre. * * * Between the date of the making of the agreement and October 11, 1900, the plaintiffs cut and removed from about 10 acres of the land in question a large quantity of redwood, pine, and oak timber, the value of which and the particular time at which its value is to be determined is the principal issue in this case. On October 11, 1900, Pew, having received information of the cutting of the timber in question, gave notice in writing to the plaintiffs that he elected to exercise the right to acquire the land covered by the agreement, and offered, upon receiving a good title to the land, to pay for the same at the rate of $15 per acre, less the loss in value of the land occasioned by the removal of the timber by the plaintiffs. There were certain incumbrances on the title, which constituted defects in the title, which were not removed until some time in December following, or about the 1st of January, 1901. The parties could not agree upon the amount to be deducted from the price on account of the removal of the timber; but, subject to the settlement of that question, the plaintiffs were ready to perform their agreement and convey a good title on the 6th of December, 1900. Not being able to agree upon the amount of compensation to be allowed for the timber removed, the plaintiffs claimed that the agreement had been forfeited, and in March, 1901, brought the present action against the defendant to quiet title. Pew filed a cross-complaint, setting out the agreement aforesaid, averring the election to acquire title thereunder by himself and those associated with him, and their purpose in acquiring the lands as aforesaid, and asking that the court enforce specific performance of the contract according to its terms, and allow a deduction from the price as compensation for the loss to him by reason of the timber removed by the plaintiffs prior to the time he gave notice of his election to exercise the option.

The agreement of option, or the part thereof important or specially material to the inquiry here, reads as follows: "Now, therefore, for value received by said party of the first part (plaintiffs) from said party of the second part (defendant), and to induce said party of the second part to undertake the disposition of said property, said party of the first part has granted unto said party of the second part, his representatives and assigns, for the period of twelve months from the date hereof, an exclusive and irrevocable option to acquire from said party of the first part for said party of the second part, or his assigns, or such parties as he may negotiate with, for the sum of fifteen dollars per acre, a good and sufficient title to the property situate in Mendocino county, state of California, and more particularly described as follows:" Then follows a description of the property. Said agreement was signed and executed by both the plaintiffs and the defendant, and was recorded in the office of the county recorder of Mendocino county on the 21st day of September, 1900.

Counsel for the appellants, at the oral argument, expressly abandoned the appeal from the order, thus waiving any alleged errors of law occurring at the trial, and declared that they relied and would rely solely upon the points made upon the appeal from the judgment. We shall, therefore, in the consideration of this appeal, confine ourselves to a review and decision of what is in effect the single proposition, urged in the oral argument with the skill of a master and the vigor that is the offspring only of unfeigned earnestness, submitted here, viz., that the cross-complaint is bad for want of sufficient facts. This postulate is sought to be supported and sustained chiefly by two points; the first of which in the order in which we shall consider them being a direct attack on the sufficiency of the cross-complaint to state a cause of action, and the second involving a direct attack on the findings, which, since in that regard they follow, substantially, the allegations of the cross-complaint, may also be treated as challenging that pleading on the ground that the facts therein stated are not such as to entitle the defendant to the relief demanded thereby and as awarded by the decree.

These points may be stated as follows: (1) That while, confessedly, the agreement of option contains no language even remotely indicating that the building of the railroad referred to on and over a certain route, or, to state it concretely, over the route from Ukiah to Willits, in preference over other routes which were within the contemplation of the projectors of said road, constituted a consideration moving the plaintiff to grant the option in question to the defendant, yet the averments of the cross-complaint, themselves, disclose that the building of said road along the indicated route was, in point of fact, the consideration supporting said option, and that, further disclosing that said railroad over and along said route was not completed at the time of the exercise by the defendant of his election to purchase the property in dispute in pursuance of said option, the pleading of the defendant, therefore, signally and completely fails to show or set forth a contract for the sale and purchase of the property or a contract whose terms can be specifically enforced. In other words, to state this proposition—the premise and the conclusion therefrom—in the language of learned counsel for the appellant in his oral argument before this court: "The plaintiffs were the owners of a tract of timber land in Mendocino county. The defendant contemplated an extension of the North Pacific Railway, and had under consideration four different routes, one of which ran from Ukiah to Willits. He proposed selecting the line along which he should secure options upon timber lands. With full knowledge of these facts the plaintiff granted him, in consideration of his building on the route from Ukiah to Willits, the right to purchase, at his option, their property within a designated time. When the time was about to expire, the defendant demanded a conveyance. The extension not being built, the plaintiffs refused to convey. That, under these circumstances, the plaintiffs were under no obligation to convey, is a proposition which would seem hardly to require argument. As the building of the road from Ukiah to Willits was the consideration of the right to a conveyance, the road must, of course, be built, before that right could be exercised. If I promise to give you something in consideration of your doing something, surely you may not ask for the thing I am to give until you have done the thing you are to do." (2) That the offer or option granted by the plaintiffs was never accepted, it appearing from the findings "that the offer was to sell at a certain price, and the proposal to buy at a different price." In other words, the contract made is not the one upon which the defendant relies in this action.

There are other objections aimed at the findings and cross-complaint, among which is the one involving the contention that the option granted by the plaintiffs to the defendant was not supported by any consideration.

If, as before suggested, as to the proposition that the contract declared upon is not the contract made, the findings thus assailed do not support the judgment, then, manifestly, the cross-complaint does not and never did state a cause of action, since, as we have seen, the findings so attacked are substantially in the language of that pleading.

Replying to the propositions thus submitted by the appellants, the defendant first contends that the precise question whether the facts alleged in the cross-complaint state a cause of action, or are such as to entitle him to the specific performance of the alleged agreement of sale and purchase, was involved in and decided, adversely to the position of the appellants here, on the appeals in the case of these plaintiffs against the defendant (153 Cal. 735, 96 Pac. 893, 21 L. R. A. [N. S.] 800, 15 Ann. Cas. 630, and 147 Cal. 299, 81 Pac. 958), and that therefore, regardless of whether the court was right or wrong in its construction of the scope and effect of the allegations of the cross-complaint and of the findings referred to, the question of the sufficiency of that pleading is now inhumed beneath the doctrine of res adjudicata, and that said question is, consequently, so far as this action is concerned, no longer open to review.

It is secondly contended that there is nothing either in the language of the written option, the findings, or the allegations of the cross-complaint which furnishes the slightest pretext for the contention that the building of the railroad referred to from Ukiah to Willits or over any other route constituted the consideration or any part thereof inducing the plaintiffs to grant the option or was intended to operate as a condition precedent to the right of the defendant to exercise the option to purchase the lands, or that indicated a different contract from that upon which the defendant declares. As to the latter proposition, the defendant submits that, the plaintiffs themselves having by their own acts changed the condition of the property during the life of the option so that full performance of the agreement on their part could not be had, the defendant was entitled to part performance thereof or performance of so much of the agreement as it was within the power of the plaintiffs to consummate, with compensation for the deficiency. Civ. Code, § 3386. In other words, the contention is that the acceptance of the option by the defendant was an acceptance of the original offer, precisely as it was granted, subject, however, to the latter's right to be compensated by the plaintiffs for a deterioration in the value of the lands occasioned by their own unauthorized acts while the option still subsisted.

It may be just as well to announce, in limine, that our conclusion is that the attack upon the cross-complaint and the findings, as indicated in the foregoing, is without substantial grounds for its justification.

We shall consider the points urged in the order in which they are stated herein and as if both involved, as the first point certainly does, a direct assault upon the sufficiency of the cross-complaint to state a cause of action.

As seen, the cross-complaint avers the execution of the agreement of option, as set out in the complaint, granting to the defendant the exclusive right, for a period of 12 months, to purchase the property therein described. The pleading then proceeds with the following allegations, which constitute the sole fulcrum of the argument addressed to the proposition that the building of the railroad was intended as and was an act prerequisite to the right of the defendant to a conveyance:

"(4) That in the making of said agreement this defendant was not acting in his own interest and behalf, but for others associated with him, who were to construct the railroad hereinafter mentioned, and as to the interest of said persons, although made and taken solely in the name of this defendant, as party of the second part.

"(5) That at the time said agreement and contract was made, this defendant and the persons so associated with him were contemplating and preparing for the building of a railroad from some point on the line of the railway of the San Francisco & North Pacific Railway Company into some portion of Mendocino county, in which timber and wood could be procured in large quantities. That at said time four different locations (or routes) for said proposed railroad were under consideration by them, and it had been determined by them to so build said railroad at some one of the said contemplated locations only, but it had not been decided at which one. That one of the said contemplated locations for said proposed railroad was from Ukiah, northerly to Willits in said county. That the building of said railroad at last-mentioned location would greatly increase the value of the lands hereinbefore described by making the timber thereon accessible to a market; but the building thereof at any one of the other proposed and contemplated locations would not increase the value of these lands. That the selection of a route or location depended largely upon securing options upon timber lands along the line of the proposed railway. That all these facts were well known at the time to plaintiffs, and that the inducements and consideration moving the plaintiffs, and causing them to enter into said contract or agreement, were the encouragement and inducement of the building of said railroad from Ukiah to Willits in preference over said other routes.

"(6) That thereupon and thereafter this defendant, and the persons so associated with him, secured the selection of said route and location for said railroad from Ukiah to Willits in preference to said other routes and locations; and said railroad was thereupon surveyed and laid out and is now in process of construction and being rapidly built and pushed toward completion, and will be built from Ukiah to Willits within a short time; and that the consideration and inducement causing preference to be given to said location thereof was the option given in said contract hereinbefore set forth, giving this defendant the privilege of purchasing said land, and similar options in similar contracts regarding other lands adjacent thereto and in that portion of the county, and said options were all taken and said contracts all entered into solely for the purpose of securing freight for said railroad, and the added valuation that would be given to said lands by the construction of the railroad in excess of the price set in said contracts respectively."

[1] In vain have we prosecuted an examination of the foregoing paragraphs of the cross-complaint to find a single line or even a word which may rationally be interpreted to justify the inference that the actual building of the railroad constituted any part of the consideration moving the plaintiffs to grant the option in question to the defendant. Much less do the averments disclose a direct statement indicating the act of actually building the railroad to have been imposed as a condition precedent to the defendant's right to a conveyance. The nearest approach to an allegation justifying the contention of the plaintiffs in that regard is the following: "That all the facts were well

known at the time to plaintiffs, and that the inducements and consideration moving the plaintiffs, and causing them to enter into said contract or agreement was the *encouragement and inducement of the building of said railroad* from Ukiah to Willits in preference over said other routes." But this allegation, it is plainly apparent, does not say that the defendant *agreed* to build the railroad, in consideration for the option, or that it would complete its construction within any specified time, but merely declares that the plaintiffs, to *encourage* and *induce* the projectors to build the road over said route, were thus moved to enter into the agreement. There is, in fine, nothing in the language of the cross-complaint binding the defendant to do anything with respect to the building and completion of said railroad, or indicating that upon the building and completion of the road rested the right of the defendant to exercise the option to purchase the property.

[2] But we think that this question—the objection to the cross-complaint upon general grounds—has been definitively and conclusively determined by the Supreme Court in the case of McCowen v. Pew, 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630, the second appeal in this case.

The question of the sufficiency of the cross-complaint on that appeal arose over the ruling by the trial court by which it sustained an objection by plaintiffs to any evidence being received in support of the averments of that pleading on the ground that it did not state facts sufficient to constitute a cause of action or defense to the action of plaintiffs.

The sole proposition on which the asserted insufficiency of the cross-complaint was predicated at that trial of the case was, as stated by the Supreme Court in its opinion, "that the contract sought under that pleading to be specifically enforced was contrary to public policy and void." That this was the specific ground of attack on the cross-complaint in that case was assumed by the Supreme Court from the fact only that the briefs and arguments of counsel for the appellants were confined to a discussion of the question whether, as they claimed the cross-complaint revealed to be the fact, "contracts between a landowner and a company for the establishment of the line of road to subserve and promote private and pecuniary advantages of those entering into them are in contravention of such (public) policy and void, because the tendency of all such contracts is to sacrifice the public interest to the selfish private advantage of the contracting parties." In other words, the specific ground upon which it was contended and argued at the hearing of that appeal, on behalf of appellants, that the cross-complaint failed to state a cause of action, was that the allegations of said pleading disclosed that the agreement between the plaintiffs and the defendant was of the nature of one whereby the defendant, acting for the railroad company, agreed with the plaintiffs to preclude said company "from establishing or locating depots or stations on its road at any other than certain localities, or within certain prescribed limits." And this question the court decided in that case, among other things saying that such agreements "are plainly in violation of a clear duty owed by the railroad company to the public, as public agents, to locate their depots and stations where the public wants and necessities demand their establishment," etc.

While it is true that the precise special reason urged in support of the general objection to the cross-complaint at the hearing of that appeal in this case was different from the precise special reason urged in support of the general objection to the pleading here, it is the statement only of an obvious proposition to say that the ultimate question submitted for decision by the court on the former appeal is precisely the same as the ultimate question submitted for determination here, viz.: Does the cross-complaint state facts sufficient to constitute a cause of action? Nor, if it may be said that, strictly speaking, the court on the former appeal did not expressly pass upon the specific objection here urged in support of the general objection then interposed and argued against the cross-complaint, can it be maintained that the court did not then decide that that pleading was good as against an objection on general grounds for any reason that might be assigned in support of such objection. The objection to the reception of evidence in support of the allegations of the cross-complaint upon the ground that it failed to state a cause of action was, manifestly, tantamount to an objection thereto upon the same ground through the agency of a general demurrer. It often happens that more than a single reason may be assigned and urged in support of the general objection, in whatsoever form the objection may be raised, that a pleading is bad for paucity of facts. Indeed, the case at bar is a striking illustration of this proposition. And where a pleading is challenged for want of sufficient facts, in whatever form such attack may be garbed, we apprehend it to be the duty of a court of review, and a duty that it will in all cases execute, in the examination of such objection, to take such pleading up by the four corners, thus scrutinize and measure its averments by the full breadth of the objection thus interposed to it, and then decide whether, for the reason or reasons advanced, or for other reasons, not advanced, the general objection that the pleading fails to state a cause of action is well taken. If this were not true, a piecemeal method of attacking a pleading for insufficiency of facts would obtain—a practice which the law does not countenance and which the courts, for the sake of putting an end to litigation, should not encourage. Therefore we affirm that the Supreme Court, having sent the cause back for retrial after a decision against the objection that the cross-complaint here was bad for want of facts, has impliedly if not expressly held that the specific objection here urged against said pleading is groundless.

But we think that it cannot for a moment be doubted that, in its opinion in 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630, in this case, the court has passed upon and sustained the ability of the cross-complaint to withstand the specific attack made upon it here.

In order to determine the question whether the specific point urged in support of the objection made to the cross-complaint on the second appeal (153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630) on the ground that it set forth no cause of action, viz., that its averments disclosed an illegal, and therefore void, agreement as the basis of the relief asked for therein, the Supreme Court was, in the very nature of the proposition before it, compelled to examine the allegations of said pleading to satisfy itself upon the proposition whether the agreement between the plaintiffs and the defendant came within that class of agreements unlawful and void because in contravention of public policy. In the prosecution of this inquiry, the first proposition that would naturally be examined and solved was whether the cross-complaint, in point of fact, disclosed an agreement of any character whatsoever requiring the railroad to be built before the defendant would become entitled to a conveyance. And the court decided this question in the very beginning, holding, in as clear and explicit language as could well be employed, that the averments of the cross-complaint did not show that the plaintiffs were moved in granting the option by the consideration or promise that the defendant, before being entitled to accept such option, would build the railroad over the line from Ukiah to Willits, or that the defendant bound himself to do anything with regard to the location of the route or the building of the railroad. After stating the proposition upon which the appellants based their contention that the cross-complaint was insufficient to entitle the defendant to the relief demanded by his pleading, and saying that "the only question necessary for consideration is the refusal of the trial court to permit the introduction of any evidence by appellant in support of his cross-complaint," the court, inter alia, said: "We make no question about the rule as contended for by the respondents, but we are satisfied, taking the allegations of the cross-complaint with the other pleadings in the case, which must be considered for that purpose (although it was on the allegations of the cross-complaint alone that the point of invalidity was based) that it does not appear therefrom that in the granting of the option any restriction or limitation was imposed thereby on Pew and his associates, who contemplated building the railroad, as to the selection of a route. * * * As to the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that they were made by the cross-complaint as a foundation for a claim for special damages for the cutting of the timber during the life of the option, *and for no other purpose* (McCowen v. Pew, 147 Cal. 299, 81 Pac. 958), while the answer to the cross-complaint denies that any such consideration entered at all. * * * The agreement itself granting the option * * * provides for an option in favor of respondent Pew to purchase the 1,160 acres of timber land at $15 an acre, and recites that the owners (McCowens) desired to dispose of same and 'to have the assistance of said party of the second part (Pew) in so doing without cost to the parties of the first part,' and declares the consideration for the option to be 'for value received, * * * and to induce said party of the second part to undertake the disposition of said land.' On the part of Pew he stipulated 'to use his best endeavors to dispose of said property, either by acquiring same or selling same to others' without cost to the McCowens. These are the only provisions of the contract of option itself. There is nothing therein relative to any conditions or stipulations or restrictions as to any route for a contemplated railroad, nor mention made of any railroad at all. Neither, when we come to an examination of the allegations of the cross-complaint, do we find anything *from which it appears that any agreement was made that in consideration of the granting of the option the selection of any particular route was provided for.* (Italics ours.) * * * It will be observed that there is nowhere in these allegations any statement that Pew and his associates agreed to select any particular route to the exclusion of any other route, *nor, in fact, so far as said allegations are concerned, does it appear therefrom that they undertook to do anything.* (Italics ours.) * * * All that appears is that Pew and his associates, for the purpose of securing freight for the railroad they contemplated building, took options upon timber lands in the locality through which the line of said road might be built and such freight received; that certain owners of land, as an *inducement to the building of the railroad over one of the four contemplated routes*, gave an option upon their lands at a price specified in the option representing the full value of the land and that the only advantage to be secured to the builders of the road (as full value for the land was to be paid) was the obtaining of freight to be carried. * * * In the absence of anything to the contrary in the allegations of the cross-complaint, it must be taken that Pew and his associates were persons contemplating the formation of a railroad corporation, and that the options obtained by Pew were for the benefit of such corporation, and that any inducements operating upon the granting of such options must be taken to have extended to the contemplated railroad itself."

[3] Thus we have quoted in extenso from the opinion of the Supreme Court to show, as the opinion clearly does show, that the very question involved in the present discussion was decided in said opinion by that court, viz., whether the cross-complaint discloses that the consideration or a part of the consideration moving the plaintiffs to grant the option in question to the defendant was a promise or agreement on the part of the latter to secure the location of the route or the building of the railroad from Ukiah to Willits. Disregarding, if we may choose to do so, all the other language of the opinion but the following, and we find the proposition succinctly and conclusively decided: "As to the allegations concerning the consideration and inducement to the granting of the option, it is quite apparent that *they were made by the cross-complainant as a foundation for a claim for special damages for the cutting of the timber during the life of the option, and for no other purpose.*" And that "it will be observed that there is nowhere in these allegations any statement that Pew and his associates agreed to select any particular route to the exclusion of any other route, *nor, in fact, as far as said allegations are concerned, does it appear that they undertook to do anything.*"

If, by the foregoing, the court does not expressly decide that the specific objection here made to the cross-complaint is without merit, then we confess our inability to understand the above language or the import of the decision.

Our conclusion upon the point under consideration is, as must be apparent from what we have said: (1) That nowhere in the cross-complaint is there a single statement or averment which may be held to disclose an agreement that the road should first be built before the defendant's right to a conveyance ripened. There is even not shown, as the Supreme Court declares, an agreement to locate the road over the route from Ukiah from Willits, must less an agreement that the road should be built before the defendant would be authorized to exercise his option. (2) That, assuming that our conclusion as thus stated is erroneous, the decision of the Supreme Court to which we have referred, holding the objection to the cross-complaint on the general ground that it does not state a cause of action not to be good involves the law of the case upon that question and is conclusive as to the parties to this action. And since the findings upon this point follow the averments of the complaint, it therefore follows that the court did not, as is the contention, find that the building of the railroad constituted a prerequisite to the right of the defendant to a conveyance.

What we have said with regard to the law of the case applies with equal pertinency and force to the second point advanced by the appellants.

The proposition is, as we have seen, that the findings disclose a variance, fatal to the judgment, between the option granted by the plaintiffs and the acceptance by the defendant. The finding in this particular, as we have heretofore shown, substantially follows the averments of the cross-complaint. As before suggested, if that finding does not support the judgment for the reason stated, then clearly the cross-complaint has at no time stated a cause of action. The point thus made is, therefore, in effect an attack upon the sufficiency of the cross-complaint to state a cause of action. Although it is strictly correct to say that this precise point was not raised or considered on the second appeal of this case (153 Cal. 735, 96 Pac. 893, 21 L. R. A. [N. S.] 800, 15 Ann. Cas. 630), yet we adhere to what we have already said regarding the effect of that decision upon the question of the sufficiency of the cross-complaint, and hold that thereby that pleading was held to be good as against that objection for any reason that might or *could* have been suggested in its support. The court, as before stated, remanded the cause for a *new trial.* Upon what, must we assume? Upon a pleading which, for any reason, stated no cause of action? The questions embrace their own answer. But conceding that there was no implied ruling against the contention of the appellants as to the point now under review in the opinion in 153 Cal. 735, 96 Pac. 893, 21 L. R. A. (N. S.) 800, 15 Ann. Cas. 630, still there can be left no room for any doubt, after an examination of the opinion in McCowen v. Pew, 147 Cal. 309, 81 Pac. 958 (the first appeal in this case), that this point was presented and argued by counsel and decided by the court adversely to the contention of the appellants here.

The cause, on said appeal, was first heard in department and the judgment and order in favor of the defendant affirmed. In the department opinion it is said: "One of the contentions on the part of the appellants is, as stated by their counsel 'that the option in this case was merely an offer to sell the property, and that in order to make it a valid contract, capable of specific performance, it was necessary for the defendant Pew, within the time set in the option and before its withdrawal, to accept the offer in the *exact terms in which it was made.* * * * An acceptance of an offer to purchase the property must be unconditional in order to create a contract, and the slightest condition attached to an attempted acceptance of the option prevents an agreement of the parties.' This contention cannot be maintained"—citing Burks v. Davies, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213.

[4] The court in banc reversed the department on one point and so sent the cause back for retrial. The single point upon which the reversal was founded was, as we have before shown, that the trial court erred in its adoption of a basis for the admeasurement of compensation to which the defendant claimed to be entitled because of the removal of the timber from the lands. The question now under consideration was not discussed by the court in its opinion rendered in banc, but it was before the court then as it was before the department. Indeed, it was one of the prominent points urged for a reversal at the hearing of that appeal, and the judgment and order having been reversed on another point, without any reference in the opinion to this point, it must be assumed that the court regarded it as possessing no merit, which is equivalent to saying that the court's decision of the question was against the position here of appellants.

[5] But apart from any consideration of the proposition whether the decisions of the Supreme Court heretofore rendered in this case constitute the law of the case upon this question, we are persuaded that the position of the appellants, as a legal proposition, is altogether untenable.

As has appeared, the plaintiffs granted to the defendant the option to purchase, within 12 months, the lands in dispute. During the life of the option, the plaintiffs cut and removed a large quantity of timber from said lands, and thus, by their own acts, changed the condition of the property from that in which they agreed to permit the defendant to buy it, if he so elected within the time granted to him. Within that time, the defendant did elect to exercise his right to purchase the property according to the terms of the option, and in writing so notified the plaintiffs; but, having been informed of the destruction and removal of a large quantity of timber from said lands after the granting of said option, he demanded of the latter compensation therefor commensurate with the depreciation in value that the property had necessarily suffered thereby. The plaintiffs, as we have seen, acquiesced in the acceptance as it was thus made by the defendant. In other words, as the court found, the "plaintiffs made no objection to the notice of acceptance of option, as so given by defendant, or to his offer to perform on his part, and that they had opportunity so to do if any objections they had; and they did forthwith assent and agree to the same and to all propositions made by defendant in said writing." And thus the plaintiffs distinctly recognized the acceptance thus made by the defendant as an acceptance of the identical option which they had granted to him. And, obviously, such acceptance *was* of the precise offer by the plaintiffs. The option provided that the plaintiffs would grant the defendant the right to purchase, within 12 months, 1,160 acres of land, specifically described in said offer, at the rate of $15 per acre, and the acceptance declared that the defendant would accept the offer and purchase *said 1160 acres, so described, at the rate of $15 per acre.* Up to this point, it would and could not be doubted that a court of equity would compel specific performance on the part of either of the parties to this contract. But it transpires that the plaintiffs—the owners of the lands and the optioners—through their own deliberate and unauthorized acts, find themselves unable to perform their agreement in full. By their own acts during the life of the option they have lessened the value of the lands which they agreed to allow the defendant to buy at a specified price. Willing for and desirous of a performance of so much of the agreement as the optioners were able to carry out, the optionee added to his acceptance: "You have despoiled the property which you granted me the option to purchase of some of its valuable timber, which was my chief inducement to the securing of said option, and thus have you reduced the value of the lands. Now, I think it is only just and right that, having elected to buy the property on the stipulated terms, I should be compensated for the value of that timber." To which proposition the plaintiffs assented, and thus, it is argued, a conditional contract or a new agreement, entirely independent of and distinct from the proposition involved in the original negotiations, has been introduced and is relied upon by the defendant. Obviously, the inevitable result of this contention, if sustained, would be, to employ an illustration: That A. may agree to grant to B. an option to buy his house and lot at a specified price within a specified time. A. may get rid of the obligation thus imposed upon himself, or, as might in effect strictly be true, arbitrarily rescind or withdraw the option by wrongfully removing the house from the lot during the life of such option and before it had been accepted.

The proposition as thus stated and contended for cannot be upheld. B., it is very true, might justify a refusal on his part, after acceptance, if he accepted the option with no knowledge of the changed condition of the property through the optioner's own fraud, to take the property; but the optioner certainly could not, upon any equitable consideration, refuse to convey upon acceptance by the optionee, with just and proper compensation to the latter for the part of the agreement which he was thus made unable to perform. In other words, the case here comes clearly within the rule of part performance with compensation for the deficiency as enunciated by section 3386 of the Civil

Code, supra, which reads: "Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compelled specifically to perform, everything to which the former is entitled under the same obligation, either completely or *nearly so together with full compensation for any want of entire performance*."

The rule is thus stated by Prof. Pomeroy, in his work on Equity Jurisprudence (volume 6, § 831): "Where the vendor is unable even substantially to perform his contract, the vendee, at his election, may have specific performance with compensation for the deficiency, on the principle that 'where one party would be foiled at law, but the other may have the reasonable, substantial effect of his contract, compensation shall be admitted.' "

The cases cited by appellants—notably, Clarke v. Burr, 85 Wis. 649, 55 N. W. 401, and Caldwell v. Frazier, 65 Kan. 24, 68 Pac. 1076—deal with a widely different state of facts from that in the case at bar, and are therefore not in point here.

In the first-mentioned case, Clarke granted to Burr an option to purchase a certain piece of land, upon which a sawmill stood. At the time the option was given, the sawmill was insured for $9,500. The mill was destroyed by fire during the life of the option, and thereafter Burr, within the time designated by the option, notified Clarke of his acceptance of the offer to sell, but demanded that the insurance money be credited to him as a part of the purchase price; that is, that he (Burr) was ready to buy the property for a price amounting to the difference between the sum originally agreed upon and the amount of the insurance on the mill. The court held that the "acceptance" by Burr was not an unconditional acceptance, and therefore constituted the proposal of a different contract from that contemplated by the option, and refused to decree specific performance of the alleged contract.

The case of Caldwell v. Frazier, supra, is quite similar as to the essential facts upon which the decision of the controversy hinged to the case of Clarke v. Burr, supra.

There are several conclusive answers to the contention, pressed with vigor, that these cases are applicable to the case at bar. First, it is to be observed, as we have shown, that there was here no conditional acceptance of the offer. The defendant, in other words, did not accept the offer upon the condition that the price stipulated in the option be reduced, but accepted the offer for the precise price at which the plaintiffs therein offered to sell the lands. The demand for an allowance for the inability of plaintiffs to fully complete the contract to convey arising upon the acceptance of the offer was not, manifestly, a proposition to reduce the *price* for which they offered the lands, but for *compensation* for the loss which would accrue to the defendant because it became impossible for plaintiffs to convey to the defendant all that they had offered to convey for the stipulated price. Secondly, the plaintiffs expressly acquiesced in the acceptance and treated and recognized said acceptance as of the precise option which they had granted to the defendant, and thus they waived any objection to the acceptance upon the ground that it varied from the terms of the option. Civ. Code, § 1501; Code Civ. Proc. § 2076; Oakland Bank of Sav. v. Applegarth, 67 Cal. 86, 88, 7 Pac. 139, 476; In re Pearsons, 102 Cal. 569, 36 Pac. 934; Royal v. Dennison, 109 Cal. 558, 42 Pac. 39; Kofoed v. Gordon, 122 Cal. 314, 54 Pac. 1115; Latimer v. Capay Valley L. Co., 137 Cal. 286, 70 Pac. 82. Thirdly, and, indeed, the most important of the considerations distinctly differentiating this case from those cited and referred to, the changed condition of the property, as we have seen, was due entirely and solely to the deliberate and unauthorized acts of the plaintiffs themselves during the life of the option, and it is a familiar principle that no one will be permitted to take advantage of his own wrong. As is shown by the illustration above employed, a party will not be permitted arbitrarily, or at his own will, or by his own acts, or without the consent of the other party thereto, to render his contract nugatory. An option agreement, although in its nature unilateral, is as binding upon the part of the optioner as is a bilateral agreement upon the parties thereto. So long as it is supported by a consideration, the optioner can no more capriciously withdraw or rescind it than one of the parties could arbitrarily or without the consent of the other party rescind a bilateral contract.

[6] And this brings us to a consideration of the only one of the several remaining points to which we feel called upon to give special attention in this opinion, viz., that the option was not supported by a consideration. The obvious answer to this proposition is that the option as an option agreement became functus officio at the moment of its acceptance by the defendant. After that event, in other words, it was eliminated from the transaction as an option, and could then serve no purpose except in so far as it disclosed and involved the terms of the bilateral agreement arising, ipso facto, upon its acceptance, and, therefore, whether it was supported by a consideration is now immaterial. If, as a matter of fact, it was unsupported by a consideration (although the court found to the contrary), it was, of course, then a mere nudum pactum, and the plaintiffs could therefore have withdrawn it at any time before its acceptance. Brown v. S. F. Sav. Union, 134 Cal. 448, 452, 66 Pac. 592, and cases therein cited; Mitchel v. Gray, 8 Cal. App. 423, 429, 97 Pac. 160. But, while this is true, the plaintiffs not having withdrawn it, but, on the contrary, treated it as a binding obli-

gation by acquiescing in its acceptance, it was good without a consideration until so withdrawn.

We have now examined the record before us and the points pressed upon us for a reversal with much care and have thus found no reason which would warrant us in disturbing the judgment.

The defendant having appealed from that portion of the judgment allowing the plaintiffs interest on the amount adjudged to be due them for the property in dispute, which said appeal, No. 882, is pending in this court, the judgment appealed from in the case at bar, except that portion relating to such interest, and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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PEOPLE v. HARRISON. (Cr. 203.)

(District Court of Appeal, Second District, California. Feb. 21, 1912. Rehearing Denied by Supreme Court April 19, 1912.)

1. Criminal Law (§ 1166½*)—Harmless Error — Impaneling — Peremptory Challenges—Review.

Where accused, required, over his objection and contrary to his request that the jury box be filled, to exercise his peremptory challenges while only eight jurors remained in the box after four had been excused following a voir dire examination, was not prejudiced thereby, the ruling was not reversible error, though in impaneling the jury the better practice does not require either party to exercise a peremptory challenge until there are in the box twelve men, adjudged competent by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114–3125; Dec. Dig. § 1166½.*]

2. Criminal Law (§ 1158*) — Findings of Trial Court—Conclusiveness.

A finding of the trial court on conflicting evidence on the issue of the competency of a juror is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061–3066, 3070, 3071, 3074; Dec. Dig. § 1158.*]

3. Jury (§ 103*)—Competency of Jurors—Evidence.

A juror who, on his voir dire, stated that, while he would not be prejudiced against accused merely because of failure to testify as a witness, yet he would go into the jury box with the impression that accused should take the stand, and would arrive at a verdict on less evidence for the prosecution than if defendant testified, but who subsequently stated that he would follow the instructions, was competent, under the rule that a juror entertaining an erroneous impression as to a matter of law, subject to removal by instructions, was not disqualified.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461–479; Dec. Dig. § 103.*]

4. Jury (§ 103*)—Competency of Jurors—Evidence.

A juror who, on his voir dire, stated that what he had heard led him to believe that he could not give accused, at the beginning of the trial, the presumption of innocence, by reason of which he would require less evidence to prove accused's guilt than if he had heard nothing about the case, but who stated that he could follow the instructions and could act impartially, was not disqualified.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 461–479; Dec. Dig. § 103.*]

5. Witnesses (§ 40*) — Competency — Presumptions.

A person 15 years old is presumptively competent to testify.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.*]

6. Witnesses (§ 40*)—Incompetency — Burden of Proof.

A party, to show that a person 15 years old is incompetent to testify on the ground of unsoundness of mind, must show that the witness is wanting in sufficient intelligence to observe, recollect, and communicate with regard to the occurrences pertaining to the matter concerning which he is called to testify; and, in the absence of evidence of want of a sense of moral responsibility, or of any lack on the part of the witness of the recognition of a duty to testify according to her recollections and knowledge, the witness may properly be held competent.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 97, 98; Dec. Dig. § 40.*]

7. Witnesses (§ 39*)—Appeal—Rulings on Competency of Witnesses—Review.

Though, under Code Civ. Proc. § 1880, subd. 1, the ruling of the trial court on the competency of a witness, alleged by a party to be incompetent on the ground of mental unsoundness, is reviewable, the determination of the question by the trial court is almost wholly in its discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 96; Dec. Dig. § 39.*]

8. Witnesses (§ 77*) — Competency — Preliminary Examination.

A court, required to determine the condition of mind of a witness at the time of his production for examination, may examine the witness, and from such examination determine the competency of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 195–200; Dec. Dig. § 77.*]

9. Trial (§ 50*) — Competency — Question for Court.

The question of the mental competency of a witness is for the trial court; and it may, in its discretion, excuse the jury while hearing the preliminary testimony on the issue of competency.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 122; Dec. Dig. § 50.*]

10. Witnesses (§ 327*)—Mental Competency—Decision of Court—Evidence—Admissibility.

Where the court ruled that a witness was mentally competent to testify, the exclusion of evidence of a prior mental condition of the witness was proper, especially where the evidence related to the mental condition some two years preceding the trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1101, 1102; Dec. Dig. § 327.*]

11. Witnesses (§ 327*)—Impeachment.

Under Code Civ. Proc. §§ 2051, 2052, prescribing the modes for impeaching a witness, a witness adjudged mentally competent by the court may not be impeached by proof of his mental condition.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1101, 1102; Dec. Dig. § 327.*]

12. Criminal Law (§ 542*)—Testimony of Deceased Witness—Admissibility.

The mere fact that the preliminary examinations of defendant and codefendant, sepa-

rately charged with a like offense, were held at the same time, at which part of the testimony of a witness, since deceased, related to the charge against defendant, and a part concerned the charge against codefendant, did not deprive the prosecution of its right, on the trial of defendant, to introduce, as authorized by Pen. Code, § 686, such parts of the testimony of the deceased witness as constituted competent evidence against defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1232, 1236; Dec. Dig. § 542.*]

13. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

Where the instructions fairly and fully stated the law, it was not error to refuse requested instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Ed Harrison was convicted of statutory rape, and he appeals. Affirmed.

See, also, 13 Cal. App. 555, 110 Pac. 345.

H. T. Miller, J. R. Dorsey, and Thomas Scott, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with statutory rape. He appeals from the judgment and an order of the court denying his motion for a new trial.

As grounds for reversal, numerous errors are assigned, very few of which, however, merit other than general notice.

[1] In impaneling the jury to try the case, 12 men were called to the jury box, and, following their examination upon voir dire, 4 were excused, upon the ground that they were disqualified. Without calling others to take the place of those so excused, and with the jury box containing only 8 qualified jurors, defendant, over his objection and contrary to his request that the box be filled, was required to exercise his peremptory challenges. In so ruling, it is claimed the court erred. The Code does not specify the particular stage of the proceedings when a peremptory challenge shall be interposed to an objectionable juror, and, so far as we are advised, the Supreme Court has announced no rule applicable to the facts here presented. Under these circumstances, we are not inclined to hold that the court erred particularly as it is not made to appear that defendant was in any wise prejudiced by such ruling. It has been held that in the impaneling of a jury to try a civil action neither party can be required to exercise his peremptory challenges until there shall be found in the box 12 men, whom the court shall adjudge to be competent and qualified jurors. People v. Scoggins, 37 Cal. 679; Taylor v. Western Pac. R. R. Co., 45 Cal. 323, 330. The reasoning of the court given in the latter case in support of the rule is equally applicable in support of a like rule in impaneling a jury in a criminal case; and we think the usual and better practice in criminal cases is to follow the rule there announced. Indeed, such we understand to be the prevailing practice in the courts of this state.

Defendant interposed challenges for cause to Mr. McLees and Mr. Buckmaster, who were called as jurors. Both challenges were denied; whereupon both proposed jurors were excused upon peremptory challenges made by defendant, who, prior to the completion of the jury, exhausted the ten peremptory challenges allowed him. Appellant contends the effect of the ruling, since he was compelled to exercise two of his peremptory challenges in eliminating the two jurors who, it is claimed, should have been excused for cause, was to deprive him of the use of two challenges, thus contracting the number to which he was entitled; and that the alleged error was not cured, notwithstanding the fact that he did not offer to exercise peremptory challenges to which he was not entitled, or otherwise indicate dissatisfaction with the jury, or any member thereof, as it was completed. In support of this contention, he directs our attention to People v. Weil, 40 Cal. 268, and People v. Helm, 152 Cal. 532, 93 Pac. 99, which cases were followed by this court in deciding the case at bar on a former appeal. People v. Harrison, 13 Cal. App. 555, 110 Pac. 345. The Helm Case differs from this, in that it was shown by the record therein that defendant, after exhausting his peremptory challenges, was, by the ruling of the court, compelled to accept a juror whom he had challenged for cause. In its opinion, however, the court said: "It makes no difference in this respect that no challenges for cause were interposed by defendant to any jurors called to the box after the exhaustion of his peremptory challenges had been forced by the improper rulings of the court upon his challenges for cause. It may often happen that a juror most obnoxious to a defendant may successfully pass examination upon his voir dire. That examination may disclose no ground for the interposition of a challenge for cause. Yet there may be some reason known to the defendant which would make it most prejudicial to him that the juror should be retained. Even more, the right to exercise peremptory challenges is absolute. Such a challenge may be exercised upon the mere whim or caprice of defendant, so that again we say that any rulings of a court which compel a defendant to exhaust his peremptory challenges and force him to accept jurors after his challenges have been so exhausted become the proper subject of review." As against what was there said, we are confronted by the decision in the case of People v. Schafer, 119 Pac. 920. If the challenges for cause interposed to McLees and Buckmaster were erroneously denied, and defendant exhausted his peremptory challenges in relieving himself of these and other objectionable jurors before the jury was complete, all of which was done in this case, then, under the former decision on appeal in the case at bar (People v. Harrison, supra), the ruling was prejudicial error, subject to review without interposing challenges for cause to jurors thereafter called to the box, or other expression of dissatisfaction with the jury. Under the rule, however, announced in this later case, alleged error in denying a challenge for cause is not subject to review under the circumstances here shown, unless it be made to further appear that defendant in some appropriate manner expressed his dissatisfaction with the jury as completed. Following this case, we might dismiss the discussion by stating that, notwithstanding the fact that defendant exhausted his peremptory challenges in getting rid of jurors who should have been excused for cause, the record fails to disclose facts entitling him to a review of the alleged error. Inasmuch, however, as what was said by this court on the former appeal was well calculated to have misled counsel as to the steps necessary to be taken in order to obtain a review of the alleged error, and the question arising as to whether or not that decision as to the point involved does not constitute the rule of procedure in the subsequent trial, as to which fact, however, the justices of this court are unable to agree, we deem it proper to pass upon the alleged error of the court in denying the challenges for cause.

[2, 3] The objection to the qualification of the proposed juror Buckmaster was based upon the fact that on his voir dire examination he stated that, while he *would not* be prejudiced against defendant's case if he *failed* to take the stand as a witness, and that such failure *would not*, in his mind, relieve the prosecution of establishing defendant's guilt *beyond a reasonable doubt*, nevertheless he *felt* that he *should* take the stand, and if accepted as a juror he would go into the box with that impression, and would arrive at a verdict on *less* evidence for the prosecution than if defendant was a witness in his own behalf. Not only does it appear that there was a conflict in the evidence, upon which the finding of the court must be deemed conclusive (People v. Riggins, 159 Cal. 113, 112 Pac. 862), but the witness further stated on cross-examination that, notwithstanding his feeling, if the court instructed him that it was the right of the defendant not to go on the witness stand, and that the fact of his refusal to testify should not be considered in reaching a verdict, he would and could without difficulty follow such instruction. The fact that the juror entertained an erroneous impression as to a matter of law, subject to removal by an instruction of the court, did not disqualify him, particularly when it was made to appear that as to such question he would be guided by the court's instructions.

[4] The evidence as to the state of mind of Mr. McLees was likewise conflicting. While he had talked to two or three persons, not jurors or witnesses, about the case, such persons did not pretend to state to him any of the particulars or facts regarding the same, or attempt to give him any of the details thereof, and he entertained no opinion or impression as to the guilt or innocence of the defendant, and his condition of mind was such that he would be willing to be tried by a juror feeling as he did. He further testified that "what he had heard here" (presumably at the trial) led him to believe that he could not clothe the defendant, at the inception of the trial, with the presumption of innocence, by reason whereof he stated it would require *less* evidence to prove defendant's guilt than if he had heard nothing about the case; that, notwithstanding such impression, he was quite certain that he could follow the instructions of the court as to the law which should govern the case, and, if accepted as a juror, he would do so, and was of opinion that he could act impartially and fairly in the case. As said in discussing the qualification of Buckmaster, the evidence is not only conflicting, but any impression existing in the mind of the proposed juror was due to an erroneous idea with reference to the presumption of innocence with which the law clothes a defendant at the inception of his trial, and as to which the juror stated he would be guided by the instructions of the court.

[5, 6] Defendant objected to the prosecutrix, Ruth Florence Sturtevant, testifying, upon the ground that she was of unsound mind, and, as a witness, therefore incompetent under the provisions of subdivision 1 of section 1880, Code of Civil Procedure. A preliminary examination was had, from which the jury, over defendant's objection, was excluded, and at which hearing a physician was called by defendant as an expert witness, and whose testimony tended to show that the prosecutrix was of unsound mind, in that, according to his opinion, she had not sufficient mentality to record events in her memory and correctly and truthfully relate and recount them. After the giving of his testimony, the witness herself, over defendant's objection, was examined upon her voir dire, after which the court determined that she was competent. Error is predicated upon each of these rulings. The witness was 15 years of age and, under the law, presumed to be competent. It devolved upon defendant to prove her incompetent. In order to do this, it must be made to appear by the record that the witness was wanting in sufficient intelligence to observe, recollect, and communicate with regard to occurrences pertaining to the matter concerning which she was called to testify. The law, however, does not undertake to fix any standard of intelligence or capacity in this regard, but leaves its determination almost wholly to the discretion of the trial court. The testimony of the witness upon the preliminary examination, as disclosed by the record, shows that she possessed capacity mentally to understand the nature of questions put to her and give intelligent answers thereto. This contradicts the opinion entertained by the physician. There is no evidence tending to show a want of a sense of moral responsibility, or any lack on the part of the witness of a recognition of a duty to make her answers correspond to her recollection and knowledge of the events as to which she was called upon to testify; hence the existence of this element of competency must be presumed.

[7] While the ruling of the court upon an objection to the competency of a witness, made under subdivision 1 of section 1880, Code of Civil Procedure, is subject to review, and in this respect differs from like rulings upon objections to the competency of children under 10 years of age (subdivision 2, § 1880, supra), which rulings are not reviewable, nevertheless, from the nature of the case and the fact that the law fixes no standard whereby to measure the competency of a witness alleged to be of unsound mind, the determination of the question is almost wholly in the discretion of the trial judge. Wigmore on Evidence, § 496. Indeed, we have been unable to find any decision where such ruling has been disturbed.

[8] While appellant claims that the court erred in permitting an examination of the witness upon voir dire, he cites no authorities in support of the proposition. It seems clear to us that such an examination affords the very best evidence upon which to determine the question. The degree or kind of imbecility might be such as to render a witness wholly incompetent to testify upon one subject, and at the same time fully competent to testify as to another matter. Moreover, the question to be determined is the condition of mind of the witness "at the time of his production for examination," which would seem to imply an examination of the witness himself.

[9] The determination of the question of the competency of the witness was a matter solely for the trial judge. "Whether there be any evidence or not is a question for the judge; whether it is sufficient evidence is a question for the jury." Thompson on Trials, vol. 1, § 318. The jury were in no wise concerned with the question of its competency; hence the court, in the exercise of its discretion, very properly excluded it from the hearing of the evidence required in the determination of a question purely of law. "Everything having a tendency to prejudice or influence a jury in their deliberations, which is not legally admissible in evidence on the trial of the cause, should be, so far as possible, kept from coming to their knowledge during the trial." Thompson on Trials vol. 1, § 687. We find nothing in the authorities cited by appellant wherein the courts have gone further than to hold that the examination must be made in public and in the presence of the accused.

[10, 11] After the court had ruled that the prosecuting witness was competent to testify, and after her testimony had been received, defendant, as a part of his case, called a physician as a witness, by whom he proposed to show the condition of the girl's mind as he found it at a period some two years preceding the time when she was produced as a witness. The court sustained an objection to the proffered evidence, and error is predicated upon this ruling. The declared purpose of the evidence was to show that the prosecutrix was incompetent some two years prior to the time when she testified. In no event could the proffered evidence be received. The court had properly ruled upon the competency of the witness attacked; moreover, the evidence offered by defendant did not relate to the question of her mental condition at the time when she testified, but to a period long anterior thereto. Neither could it be admitted for the purpose of impeachment, for the reason that it is not one of the modes prescribed by statute (sections 2051, 2052, Code Civ. Proc.) for impeaching a witness.

[12] Upon proof of the death of a witness who had testified at the preliminary examination, a transcript of his testimony, in so far as it was pertinent and related to the charge against defendant, was received in evidence. It appears that defendant and one Webb Edwards were each separately charged with a like offense, committed upon the prosecutrix about the same time and under the same surroundings. By stipulation, it was agreed that the preliminary examination in both cases should be held at the same time and together, and that the evidence introduced should be considered as evidence in each case. The mere fact that the preliminary examinations were held at the same time, at which a part of the evidence given by the deceased witness related to the charge against Edwards, and a part thereof was concerning the offense charged against defendant herein, did not deprive the prosecution of its right, under section 686, Penal Code, to introduce such parts of the deposition as constituted competent evidence upon the trial of defendant.

Numerous errors are predicated upon the rulings of the court in admitting evidence of what appear to be isolated and immaterial facts. In support of this contention, defendant directs our attention to People v. Edwards, 13 Cal. App. 551, 110 Pac. 342, the judgment and order in which case were reversed, upon the ground of the admission of evidence relating to incidents and transactions connected with an offense with which the defendant in that case was not charged. It was said there that "the major portion of the record is taken up with an account of a rape committed by the male companion of defendant upon the prosecuting witness." In that respect, this transcript presents an entirely different case. We find no error in the rulings of the court in admitting evidence which, upon this record, could prejudice the rights of defendant.

[13] The court refused to give several instructions requested by defendant, the subject-matter of some of which had been covered by instructions elsewhere given. An examination of these rulings discloses no ground for complaint. The jury was fully and fairly instructed as to the law which should govern their consideration of the evidence in arriving at a verdict.

Mindful of the gravity of the offense charged and the severity of the judgment resulting from defendant's conviction, we have fully and carefully examined other alleged errors presented, but are unable to discover wherein any of the rulings complained of could by any possibility have prejudiced the substantial rights of defendant.

The judgment and order appealed from are therefore affirmed.

I concur: JAMES, J.

ALLEN, P. J. I concur in the judgment. The record disclosing no reviewable error in denying the challenge of jurors for cause renders unnecessary any discussion of the question which would be involved, had the action of the trial court resulted in restricting defendant's right of peremptory challenge conferred by statute.

(18 Cal. App. 330)

DEMING et al. v. MAAS et al. (Civ. 897.)

(District Court of Appeal, Third District, California. Feb. 23, 1912.)

1. PRINCIPAL AND SURETY (§ 45*)—EVIDENCE OF SURETYSHIP.

Evidence, in an action against a lessee and the surety on a bond given to secure payment of the rent, *held* to sustain a finding that the surety intended to, and did, bind himself personally as surety on the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 22; Dec. Dig. § 45.*]

2. PRINCIPAL AND SURETY (§ 161*)—ACTIONS AGAINST SURETY — SUFFICIENCY OF EVIDENCE—MODIFICATION OF CONTRACT.

Evidence, in an action against a lessee and his surety on a bond for payment of rent, *held* to sustain a finding that the surety personally assented to the modification of the lease so as not to be discharged as surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 439–441; Dec. Dig. § 161.*]

3. PRINCIPAL AND SURETY (§ 101*) — RELEASE OF SURETY—ALTERATION OF OBLIGATION.

A surety is released from liability by any material alteration of the contract made without his consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 169–180; Dec. Dig. § 101.*]

4. CORPORATIONS (§ 416*)—REPRESENTATION —SURETYSHIP—ALTERATION OF OBLIGATION —CONSENT.

Where defendant owned all but 5 of the 1,000 shares of the corporation whose name was signed to a surety bond securing the payment of rent to plaintiff under a lease to another, the 5 shares being owned by the directors merely to enable them to qualify as such, and defendant really intended to be bound on the bond, the written consent of the corporation through defendant to change the terms of the lease bound defendant as surety; defendant virtually being the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1623–1625; Dec. Dig. § 416.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Action by Mary A. Deming and another against Louis Maas and Joseph Herrscher. From a judgment for plaintiffs and an order denying a motion for a new trial, Herrscher appeals. Affirmed.

Jas. P. Sweeney, for appellant. Gavin McNab and Bronte M. Aikins, for respondents.

HART, J. The plaintiffs brought this action against the defendants to recover the sum of $525 for rent alleged to be due said plaintiffs. The action was tried by the court, without a jury, and the plaintiffs were given judgment in the sum of $575.31. From said judgment and the order denying him a new trial, the defendant Herrscher prosecutes this appeal.

The action is founded on a certain bond, of which more hereafter. It appears from the complaint that on or about the 25th day of March, 1907, by a written lease, bearing date March 23, 1907, the plaintiffs demised and delivered into the possession of the defendant Maas certain premises situated in the city of San Francisco, for a period of five years from the 1st day of April, 1907, at the total rent or sum of $14,000, payable in advance in equal monthly payments. At the same time, and as a part of the same transaction, the defendant Herrscher executed and delivered to the plaintiffs a bond, "conditioned, among other things, upon the payment of all rents and sums of money as set forth in said lease." On the 11th day of December, 1907, the terms of the lease above mentioned were so modified as that the rent was reduced for the year beginning with the 15th day of December, 1907, to the total sum of $2,100, etc. The complaint alleges that the defendant Herrscher assented to said alteration of said lease. The bond referred to was signed and executed by Louis Maas and "Jos. Herrscher & Co." The agreement modifying or altering the terms of the lease, as indicated, was subscribed and executed by the plaintiffs and "For Jos. Herrscher Co., Inc., Jos. Herrscher." This action having been instituted against Jos. Herrscher, individually, the amended complaint thus explains the circumstances under which the appellant came to subscribe to the bond a name implying such subscription to be that of a partnership, and to the agreement, modifying the terms of the lease, signed a name implying that such subscription was that of a corporation: "That said Joseph Herrscher subscribed the said bond in the form and manner following, to wit, 'Jos. Herrscher & Co.,' and that the said signature 'Jos. Herrscher & Co.' was then and there the individual trade-name, firm, and style of said Joseph Herrscher, and was appropriated and used by him exclusively as such trade-name, firm, and style, and that he signed the said bond in the form and manner aforesaid with the intention of binding himself by such signature, and that it was mutually understood by and between the plaintiffs and the said Herrscher that he and he alone was intended to be designated by such trade-name, firm, and style, and that plaintiffs signed and delivered the said lease upon the faith of such mutual understanding; and that said Herrscher at the time of signing said bond well knew that plaintiffs so understood said signature by said Herrscher, and said Herrscher well knew at the time of the delivery of said lease that the plaintiffs delivered the said lease upon the faith of such mutual understanding. That 'Jos. Herrscher Co., Inc.,' is and at all times herein referred to was a corporation organized and existing under and by virtue of the laws of the state of California; and that said Herrscher at all of said times owned and held, and now owns and holds, the entire capital stock of said corporation, except five shares thereof, which said five shares are held in the names of the directors of such corporation as qualifying shares merely to qualify them holders thereof as directors of said corporation." The answer denies that "Joseph Herrscher & Co. was at any time the individual trade-name, firm, and style of said Joseph Herrscher, or that he signed the said bond with the intention of binding himself by such signature," and denies that Herrscher, "as surety, or otherwise, assented to the alteration in said lease." The court found that "said Joseph Herrscher subscribed the said bond in the form and manner following: 'Jos. Herrscher & Co.,' and that the said signature, 'Jos. Herrscher & Co.,' was then and there the individual trade-name, firm, and style of said Joseph Herrscher, and was appropriated and used by him exclusively as such trade-name, firm, and style, and that he signed the said bond in the form and manner aforesaid with the intention of binding himself by such signature, and that it was mutually understood by and between the plaintiffs and the said Herrscher that he and he alone was intended to be designated by such trade-name, firm, and style, and that plaintiffs signed and delivered said lease upon the faith of such mutual understanding," etc. The court further found that the plaintiffs, at the express request of said Herrscher and without further consideration, agreed to and did reduce the rent reserved in said lease; that said Herrscher, by signing the writing noting the alteration in said lease, as follows, "For Jos. Herrscher Co., Inc., Jos. Herrscher," assented, as surety upon said bond, to the alteration in said lease; that " 'Jos. Herrscher Co., Inc.,' is and at all times herein referred to was a corporation organized under and by virtue of the laws of the state of California; and that said Herrscher at all of said times owned and held, and now owns and holds, the entire capital stock of said corporation, except five shares thereof, which said five shares are held in the names of the directors of such corporation as qualifying shares, namely to qualify them holders thereof as directors of said corporation."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] The contention is that the foregoing findings are not justified by the evidence. In other words, the appellant asserts: (1) That the evidence does not show that Herrscher intended to bind himself by said bond or that he did do so. (2) That if he did thus personally bind himself, there is no evidence which supports the finding that he assented to the modification of the lease, to secure the fulfillment of the terms of which the bond was given.

We are unable to agree with the appellant's contention. The evidence sufficiently supports the findings referred to. The entire transaction seems, indeed, to have been one conducted and consummated between the appellant and the lessors. Maas, it would seem, was only nominally interested in the lease. However that may be, the court was justified in finding from the evidence that Herrscher not only intended to bind himself personally by the bond, but did do so, and later personally assented to a modification of the terms thereof by subscribing to the written instrument containing terms to that effect. And it is quite clear, from all the circumstances of the several transactions, that Earsman, the agent of plaintiffs, who conducted the negotiations on their behalf, was given to understand by Herrscher that his purpose was to bind himself personally as surety for the payment of the rent.

Earsman testified that he first heard of the appellant and not of Maas as the party desiring to lease the premises. He called upon Herrscher, talked with him about the property and the leasing thereof, and then accompanied him to the premises so that he (Herrscher) might inspect the same. Herrscher "was the only man I dealt with in renting this place to Maas," he testified. "I discussed the terms with Herrscher and agreed upon them. He was to be surety for the tenant, Louis Maas, who was an employé of his, and his name was used to fill in. I was told this by Herrscher and Maas. I told them before the execution of the lease and the bond that I would not lease the premises unless a bond was given. I gave the keys to Mr. Herrscher about the end of August." Earsman prepared the lease and the bond, and when he presented the last-mentioned document to Herrscher for his signature, the name of the surety being, so he testified, left blank in the body of the instrument, the latter instructed him to insert in said blank in said bond the name, "Jos. Herrscher & Co." The appellant at one time had a partner, but he told Earsman, at the time of the execution of the bond, that said partner had withdrawn from the firm. After the execution of the bond, Herrscher paid the balance of the rent, $190, for the month of March, 1907; said rent being payable in advance.

The witness Landis, bookkeeper for the Joseph Herrscher Company for five years up to the time of the trial, testified that said company (a corporation) consisted principally of the appellant. There were, he said, 1,000 shares of stock in said company, and all those shares but 5 were owned by Herrscher. The witness himself and 4 others (members of Herrscher's family) each owned a share, having acquired the same for the sole purpose of qualifying them as directors. "I recollect," he further testified, "Mr. Earsman bringing papers to Mr. Herrscher's at Church and Market streets." He further stated that, "as bookkeeper for Mr. Herrscher, he received the rents from the building (on the premises in question) after they were collected and credited them on the books. Mr. Maas was in Mr. Herrscher's employ at that time as salesman."

Maas, the nominal lessee, testifying as a witness for appellant, declared: "I was an employé of Joseph Herrscher at that time (referring to the time of the making of the lease and bond). I signed that document (the lease) at the request of Mr. Herrscher. * * * My interest at first was this: I negotiated for the lease with the consent that *Mr. Herrscher would go on my bonds.* I was not to have any interest in the premises more than my rental interest in it—that is, in subrenting the premises. I was not to receive anything from that in addition to my salary as working for Herrscher. I was to receive no share in the profits. * * * I never received any rents. Mr. Herrscher negotiated for the reduction of the original rent asked. * * * Mr. Herrscher was the one who decided the terms of the contract with regard to the amount of rent and with regard to everything I left it entirely to Mr. Herrscher."

The appellant testified that "there is a corporation in which I am interested, known as 'Jos. Herrscher & Co.' That was in existence at the time this lease and bond were executed. *Nothing was said about the corporation going on the bond.* When the lease and bond were presented to me with the name 'Jos. Herrscher & Co.' written in, I called Mr. Earsman's attention to that fact. He said that the lease (bond?) was already made out 'Jos. Herrscher & Co.'—never mind—for me to sign exactly as he had written it out on top, which I did, signed it exactly as he told me to sign it. There was no such firm as Joseph Herrscher & Co. in existence."

The foregoing statement of the evidence, in substance, is, we think, sufficient to show that the court was justified in not only finding that the appellant intended to bind himself personally to the obligations of the bond, but that he did do so, and, further, that he not only personally assented to a modification of the terms of the lease, but that such alteration was brought about solely through his own negotiations with plaintiffs.

If any doubt could arise from the testimony produced by plaintiffs upon the question whether appellant intended to and did personally bind himself on the bond, that doubt is certainly removed by his own admissions. He testified, as seen, that nothing was said about the corporation going on the bond and that there was no partnership known as "Jos. Herrscher & Co." in existence when the transaction took place. He signed the bond in the name of a partnership which had no existence, but in doing so signed his own name. The circumstances under which he subscribed that name to the bond clearly disclose his intention, for had he intended to thus bind the corporation and not himself in his individual capacity, he would undoubtedly have so announced and refused to subscribe either his individual name or that of a partnership having no existence when the instrument was submitted to him for his signature and execution. At least this would have been the natural and sensible course of a sensible and honest business man having no intention of binding himself as an individual and who was acting in good faith in the transaction. Another circumstance of potent significance bearing upon the question of his intention is the fact, not disputed, that he was interested in the lease—indeed, if not in reality the sole lessee, he was a joint lessee with Maas. It is quite reasonable to suppose from this fact that he would be perfectly willing and, in truth, intended to bind himself personally for the rent reserved in a lease in which he was more vitally interested than any other person, except, perhaps, the lessors. But the very fact itself that he signed the bond is sufficient to bind him, whatever may have been his intention, notwithstanding that in signing the bond he unnecessarily added the words "& Co." to his own name. If, as he testified, there was no partnership in existence by the name of "Joseph Herrscher & Co." then the words thus added to his name as subscribed to the bond were superfluous and surplusage, are perfectly meaningless and without legal or any significance as so employed, and can therefore in no way operate to release him from personal liability on the bond.

Nor, under the evidence, can the plea that, because the instrument changing the terms of the lease was subscribed by the appellant as "Jos. Herrscher Co., Inc.," be successfully set up in support of the position that he did not personally assent to such modification.

[3] No one will dispute the very obvious proposition that a guarantor is released from liability by any material alteration of the terms of the contract guaranteed, where such alteration is made without his consent.

[4] But we think that it appears very clearly from the evidence that Herrscher consented to the change in the terms of the lease involved here. In the first place, it is to be noted, in this connection, that the proof shows that Herrscher was himself, practically, the corporation. He owned all but 5 of the 1,000 shares of stock for which the corporation was capitalized, and the shares thus otherwise owned had been given or transferred to the holders thereof for the single purpose of completing the machinery essential to the operation of the corporation. Under these circumstances, the subscription of the corporation's name to the writing effecting the alteration in the terms of the lease was at one and the same time both the act of the corporation and his act as an individual. Being practically owner of all the stock, he was virtually the corporation itself, or, as the cases put it, the corporation was his "corporate double." Relley v. Campbell, 134 Cal. 175, 66 Pac. 220; Rutz v. Obear, 15 Cal. App. 436, 115 Pac. 67.

That, in point of fact, the appellant did personally consent to the modification of the lease, is a proposition that offers no possible pretext for debate. Maas testified, as we have shown, that Herrscher was the person most vitally interested in the lease. In fact, Maas said that he himself had no real interest in the lease and that Herrscher was the actual lessee. The latter addressed a letter (over the signature of the corporation, or, to speak more accurately, over his corporate name) to the agent of the lessors, asking for a reduction of the rent, and eventually, after further negotiations, succeeded in having the rent lowered. For the corporation he signed the agreement changing the lease in that regard. Manifestly, under these circumstances, it would be absurd to say that, as the corporation, he consented to the alteration, but that, as an individual, he did not. In other words, he was himself, to borrow a colloquialism, the "body, breeches, and soul" of the corporation, that is, the two were so inseparably linked together that the corporation could do no business or perform no act within the scope of its authority without such business or such act being solely for and that of Herrscher himself, and, having, as seen, personally conducted all the negotiations for himself as the corporation, it would certainly involve a palpable as well as a ridiculous solecism, in the irresistible logic of the situation as it is disclosed by the circumstances presented here, to say that both he and the corporation did not at one and the same time, as one and the same act, agree to a modification of the lease that would and did result in lessening, in a ratio equal to the extent of the reduction of the rent, the burden of his or its (in whatever gender it may please him to say that he assumed the obligation) liability on the bond guaranteeing the payment of the stipulated rent.

But we need consider the evidence in detail in this opinion no further. It is sufficient to say, generally, in concluding upon the question whether the findings essential to the support of the judgment are justified by the evidence, that the record is pregnant with circumstances and statements, to some of which we have not specifically adverted here, showing very clearly that the appellant personally executed the bond, personally assented to the alteration of the lease, and is therefore personally compellable under the obligation so assumed to execute and make good the indemnity for which he thus became personally responsible.

It is further objected that the court committed error seriously prejudicing the rights of the appellant by admitting in evidence the bond to which the name of "Joseph Herrscher & Co." was subscribed and the written instrument modifying the lease, whereby the rent was reduced. The objection to these documents was based upon the general grounds that they were irrelevant, immaterial and incompetent. The court made no mistake in receiving these instruments in evidence, as must be apparent from the conclusion at which we have arrived as to their legal effect upon the parties to this action.

The judgment and the order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

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18 Cal. App. 298

DU BOIS et al. v. PADGHAM. (Civ. 871.)

(District Court of Appeal, Second District, California. Feb. 21, 1912.)

1. Partnership (§ 230*)—Sale of Interest by Partner to Copartner—Contract to Refrain from Similar Business—Validity.

Under Civ. Code, §§ 1673–1675, authorizing a seller of the good will of his business to agree to refrain from carrying on a similar business within a specified county, city, or part thereof, and providing that partners may, on dissolution, agree that none of them will carry on a similar business within the same city or town where the firm business has been transacted, a partner selling his interest in a firm transacting business in a city he may contract to refrain from carrying on a similar business in the city or town, but a restriction of his right to carry on business may not extend to additional territory.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 477½; Dec. Dig. § 230.*]

2. Partnership (§ 242*)—Sale of Partner's Interest—Competition—Complaint.

A complaint in an action for a breach of contract binding a partner selling his interest in a firm not to engage in similar business, which alleges that the firm published a directory in a city in which its office was located, and also directories in other places in the county, and that the partner entered into the publication of a directory in the county and solicited advertising therefor, and in the same field where plaintiffs were engaged in a similar business, and were exercising the good will purchased from the partner, does not state a cause of action, though the contract is construed to bind the partner not to engage in such business within the city, since there is no allegation that he has entered into such business in such city.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 500–508; Dec. Dig. § 242.*]

3. Pleading (§ 34*)—Instructions.

A pleading must be construed most strongly against the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66–75; Dec. Dig. § 34.*]

4. Partnership (§ 242*)—Sale by Partner of Interest in Firm—Contract Not to Engage in Similar Business—Actions—Parties.

Where a partner sold his interest in a firm to the copartner, and agreed not to engage in a similar business, and the copartner subsequently sold such interest to a third person, the copartner and the third person were proper parties plaintiff in an action against the partner for damages for breach of the contract.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 500–508; Dec. Dig. § 242.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Cecil Du Bois and another against L. H. Padgham. From a judgment for defendant rendered on sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Dick Foye Harding and R. P. Congdon, for appellants. Scarborough & Forgy, for respondent.

SHAW, J. The court sustained defendant's demurrer to the second amended complaint, interposed upon the grounds of failure to state a cause of action, misjoinder of parties, and uncertainty therein; and, plaintiffs declining to further amend their complaint, judgment was rendered against them, from which they appeal upon the judgment roll.

The complaint shows that Du Bois and defendant were copartners in the business of publishing a directory in the city of Santa Ana, in Orange county, their office and location of business being in the Rossmore Hotel building in said city; that the business so conducted consisted of the "preparation of matter for the issuance, publication, distribution, and sale of a certain book and publication known as the directory of the city of Santa Ana, and other and similar publications in other places in Orange county, including the sale of said book and books, and the soliciting of persons and corporations for professional cards, business advertisements, and any and all forms of advertising matter, and the receiving of remuneration for the space occupied in said publications thereby; and that the principal value of said business was, and its principal asset consisted of, the good will thereof;" that on January 11, 1910, defendant, in consideration of $250 paid to him by Du Bois, sold his interest in the business to the latter, and executed an agreement as follows: "For value received, I hereby transfer to Cecil Du Bois all my right, title and interest in the directory and advertising business, now being conducted in the Rossmore Hotel building, the said Cecil Du Bois to assume all indebtedness and contracts for advertising. I, L. H. Padgham, agree to not enter into the publishing of directories in Orange county, unless said Cecil Du Bois abandons the business, or sells out to me or a partner of mine." On February 21, 1910, Du Bois sold and transferred to Thurston, his coplaintiff, a "one-half interest in all of said property formerly transferred to him by said L. H. Padgham, including an undivided one-half interest in the good will of said business"; that thereafter, as copartners, up to the time of the filing of the complaint, they conducted the same; that on or about February 15, 1910, which was before commencing the action, defendant, in violation of the terms of said agreement, "entered into the publication of a directory in said Orange county, and then and there and since has solicited advertising therefor" in the same territory where plaintiffs were likewise engaged, all to the damage of plaintiffs in the sum of $300.

[1] Section 1673, Civil Code, provides that every contract whereby one is restrained from exercising a lawful business is void, unless made pursuant to the provisions of sections 1674 and 1675 of said Code. At the time of the purchase by Du Bois, he and the defendant were copartners in the business. The right of a partner to make a contract in restraint of business is limited by the provisions of section 1675, which provides: "Partners may, upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted, or within a specified part thereof." The sale necessarily worked a dissolution of the partnership, and was, therefore, made in anticipation of such dissolution. While under section 1674, Civil Code, one other than a copartner may, where he sells the good will of a business, make a valid agreement to refrain from carrying on a similar business to that sold within a specified county or city, the territorial limits as to which a partner

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

may by contract so restrict himself is, under section 1675, limited to a city or town. The restriction as to one must not exceed the territorial limits of the county, whereas as to the other it must not exceed the territorial limits of a city or town.

[2] Defendant's contract was not limited to any city or town, but by its terms he agreed not to enter into a business similar to that sold in Orange county. Even if it be conceded that, in order to render it valid, the contract should be limited in territorial extent to the city of Santa Ana (which question we do not decide), it does not appear from the complaint that defendant committed a breach of the contract by publishing any directories in the city of Santa Ana, it being alleged he "entered into the publication of a directory in said Orange county, and solicited advertising therefor, and in the same field and territory where plaintiffs were engaged in a similar business, and were exercising the good will purchased from said defendant as aforesaid." Such allegation is wholly consistent with the fact that such publication was made and advertising therefor solicited in other parts of the county than the city of Santa Ana, the exclusive right to all of which territory, as against defendant, plaintiffs claimed under the terms of the contract.

[3] A pleading must be construed most strongly against the pleader, and so construed, the complaint fails to state a cause of action. Any other view than that here expressed would render the complaint clearly uncertain; so that whichever theory be adopted the conclusion of the trial court was correct.

[4] Thurston was a proper party plaintiff. Johnston v. Blanchard, 116 Pac. 973.

It is unnecessary to discuss other points presented, further than to state that the affirmance of the judgment renders it unnecessary to pass upon respondent's motion to dismiss the appeal.

The motion is therefore dismissed, and the judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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18 Cal. App. 264

FITZPATRICK v. NORTH AMERICAN ACCIDENT INS. CO. (Civ. 908.)

(District Court of Appeal, First District, California. Feb. 16, 1912.)

1. Insurance (§ 622*)—Limitation of Actions—Validity of Provision.

An unambiguous provision in an accident insurance policy requiring actions on the policy to be brought within one year after the accident is valid, and bars an action brought 13 months after an accident causing death.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1544–1556; Dec. Dig. § 622.*]

2. Insurance (§ 623*)—Limitation of Actions—Estoppel.

An insurer is not estopped from relying on a provision of the policy limiting the time within which to bring action on the ground that it caused the delay, where it has merely insisted on a strict compliance with the requirements of the policy, as to the time for furnishing proofs of death, where the proofs were made within the time required leaving ample time within which to bring the action.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1543, 1551–1553; Dec. Dig. § 623.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Millie Fitzpatrick against the North American Accident Insurance Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

George Ingraham, for appellant. J. Rollin Fitch, for respondent.

KERRIGAN, J. This is an action upon a policy of accident insurance issued by the defendant on May 13, 1908, in favor of Roger Fitzpatrick, the husband of plaintiff. On January 23, 1909, the insured died as the result of injuries received on the 18th day of January, 1909. The defendant refused payment, and the plaintiff commenced her suit to recover on the policy on February 16, 1910, nearly 13 months from the date of the receipt of the injury resulting in the death of the insured.

The policy (which is attached to the complaint and made a part thereof) provides that the defendant shall be notified in writing, within 10 days, of any injury to the insured covered by the policy; that proof of claim must be made within 2 months after the death or end of the disability; and that suit thereon must be brought within 12 months from the date of the accident. To the complaint setting forth the facts of the case defendant interposed a general demurrer, which was sustained on the ground that the cause of action was barred by reason of the suit not having been commenced within the time prescribed in the policy, namely, within 12 months from the date of the accident. This appeal is prosecuted from the judgment entered upon the sustaining of the demurrer.

[1] The action of the trial court must be upheld. It is a settled rule that clauses in policies of insurance, limiting the time in which actions may be commenced thereon to a time shorter than that prescribed by the statute of limitations, are valid. 4 Joyce on Insurance, § 3181; Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 Pac. 501. The provision in this policy limiting the time within which suit might be brought is free from ambiguity; and it must be held that the action, having been commenced nearly 13 months after the occurrence of the accident, was under the express terms of the policy too late.

The authorities supporting this view are numerous. The latest judicial expression on the subject in this state is to be found in the case of Tebbets v. Fidelity & Casualty Co., supra. There the policy provided that proof of death of the insured must be furnished the company within two months after its occurrence, and that legal proceedings for recovery under the policy might not be brought before the expiration of three months from the date of filing proofs at the company's office, nor brought at all unless begun within six months from the time of death. There the Supreme Court held (Mr. Justice Henshaw writing the opinion) that the demurrer interposed to the complaint was properly sustained, observing: "The general rule, supported by the great weight of authority, is that a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid, if the time limited be in itself not unreasonable." Later on in the opinion the court further said: "The six months' period was not itself unreasonable. It began to run from the date of the death, and was not affected by the provision that legal proceedings could not be brought before the expiration of three months from the date of filing proofs." In addition to the authorities there cited, see Garido v. American Central Ins. Co. of St. Louis (Cal. Sup.) 8 Pac. 512; Kettenring v. N. W. Masonic Aid Ass'n (C. C.) 96 Fed. 177; Provident Fund v. Howell, 110 Ala. 508, 18 So. 311; Paul v. Fidelity & Casualty Co., 186 Mass. 413, 71 N. E. 801, 104 Am. St. Rep. 594; Travelers' Insurance Co. v. Cal. Insurance Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] If the company had been guilty of bad faith, or such conduct as rendered it impossible to comply with the provisions of the policy before the time limited for bringing suit had expired, it would be estopped from relying thereon. 4 Joyce on Insurance, § 3220. But merely exacting a strict compliance by plaintiff with the requirements of the policy as to when proof of death should be made is no ground for charging the insurer with causing delay when, as in this case, the necessary proofs were made within the time limited therefor in the policy, and there yet remained ample time in which the insured could bring his action. There is therefore no element of estoppel available to the appellant.

Case v. Sun Ins. Co., 83 Cal. 473, 23 Pac. 534, 8 L. R. A. 48, cited by appellant, is not in conflict with this view. There the policy provided that any action thereunder must be brought within twelve months next after the occurrence of a fire, and no adjusted claim was payable until 60 days after full completion by the assured of all requirements contained in the policy. In that case it was alleged and proved that a strict compliance with all the requirements of the policy was exacted by the company, and that the assured complying therewith as rapidly as he could was unable to do so fully until nearly 14 months after the fire. This certainly was, in the language of Hart v. Citizens' Ins. Co., 86 Wis. 77, 56 N. W. 332, 21 L. R. A. 743, 39 Am. St. Rep. 877, "a clear case of estoppel. The company by its own act had postponed the time when a cause of action accrued until after the limitation had run, and should be clearly denied the right to rely upon the limitation."

The plaintiff in the case at bar had ample time after the right accrued within which to bring the action on the policy, and no equitable circumstance is pleaded to take the case out of the operation of the limitation clause.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 394

GOODHART v. MISSION PUB. CO.

(Civ. 1,028.)

(District Court of Appeal, Second District, California. Feb. 29, 1912. Rehearing Denied March 30, 1912.)

1. CONTRACTS (§ 138*)—ILLEGALITY—PARTICIPANT IN FRAUD.

The agents of the publisher of a newspaper who had offered prizes to young women who would secure the largest number of votes through a subscription contest represented to plaintiff, who was a contestant, that they knew how many votes the other contestants had; that they had secured all the votes they could, and that the payment of $300 by plaintiff would give her enough votes to win the first prize; that, if necessary, they would deliver enough votes for her to insure her such prize, and that, if she did not secure the first prize, the money would be returned. On faith of these representations, she paid the $300. Such representations as to the standing of the other contestants were false, and the votes secured by plaintiff by such payment were not sufficient to insure her the first prize. *Held*, it not appearing that the terms of the contract imposed secrecy on the publishers, that the transaction so far as the representations as to the standing of the other contestants and the promise to refund the money were concerned was not a fraud on the other contestants, justifying a denial of a recovery for the false representations, and, since the damage to plaintiff was caused by such representations as to the other contestants' standings, it was immaterial whether the agreement to deliver enough votes to insure plaintiff winning the first prize was a fraud on the other contestants or not.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681–700; Dec. Dig. § 138.*]

2. CONTRACTS (§ 102*)—VALIDITY—LEGALITY.

Before relief may be denied, because of the unlawful nature of a contract whereby some rule of public policy is claimed to have been violated, it must clearly appear that the case comes within that class, and that the agreement of the parties was tainted by improper motives.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 462–467; Dec. Dig. § 102.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by Louise May Goodhart against the Mission Publishing Company. From a judgment for defendant on special findings of the jury, plaintiff appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Miguel Estudillo, for appellant. H. L. Carnahan, for respondent.

JAMES, J. This is an appeal by the plaintiff from a judgment entered in favor of defendant. Upon the trial of the case by a jury, verdict in favor of plaintiff for the sum of $300 was returned, together with findings on special questions of fact submitted by the court. Defendant thereafter moved for judgment in its favor on the special findings, which motion was granted, and the judgment appealed from was then entered.

Plaintiff alleged in her complaint that in October, 1909, the Mission Publishing Company of Riverside, being the publishers of the Morning Mission and the Riverside Enterprise, offered prizes to young women who would secure the largest number of votes through a subscription contest; that the prizes were of different value and seven in number; that the defendant represented that the contest would be conducted in a fair and honest manner; that it was not so conducted; that on or about the 13th day of November, 1909, and during the course of the contest, defendant, through its agents, stated to plaintiff that they knew how many votes the other contestants had, and also that they knew that the other contestants had done everything that possibly could be done; that neither of them had any more money to pay to the defendant for more votes, and that the payment of $300 by plaintiff to defendant would give plaintiff 600,000 more votes than the highest contestant. It was further alleged that the agents and employés of defendant were sharp and shrewd men, and that plaintiff was a young girl, 18 years of age, inexperienced, and that the representations last mentioned were made with intent to deceive and defraud her, and that she was deceived thereby and induced to pay to the defendant the sum of $300; that in truth at the time said representations were made the highest contestant did have then over and above all of the votes which plaintiff was entitled to, including the 600,000 votes to be secured by the payment of $300, more than 200,000 votes, and that three of the other contestants also had more votes than plaintiff had, notwithstanding the payment of the $300 and the votes awarded to her therefor. The prayer was for damages in the sum of $500. Defendant, after specifically denying the allegations of plaintiff's complaint, alleged that all of the representations as charged by the complaint were made by the employés of defendant, but that such employés were not authorized or empowered to make any such representations; and, further, that said employés had guaranteed that plaintiff would get the first prize, that, in the event she did not so secure it, defendant would repay to her the sum of $300. It was admitted by the answer that the defendant had received the sum of $300. Upon the case being given to the jury, four special issues of fact were submitted for determination, all of which were answered in the affirmative by the jury. The substance of all of the questions is fairly expressed in the first thereof which is as follows: "Did the agent or employé of defendant make the following representations to plaintiff, to wit: That if she, the plaintiff, would deliver $300 in cash to defendant, it would guarantee her that she would be awarded the Ford automobile; that the defendant, its agents and employés, knew how many votes the other contestants, to wit, Leona Jeffreys and Marguerite Peters, had, and also knew that the other contestants, Leona Jeffreys and Marguerite Peters, had done everything that could possibly be done, and that neither of them had any more money to pay defendant; that the payment of $300 would give 600,000 more votes than the highest contestant, to wit, than said Leona Jeffreys; that the defendant would guarantee that the plaintiff would get the first prize, and, if necessary for that purpose, would deliver enough votes to plaintiff to insure her the first prize, and that, in the event that she did not secure the first prize, the defendant would repay the plaintiff the sum of $300?" One of the questions of fact contained the added interrogatory as to whether plaintiff had delivered the money to defendant because of her reliance upon the statements and assurances of defendant's employes that, if she would pay the $300, they would guarantee that she would get the first prize, and, if necessary for that purpose, would deliver enough votes to her to insure her the first prize, and that, in the event she did not secure the first prize, defendant would repay her the sum of $300.

[1] The ground upon which defendant based its motion for judgment on the facts as found on the special questions submitted was that these facts showed that the agreement between plaintiff and defendant's agents was a fraud upon other contestants, and that courts would not enforce the contract because of considerations of public policy. It nowhere appeared in the record that by any of the terms of the so-called popular contest any secrecy was imposed upon any of the contestants, or upon the publishers of the newspapers, as to the number of votes which any contestant might have to her credit at any time. In the published notice of the prize contest it was recited that count of the votes would be printed on Thursday and Sunday of each week of all votes turned into the office up to and including the preceding evening. The fraudulent representations complained of which induced plaintiff to part with her $300 were made about a week before the contest closed. As to whether defendant's agents at any time had information regarding the condition of the vote as to any or all of the contestants, which they

were bound not to disclose, can only be surmised, for it does not affirmatively appear in the record. If public announcement of the count was made as scheduled, then there would have been complete notice to all persons who might care to read it, every three days, of the vote tally as it then stood. In so far as the representation of the number of votes which the other contestants had at the time plaintiff was induced to pay over her money is to be considered, that representation, if it had then expressed the truth, would not have worked any fraud as against the other contestants; but it nevertheless was one which plaintiff might well have relied upon to her damage. Neither would that portion of the alleged agreement, wherein defendant's agents promised that if plaintiff failed to secure the first prize they would refund to her her money, be in fraud of the rights of any of the other contestants, keeping in mind the suggestions which we have just made with reference to the question last discussed. To our minds, the further element which appears to have entered into that agreement, to wit, that, in the event plaintiff had not enough votes to secure her the first prize, defendant, "if necessary for that purpose, would deliver enough votes to plaintiff to insure her the first prize," may be rejected from consideration. As determined by the special findings, the damage accrued to plaintiff by reason of the false representations made to her as to the condition of the vote at the time she paid to defendant the $300. If the facts as to the count at that time were as represented, then the additional votes which plaintiff secured by the payment of her money would have won for her the first prize in the contest. Any of the contestants would have had the privilege no doubt of paying in a like or greater sum of money and purchasing votes of an equal amount or more than those purchased by the plaintiff, and it appears to have been altogether within the rules of the contest that votes could be so secured by any of the contestants or their friends; the money so paid being credited on account of the subscription price of the newspapers. From all that appears in the record, it would seem that the plaintiff, a young girl, acted in entire good faith, without any intention of doing otherwise than to secure for herself votes in a manner which was alike available to any of the other contestants. The defendant admitted that it received all of her money, and, admitting the falsity of the representations upon which it was secured, has sought to withhold the refunding of plaintiff's property through the claim that the contract as made contravenes the public policy of the law. It is but fair to say, however, that from the record there can be gathered enough to show that defendant was deceived and misled by its own agents who had charge of the subscription contest, and that, except for the acts of such agents, its conduct cannot be said to bear the imputation of fraudulent dealing. It was alleged on behalf of defendant that the agents who secured from plaintiff the $300 were not acting within the limits of their authority when they made the representations to plaintiff as charged. This question was settled adversely to defendant by the verdict of the jury, and is not open to review on this appeal. We think that the special findings of the jury were not inconsistent with the general verdict returned, and that the court erred in granting the motion of defendant.

[2] Before relief may be denied because of the unlawful nature of a contract, whereby some rule of public policy is claimed to have been violated, it must appear clearly that the case comes within that class, and that the agreement of the parties in its essential obligations is tainted from improper motives. To our minds the case as it is exhibited by this record is not one of that kind.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 242

STEVENS v. SELMA FRUIT CO., Inc.

(Civ. 880.)

(District Court of Appeal, Third District, California. Feb. 15, 1912.)

1. CORPORATIONS (§ 399*) — OFFICERS — AUTHORITY—GENERAL MANAGER.

The general manager of a commercial corporation has authority to do anything which is ordinarily necessary to accomplish the principal purposes of the corporate organization, unless his authority is restricted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1084, 1085; Dec. Dig. § 399.*]

2. CORPORATIONS (§ 399*) — OFFICERS — AUTHORITY—ESTOPPEL TO DENY.

Where a corporate officer is held out to have power to do all acts essential to the ordinary conduct of the corporate business, a third person will not be permitted to suffer from his acts on the ground that he did not, in fact, have such authority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602–1610; Dec. Dig. § 399.*]

3. CORPORATIONS (§ 426*)—ACTS OF OFFICERS —RATIFICATION.

The board of directors of a commercial corporation must be presumed to have had knowledge that its general manager executed promissory notes under the corporate seal.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1708, 1710–1716; Dec. Dig. § 426.*]

4. CORPORATIONS (§ 399*) — OFFICERS — AUTHORITY—EXECUTION OF NOTES.

A resolution of the board of directors of a commercial corporation gave a manager authority to employ and discharge labor in the business, purchase its necessary supplies, and sell its products, and "generally to conduct the affairs of the corporation subject to the direction of the president of this board," and ordered that all contracts for the purchase or sale of fruit, in which the corporation dealt, should be approved by the president and manager, and that the authority of the president should be exercised "over and through the manager so long as said manager shall properly conduct said business and corporation." *Held*, that the resolution gave the manager authority to execute promissory notes for the corporation where the necessities of its business required it.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602–1610; Dec. Dig. § 399.*]

5. CORPORATIONS (§ 426*)—ACTS OF OFFICERS —RATIFICATION OF UNAUTHORIZED ACT.

The act of the manager of a corporation in executing a note, if unauthorized, was ratified by the president, who had authority to execute it, authorizing such manager to pay the note as a corporate liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1708, 1710–1716; Dec. Dig. § 426.*]

6. BILLS AND NOTES (§ 493*) — CONSIDERATION—NECESSITY.

The burden was upon the maker of a promissory note when sued thereon to show the want of consideration, since a sufficient consideration is presumed; Code Civ. Proc. § 1963, subd. 21, and Civ. Code, §§ 1614, 1615, in effect so providing.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1652–1662; Dec. Dig. § 493.*]

7. CORPORATIONS (§ 579*) — REORGANIZATION —CONSTRUCTION OF CONTRACT.

A contract by a fruit packing company to sell its business to defendant recited the intention to sell the business and good will of the company, and all contracts for supplies in connection with "said business" and contracts for the purchase of about 100 tons of raisins, and that the purchaser was instructed to make arrangements to "immediately take over the business" of the selling company, and that the "business of said" selling company should be continued by it, under its present organization on behalf of the corporation to be formed for purchasing, and that the selling company should continue to operate the business until the new corporation was formally organized and took over the business for its own account, and all business contracted after the date of the agreement should be subject to the approval of the committee for forming the new corporation. *Held*, that the buyer agreed to assume all of the contracts of the selling company, including an existing contract by it for the purchase of raisins.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2313–2318; Dec. Dig. § 579.*]

8. CORPORATIONS (§ 579*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note given by defendant corporation for raisins, which defendant's predecessor contracted to purchase from plaintiff, evidence *held* to sustain a finding that defendant assumed the contract for the purchase of the raisins as made by its predecessor.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2313–2318; Dec. Dig. § 579.*]

9. CORPORATIONS (§ 426*)—RIGHT OF ACTION.

When plaintiff demanded a settlement from defendant company for raisins agreed to be sold to its predecessor, defendant's manager asked plaintiff to take the corporation's note for the amount because it needed money, which was done, and he used the money in the course of his business. *Held* that, even if defendant did not act for plaintiff in selling the raisins, having used the money which its manager received defendant would be liable therefor to plaintiff.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1596, 1702–1704, 1708, 1710–1716; Dec. Dig. § 426.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by E. M. Stevens against the Selma Fruit Company, Incorporated. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

M. K. Harris and N. C. Coldwell, for appellant. M. G. Gallaher, Everts & Ewing, and S. L. Strother, for respondent.

HART, J. The complaint in this action counts upon two causes of action, viz.: (1) Upon a promissory note for the sum of $2,902.55, payable 100 days after the date of its execution, October 5, 1908, together with interest at the rate of 8 per cent. per annum, said note, so it is alleged, having been made and delivered by the defendant to E. M. Stevens & Son, a copartnership; (2) upon an account stated on the 5th day of October, 1908, by and between said copartnership, E. M. Stevens & Son, and the defendant, Selma Fruit Company, Incorporated, "for a balance due for moneys received by said defendant for said E. M. Stevens & Son on account of raisins sold by and through said defendant, less charges for brokerage, discount, and packing charges, upon the statement of which said account it appeared that the said defendant was indebted to the said E. M. Stevens & Son in the sum of $2,902.55." The transactions culminating in the execution and delivery of the promissory note and the rendering of the stated account are alleged to have taken place at the same time, and that both the note and the stated account involve the same indebtedness. It appears from the complaint that antecedently to the institution of this action R. E. Stevens, one of the copartners, assigned to plaintiff, E. M. Stevens, all his right and interest in and to said promissory note and the stated account, and that the plaintiff is the owner and holder of both said note and of said account. Judgment is asked for in the sum of $2,902.55 and interest on said sum from the date of the execution and delivery of said note.

The answer first denies generally the averments of the complaint as to the first cause of action, and then sets up the plea that the promissory note therein declared upon was "executed and delivered without any consideration." The allegations of the second count of the complaint are denied, and, additionally, and by way of a special defense, it is charged that the alleged account and the promise to pay the same were stated and made by T. H. Elliott, the manager of the defendant, under a mistaken belief that the transactions as to which said account was stated were had and conducted between said copartnership and this defendant; whereas, so it is alleged, said transactions were had between said E. M. Stevens & Son and Selma Fruit Company, a corporation, of which more will be learned in the course of this opinion, and that defendant was not concerned or connected with said transactions. Judgment passed for the plaintiff in the sum evidenced by the note and accrued interest. This appeal is by the defendant from said judgment and the order denying it a new trial.

A full and accurate statement of the facts leading to this action is embodied in the brief of the respondent, and we deem it convenient to adopt said statement as a recital of the facts in this opinion:

"The Selma Fruit Company was, during all the times mentioned in the complaint, a corporation duly organized under the laws of the state of California, and from January, 1908, until the 1st day of August, 1908, the said Selma Fruit Company owned and operated a packing house in the town of Selma, county of Fresno, state of California, and was engaged in the business of buying, packing and selling raisins, both upon its own account and for others. It also appears that during the winter months of 1908, and after the 1st of January, 1908, E. M. Stevens & Son delivered certain raisins to the warehouse of said Selma Fruit Company and for which weigh tags were duly issued to E. M. Stevens & Son. It further appears from the evidence that on the 9th day of April, 1908, said Selma Fruit Company took up the weigh tags for said raisins and issued to said E. M. Stevens & Son a warehouse receipt for the raisins so delivered to said company, being the same raisins represented by the weigh tags theretofore delivered to E. M. Stevens & Son and at that time taken up by said company. The said Selma Fruit Company was instructed by said E. M. Stevens & Son to receive offers for said raisins and submit any offers received by said company for said raisins to said E. M. Stevens & Son. About July 8, 1908, Jas. R. Baker & Co., of Chicago, offered to buy from said Selma Fruit Company raisins, which offer was submitted to said E. M. Stevens & Son and by them approved. On July 17, 1908, said Selma Fruit Company and one T. H. Elliott entered into an agreement to sell to certain parties certain patent applications of said T. H. Elliott, together with all of the property, real and personal, packing house, business, and good will of said Selma Fruit Company, the purchaser of said property purchasing the same for a corporation thereafter to be formed.

"The purchasers of said property constituted a committee whose business it was to procure said property and business and to form a corporation for the purpose of taking over all of said properties and business and to carry on the business of buying and selling and dealing in fruits and raisins and conducting a general packing business. On August 1, 1908, said committee entered into a contract with said Selma Fruit Company and said T. H. Elliott in pursuance of said original agreement of purchase in which it was agreed that the business referred to should be conducted by the Selma Fruit Company under its then organization commencing August 1, 1908, for and on behalf of said corporation to be formed by said committee. 'Said Selma Fruit Company shall continue to operate said business until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account. All the contracts made by Selma Fruit Company for the delivery of dried fruit and raisins by growers on and after August 1, 1908, shall be carried ont by said Selma Fruit Company, for and on behalf of said new corporation.'

"Said Selma Fruit Company conducted the business in which it had theretofore been engaged from and after August 1, 1908, for and on behalf of the new corporation to be organized, and a new corporation was organized in pursuance of the agreements of said committee and by formal resolution passed by the unanimous vote of the stockholders at the meeting of stockholders of said new corporation, the Selma Fruit Company, Incorporated, on September 5, 1908, all of the work of said organizing committee was ratified and approved, said committee having made a full report to said stockholders' meeting, and all said properties and business of said Selma Fruit Company together with all said patent applications of said T. H. Elliott, including all trade-marks and brands belonging to said business had been formally taken over by the board of directors of said Selma Fruit Company, Incorporated, at a meeting thereof held August 17, 1908. By act of the board of directors of the Selma Fruit Company, Incorporated, and by unanimous vote of the stockholders of said Selma Fruit Company, Incorporated, all of the work of said committee of organization was duly ratified and all of the business of the Selma Fruit Company was taken over as of August 1, 1908, from which time it was operated by the Selma Fruit Company for and on behalf of the Selma Fruit Company, Incorporated, being under the advice and control of said committee, until the time of the formal resolution of the new company taking over the business, after which the business was operated and controlled by the new corporation, Selma Fruit Company, Incorporated, for and on its own behalf.

"The raisins delivered by said E. M. Stevens & Son were held from and after August 1, 1908, until about the middle of September, 1908, at which time they were shipped to Jas. R. Baker & Co., with other raisins with which they had been mingled after being stemmed and seeded, and the Selma Fruit Company, Incorporated, received the money paid for all said raisins of E. M. Stevens & Son, for which said Selma Fruit Company, Incorporated, by its secretary and manager, rendered a stated account and executed and delivered to E. M. Stevens & Son a promissory note of said Selma Fruit Company, Incorporated, for the balance found due on said stated account."

The court found, among other things, that the defendant is a corporation engaged in the business of selling, packing, shipping and dealing in dried fruits and raisins, in the town of Selma, Fresno county; that during the months of August and September, 1908, said E. M. Stevens & Son owned and had stored in the warehouse of the defendant certain raisins, and that, in the month of September, 1908, the "defendant sold, shipped, and delivered said raisins and received the purchase price and all the proceeds of said sale of said raisins, and appropriated all the said money to its own use and that said sale and delivery of said raisins and the receipt of the proceeds thereof were by and with the consent of said E. M. Stevens & Son"; that on the 5th day of October, 1908, the defendant and said E. M. Stevens & Son had an accounting between themselves, "and account was duly stated between defendant and said E. M. Stevens & Son, and it was found by said account stated that defendant owed said E. M. Stevens & Son the sum of $2,902.55, and defendant then and there agreed to pay to said E. M. Stevens & Son said sum of $2,902.55 so found due to said E. M. Stevens & Son from defendant, and said E. M. Stevens & Son then and there agreed with defendant that said sum of $2,902.55 was the balance due said E. M. Stevens & Son from defendant, and defendant agreed to pay said sum of $2,902.55 to said E. M. Stevens & Son, with interest thereon, at the rate of 8 per cent. per annum until paid"; that "said T. H. Elliott, as the manager of defendant, acted for and on behalf of defendant in stating said account between said defendant and said E. M. Stevens & Son, and said T. H. Elliott and defendant had full knowledge of the account between defendant and said E. M. Stevens & Son, and said account was not stated by mistake of said T. H. Elliott, or any other person, or of defendant, but said account was stated with full knowledge of all the facts at the hand and in the possession of defendant and its said manager and fully known to defendant and said manager"; that the net proceeds from the sale of said raisins of E. M. Stevens & Son constituted the consideration of the promissory note set out in the complaint; and that "said note was duly executed by defendant under its corporate seal."

The findings above referred to, based principally upon the testimony of T. H. Elliott, are challenged upon the ground that the evidence does not sustain them, and the conclusion of law therefrom and the judgment are attacked upon every conceivable ground of which anything like a plausible assault could well be predicated.

The crux of the whole controversy, as it is argued and submitted here, is immured within the proposition whether T. H. Elliott, the manager of the defendant, was, as such manager, clothed with authority to make the stated account and execute the note counted upon in the complaint for and on behalf of the defendant.

After the creation and organization of the new corporation (the defendant), T. H. Elliott was duly appointed as the manager thereof. By resolution or motion duly entered in the minutes of the meetings of the board of directors, the latter vested in the manager the authority "to employ and discharge the necessary labor in and about the packing house of the corporation, to conduct the packing operations, to purchase the necessary supplies and to buy and sell the goods and products in which the corporation intends to deal, and generally to conduct the affairs of the corporation, subject to the direction of the president, and this board." It was further ordered by the board of directors that "all contracts for the purchase or sale of dried fruit or raisins, or other products or merchandise to be dealt in by the corporation, or for packing material or supplies, be approved by both the president and the manager." The following is also a part of the order or resolution of the board, entered upon its minutes, relative to the powers of the manager and president: "The president of this corporation is hereby requested and instructed to visit the packing house, at some time during every working day, during the active operations of the house, and to carefully oversee such operations in a general way, to require all contracts of purchase or sale as per previous resolution to be submitted to him for his approval, and generally to consult with and direct the manager in the conduct of the business of the corporation, it being understood that the immediate direction of said operations is in the hands of the manager and orders and directions regarding same shall be issued by him except in the event of flagrant abuse or neglect of such authority by said manager, *and that the authority of the president shall be exercised over and through the manager so long as said manager shall properly conduct said business and operations.*" There is in the record before us no evidence from which it appears that any particular officer of the defendant was specifically authorized by the board of directors to execute promissory notes for and on its behalf. The very nature of commercial corporations, of which the defendant is a type, requires that the authority to transact their usual or ordinary business affairs shall be vested in some one or more persons.

[1] A corporation is an artificial person, and, where it is organized for commercial purposes, its president or general manager or whoever may be given immediate direction or control of its affairs is its agent, em-

powered, unless expressly restricted to the performance of certain specified acts, to do anything which naturally and ordinarily has to be done to carry out its paramount purposes; and where authority to do some particular act, which is included within the ordinary affairs of such a corporation, is not specifically given to any particular officer, and the performance of which is not specifically inhibited to the person authorized to manage its affairs generally, the intention of the board of directors to confer upon the person or officer in whom is vested the immediate direction or control or management of the affairs of such corporation to perform such particular act will be inferred from the general authority so given.

[2] And where, as was clearly the case here, an officer of a corporation is held out by such corporation to be possessed of power to perform all acts involved in its ordinary or usual business, the law will not permit third parties to suffer from such acts of such officer by the plea of the corporation that the ostensible authority of such officer was not in fact conferred upon him. McKiernan v. Lenzen, 56 Cal. 61; Phillips v. Campbell, 43 N. Y. 271; Seeley v. San Jose Independent Mill & Lumber Co., 59 Cal. 22, 24; Bank of Healdsburg v. Bailhache, 65 Cal. 327, 332, 4 Pac. 106; Jennings v. Bank of California, 79 Cal. 323, 328, 21 Pac. 852, 5 L. R. A. 233, 12 Am. St. Rep. 145; Greig v. Riordan, 99 Cal. 316, 323, 33 Pac. 913; Bates v. Coronado Beach Co., 109 Cal. 160, 162, 41 Pac. 855; Wells, Fargo & Co. v. Enright, 127 Cal. 669, 672, 60 Pac. 439, 49 L. R. A. 647; Siebe v. Hendy M. Works, 86 Cal. 390, 392, 25 Pac. 14. In the case at bar, Elliott, the secretary and manager, testified that he had, as such officer of the defendant, executed, under the seal of the corporation, and as the acts of the corporation, other promissory notes, and his authority to do so never was questioned by the board of directors or president.

[3] Of these acts by the manager the board of directors must be presumed to have had knowledge. In Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49, the United States Supreme Court, speaking through Mr. Justice Harlan, said: "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." See, also, Carpy v. Dowdell et al., 115 Cal. 677, 47 Pac. 695. It is further said in the Martin v. Webb Case that the authority of a particular officer of a corporation to do a particular act for and in the name of such corporation, where the authority to do such act is not expressly conferred, may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of such corporation. In other words, his authority may be by parol, and collected from circumstances.

In Bank of Healdsburg v. Bailhache, supra, it is said: "While the authority of all officers or agents of a corporation must be limited to such modes of binding the corporation as result from the nature of the duties and the powers conferred upon them, yet when the corporation itself holds out to the public that its officers or agents have authority to act according to the general usage, practice, and course of its business, the acts of such agents within the scope of such usage, practice, and course of business will be binding upon the corporation in favor of third persons possessing no knowledge to the contrary." No one can read the evidence in this record and reasonably arrive at any other conclusion than that the defendant held out to the public that its manager, Elliott, had full power to do all things embraced within the ordinary and usual course of its business, including the very common practice, when necessary, of executing promissory notes.

[4] But we think that a fair, just, and reasonable construction of the above-noted order or resolution of the board of directors defining the powers of the secretary and manager must include therein the authority to execute promissory notes for the corporation where the exigencies of its business require such transactions. Counsel for appellant argue, however, that the general language of the first part of said order which reads, "and generally to conduct the affairs of the corporation, subject to direction of the president and this board," necessarily implies a limitation of the power of the manager to the exercise of the specific authority previously given—that is to say, that, he having been clothed with power to do certain specified acts with relation to the affairs of the corporation, the general language referred to means that he is to have general power only to do the acts specifically designated. But, even if it be granted that counsel are correct in their contention that the general power thus given is to be confined in its exercise to those matters as to which specific authority is conferred, or, in other words, does not have the effect of enlarging the authority of the manager or extending it beyond that with which he is specifically vested, still in our opinion the language of the order specifying the powers of the manager is broad enough to include the authority to execute, when the exigencies of the corporation's business require it, promissory notes for the corporation and thus and thereby to bind it. The order provides, it will be noted, that the manager may "buy and sell the goods and products in which the corporation intends to deal," and it will not be disputed that, in the absence of an express negativing of such authority, the power in the manager to buy goods in which the corporation deals for the

corporation implies and carries with it the power to pay for the goods from the latter's funds, or includes the authority to buy on credit, and to do such a usual thing as to give the note of the corporation as evidence of its obligation to pay. Siebe v. Hendy M. Works, supra, and cases therein cited. But throughout the entire order or resolution of the board of directors purporting to outline the duties and define the authority of the manager it is plainly manifest that the intention was to vest that officer with full power to transact the ordinary business of the corporation and to that end to do all things and perform all acts necessary to the execution of the general commercial purposes of the defendant. It will be observed that the authority of the president is supervisory only over the manager. All contracts of purchase or sale must be, it is true, submitted by the manager to the president for the latter's approval, but it is expressly provided that the immediate direction of the operation of the business shall be vested in the manager. The latter is clothed with all the authority of the president, "so long as said manager shall properly conduct said business and operations." By this provision, it is clear that it was intended to give full authority to the manager to perform all such acts as were required to be performed in the ordinary or usual course of the corporation's business. The president no doubt possesses authority superior to that of the manager. As to all corporations, the board of directors possess the ultimate power over their affairs, but it is true as to all corporations, as it is here, that, where to a particular officer or person is committed the immediate direction of their affairs, his act, within the scope of his authority, and arising in the transaction of the ordinary and usual business of the corporation, will be binding upon the corporation, unless such act has been expressly inhibited to him under such circumstances as that the public or those having business with the corporation ought to know of the inhibition.

[5] But, even if it be conceded that the rendering of the stated account and the making of the note for the corporation involved an act in excess of the sphere of Elliott's authority as manager it is nevertheless true that the fact stands undisputed in the record that the president, whose authority to execute promissory notes for the corporation is not and cannot be questioned, authorized Elliott to pay the note, as a liability of the corporation, upon its maturity, thereby ratifying the act of the manager in executing the note and thus fully recognizing the propriety of that act as one among those within the authority of the manager to perform.

[6] But it is contended that the note is unsupported by a consideration. It was, of course, incumbent upon the defendant to show a want of consideration; the presumption being that a promissory note was given for a sufficient consideration. Section 1963, subd. 21, Code Civ. Proc.; sections 1614 and 1615, Civ. Code; Schallard v. Eel River Navigation Co., 70 Cal. 144, 146, 11 Pac. 590; Vica Valley & Clear Lake Railroad v. Mansfield, 84 Cal. 560, 565, 24 Pac. 145; Underhill v. Santa Barbara Co., 93 Cal. 300, 314, 28 Pac. 1049; Burnett v. Lyford, 93 Cal. 114, 117, 28 Pac. 855; Mills v. Boyle Mining Co., 132 Cal. 95, 97, 64 Pac. 122; Keating v. Morrissey, 6 Cal. App. 163, 91 Pac. 677. As we have seen, the defendant not only challenges the authority of Elliott, as manager, to make the note in question, but denies his right as such manager to render the stated account upon which the note was executed and delivered to Stevens & Son, and, moreover, denies that the liability upon the transaction as to which the account was stated and the note given existed against the defendant. The claim is, in other words, that the obligation or debt for which the note was given was not the obligation or debt of the defendant, but that of Selma Fruit Company—the old corporation. The purpose of the proof addressed to this point was to show, of course, that the note was given without a consideration.

[7] But we think that the evidence very plainly discloses that the defendant, by agreement, not only absorbed the old corporation, Selma Fruit Company, including all its property, but assumed the fulfillment of all its uncompleted contracts and the satisfaction of all its outstanding obligations, including the transaction upon which this action is founded. The facts as to the formation of the new corporation and the arrangement with the old company have already been told in a general way and are undisputed. The question upon which the parties differ is as to the intention or scope and effect of the understanding and arrangement of said parties in the premises as evidenced by the written agreement between the committee, appointed from the subscribers to the capital stock of the proposed new corporation to prepare for the formation of the latter, and the old corporation. This agreement is not in obscure or doubtful language, and clearly exhibits, we think, the extent to which it was intended that the new corporation was to be bound in the matter of the burdens and contracts of the corporation to whose business and properties it succeeded.

After explaining that Selma Fruit Company and T. H. Elliott agreed to "sell to certain parties four certain patent applications of T. H. Elliott, and lots, packing houses, machinery, etc., and the good will of Selma Fruit Company," all packing material and supplies on hand and all contracts for supplies in connection with *said business*, and contracts for the purchase of about one hundred tons of raisins, etc., and that said company was instructed to make arrangements "to immediately take over *the business* of the Selma Fruit Company," etc., said agreement provides, *inter alia*, "* * * That the *business of said Selma Fruit Company,* etc., * * * shall be continued by said Selma Fruit Company, *under its present organization,* commencing Aug. 1st, 1908, *for and on behalf of said corporation so to be formed by said committee.* Said Selma Fruit Company *shall continue to operate said business until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account.*"

It appears to us that nothing could be clearer than that, by the foregoing language of said agreement, it was intended and understood that the proposed new corporation, the specific and avowed purpose of which was to succeed to the *business* of the old company, should not only take over all the properties of the old corporation, but assume all its obligations and contracts. The fact that the old corporation was authorized and empowered to proceed with the transaction of the business in which it was and had been engaged *for and on behalf of the proposed new corporation* and to so continue "*until said new corporation shall be formally organized and shall by formal resolution take over the operating of said business for its own account*" leaves open no other construction of the scope of the agreement. And, as if to emphasize the intention as thus gathered, the agreement proceeds: "All business contracted on and after August 1st, 1908, (the date of the agreement) *shall be subject to the consideration and approval of the parties of the second part.*" In other words, all business for which contracts had been made by the old company prior to the execution of the agreement is not subject to the consideration and approval of the committee (parties of the second part), since such contracts have already been considered, approved, and accepted and the company has bound itself to carry them out; while that business for which contracts may be made subsequently to the making of the agreement must first be approved by said committee, since after that date the operation of the business of Selma Fruit Company by the latter is not for and on account of said company but for and on account of its proposed successor, the defendant herein.

[8] In short, the transaction from which this action arises was pending and existed as and involved one of the obligations of the old company at the time of the execution of the agreement referred to. The old company was in that transaction acting as a broker for the copartnership. The raisins were in the possession of the old company at the time of the making of said agreement, and an offer to purchase the raisins had been made and accepted. Now, even if it may be said that it is not clear from the language of the agreement itself that the defendant intended to assume and did in fact assume the relation to Stevens & Son, as to the raisins involved in the transaction, which was sustained to the copartnership by the predecessor of the defendant, we think that such relation is nevertheless clearly and conclusively established by the fact that the defendant, after it was formed and organized and took over all the properties and the business of the old company, shipped the raisins of Stevens & Son to the Chicago buyer, and received the money from said buyer in payment thereof.

Moreover, no question was raised by the defendant of the relation it sustained to the copartnership at the time the account between it and Stevens & Son was stated and its note given as evidence of the amount ascertained to be due on said account. The president knew of the circumstance of the rendering of the account by Elliott in his capacity as manager, knew that, in lieu of turning over the money received for the raisins to Stevens & Son, Elliott made and delivered to them the note of the defendant for the amount so received, and indeed, as seen, subsequently recognized and ratified the manager's action in the matter as the action of the defendant by ordering the note to be paid.

No ground, it seems to us, exists for doubting that the findings are amply supported, and much less can it be doubted that the judgment is absolutely just. Indeed, the complaint, so far as the cause of action on the promissory note is concerned, could and should be sustained solely upon the theory that the defendant borrowed from Stevens & Son the money for which the note in question was given and without regard to the question whether the money so borrowed constituted the proceeds of a sale of the raisins or whether said raisins were sold either by Selma Fruit Company or by the defendant. It cannot be doubted that Elliott, either as an individual or as the agent of the defendant, received the sum of money specified in the note for Stevens & Son on account of the sale of the latter's raisins. He declared that the money was forwarded by the purchaser of the raisins to the defendant, and that the latter received said money for Stevens & Son.

[9] But, however that may be, there is one very important and vital fact which appears to be unquestionably established by his testimony (and upon this point he is not contradicted), and that is that, when Stevens & Son demanded a settlement and the sum of money due the copartnership was determined, he (Elliott), acting in his capacity as manager of the defendant, asked them to take the corporation's note for the amount for the term of 100 days, saying that the defendant needed the use of the money. Stevens & Son consented to the proposition and accepted the note. It is not disputed that the corporation needed the money and used it for its purposes. To the contrary, the only evidence in the record addressed to that

point discloses that the corporation did need the money and used it in the course of its business operations. Now, conceding that the defendant did not act for Stevens & Son in the handling and sale of their raisins, and that it did not receive the money from Stevens & Son from the purchaser of the raisins, but that Selma Fruit Company conducted the transaction and that Elliott, as an individual, received the money after the absorption of the old company by the defendant, and yet no one will have the temerity to gainsay the very obvious proposition that, having borrowed the money and executed its promissory note as evidence of the liability or obligation, the defendant must be held for the extinguishment of such obligation. In such case, the question whether the defendant acted as broker for Stevens & Son in the sale of the raisins would, manifestly, be immaterial.

The contention that plaintiff is not owner of the account and note is without merit. Both plaintiff and his son, R. E. Stevens, testified that they constituted the copartnership of E. M. Stevens & Son, and that R. E. Stevens, prior to the commencement of this action, assigned and transferred to his father, the plaintiff, all his interest in the account and note in question. It is argued, however, that, in order to vest the sole ownership of the account and note in the plaintiff, it was necessary that the assignment should have been made by the copartnership. We know of no rule or reason against the right of one partner to assign his interest in the copartnership or in the property or contracts of the copartnership to another partner.

We have not attempted to notice all the points, of which there is a great variety, urged by the appellant against the decision of this controversy. Nor have we followed, or deemed it necessary to follow, the ramifications of the ingenious arguments offered in support of those points. We conceive it to be enough to say that neither the points nor the arguments, the latter monuments to the genius and zeal of counsel, have appealed to us as possessing sufficient force to molest in the slightest measure a judgment that plainly appears to our minds to be not only just but in all respects legally impregnable.

The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

18 Cal. App. 349

JESSEN v. PETERSON, NELSON & CO.

(Civ. 923.)

(District Court of Appeal, First District, California. Feb. 26, 1912. Rehearing Denied by Supreme Court April 26, 1912.)

1. TRIAL (§ 395*)—FINDINGS—SUFFICIENCY.

While ordinarily the trial court should find the ultimate fact in issue, it is sufficient to sustain the judgment if probative facts are found from which the ultimate fact must be conclusively inferred.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934, 939; Dec. Dig. § 395.*]

2. JUDGMENT (§ 256*)—FINDINGS TO SUPPORT—SUFFICIENCY.

The complaint in a personal injury action claimed $2,310 for damages, and specifically stated that $2,000 was for the injuries, and $310 for medical attendance. The court's finding specifically stated that plaintiff had expended $122.50 for medical attendance, but did not state the amount to which she was entitled for the injuries, but the single conclusion of law stated that "plaintiff is entitled to judgment against the defendant in the sum of $1,000." *Held*, that the findings supported the judgment for $1,000, though the fact findings did not state the amount to which plaintiff was entitled for the personal injuries, since that could be ascertained by deducting the amount specifically found as medical expenses from the amount found for plaintiff in the conclusion of law.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 446–454; Dec. Dig. § 256.*]

3. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSONS—LINE OF EMPLOYMENT—BURDEN OF PROOF.

If an employé is intrusted with the possession and operation of a vehicle with permission to use it at will in the employer's business, the employer is responsible for personal injuries resulting from its negligent use by the employé without proving that he was engaged in executing any particular business of the employer at the time.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270–1272; Dec. Dig. § 330.*]

4. MASTER AND SERVANT (§ 302*)—SCOPE OF EMPLOYMENT.

That an employé was acting within the general scope of his employment, and the injury resulted from his negligence, is sufficient to charge the employer with responsibility for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1217–1221, 1225, 1229; Dec. Dig. § 302.*]

5. MASTER AND SERVANT (§ 330*)—INJURIES TO THIRD PERSONS—SUFFICIENCY OF EVIDENCE—LINE OF EMPLOYMENT.

Evidence in an action against a corporation for personal injuries from the negligent handling of a buggy belonging to defendant *held* to sustain a finding that the horse and buggy were wholly in defendant's control and possession, through its employé, the driver, at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270–1272; Dec. Dig. § 330.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Millie Jessen (formerly Millie Ring) against Peterson, Nelson & Co. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

N. A. Dorn, for appellant. W. M. Cannon and S. W. Molkenbuhr, for respondent.

LENNON, P. J. In this action the plaintiff recovered a judgment against the defendant for the sum of $1,000, as damages for personal injuries, alleged to have been caused by the negligent and reckless driving of a horse and vehicle owned by the defendant and which, at the time of the accident, was being used in the business of the defendant and under the control of one of its agents. The plaintiff's complaint alleged damages to her as the result of the accident, aggregating the sum of $2,310. Of this amount $2,000 was claimed for injuries to plaintiff's person, and $310 was alleged to have been expended by her for nursing, medicines, and surgical attendance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The answer of the defendant specifically denied the existence of the damages pleaded, and upon the issue thus raised the trial court found for the plaintiff to the extent of $122.50 for money expended in medical attendance, but omitted in its findings of fact to designate the specific amount in which the plaintiff was damaged on account of personal injuries. The court did find however:

"(1) That the plaintiff, at the time of the commencement of this action, was a feme sole. That since the said action was commenced plaintiff married. * * *

"(3) That on the 12th day of October, 1907, a horse and buggy owned by the defendant corporation, and wholly in the possession and under the control of said defendant corporation, was being driven along, over, and upon Market street, a public highway and street in the city and county of San Francisco, and when at or near the junction of the following named public streets in the city and county of San Francisco, to wit, Jones, Market, and McAllister streets, the defendant corporation handled, managed, and drove said horse and buggy in such a careless, negligent, reckless, and fast manner as to cause the defendant's buggy to strike the plaintiff and violently throw her to the ground, and thereafter drag her for some distance, thereby bruising her body and breaking her right leg."

With the exception of the omission heretofore noted, the trial court found specifically in favor of the plaintiff upon every material issue in the case, and from the findings as a whole deduced the single conclusion of law "that the plaintiff is entitled to judgment against the defendant in the sum of $1,000."

The action was tried by the lower court without a jury, and this appeal is from the judgment and an order denying the defendant a new trial.

It is now insisted upon behalf of the defendant that the findings upon the issue of damages do not support the judgment because of the neglect of the trial court to specifically designate in the findings of fact the amount in which the plaintiff was damaged by reason of the injuries alleged and found to have been inflicted upon her person. Undoubtedly it was the duty of the trial court to find upon all of the material issues raised by the pleadings, and the judgment in the present case could not be upheld if it were true, as defendant claims, that there was an utter failure to find the facts of a material issue upon which a finding, had one been made, would not necessarily have been adverse to the defendant.

[1] Ordinarily it is necessary to the validity and sufficiency of findings that the trial court find the ultimate fact in issue, or such probative facts as will enable the court to declare that the ultimate fact necessarily results therefrom; but, where probative facts are found from which the existence of the ultimate fact must be conclusively inferred, the finding is sufficient, and a judgment based thereon will be sustained. Coveny v. Hale, 49 Cal. 556; Smith v. Acker, 52 Cal. 219; Mott v. Ewing, 90 Cal. 231, 27 Pac. 194; Alhambra Water Co. v. Richardson, 72 Cal. 598, 14 Pac. 379.

[2] In the case at bar the probative facts upon which rested the allegations of plaintiff's personal injuries were fully found in her favor, and it necessarily follows from those facts that she must have suffered damage to her person in some amount which, although not specifically stated in the findings of fact, can be readily ascertained by deducting the amount of money found to have been expended by her for medical attendance from the total amount which the court, in its conclusions of law, declared would compensate for all damages sustained by her as the result of the defendant's negligence. The trial court's declaration that the plaintiff was entitled to a judgment for $1,000 as the result of the damages inflicted by defendant was in effect a finding of the ultimate fact that the plaintiff had been damaged to that amount, and its mere presence in the conclusions of law rather than in the findings of fact, where it belonged, and should have been placed, did not detract from or destroy its efficacy as a finding of fact. So construed and read in conjunction with the preceding probative facts found by the court it is sufficient to support the judgment upon the issue of damages. Jones v. Clark, 42 Cal. 192; Breuner v. Insurance Co., 51 Cal. 107, 21 Am. Rep. 703; Edwards v. Sonoma Valley Bank, 59 Cal. 148; Bath v. Valdez, 70 Cal. 355, 11 Pac. 724; Foot v. Murphy, 72 Cal. 105, 13 Pac. 162; Burton v. Burton, 79 Cal. 494, 21 Pac. 847; Millard v. Legion, etc., 81 Cal. 342, 22 Pac. 864; McCray v. Burr, 125 Cal. 636, 58 Pac. 203.

The further point is made that the evidence is insufficient to support the findings in this: That the evidence offered and received in support of plaintiff's case falls short of showing that the person in charge of the horse and buggy was at the time of the accident in any wise occupied in the performance of any duty relating to the business of the defendant. Neither the purpose for which the defendant was incorporated nor its business are definitely stated in the record before us, but it may be fairly inferred from the evidence upon the whole case that the defendant at the time of the accident was engaged in general contracting and construction work in the city and county of San Francisco. It was an admitted fact in the case that the horse and buggy belonged to the corporation defendant, and that the driver, Charles Nilson, "was an officer of the defendant who had the right to operate the buggy." Nilson was the vice president of the defendant and testified as a witness in its behalf. Upon his cross-examination it developed that in the performance of his duties as vice president he "had no regular hours whatsoever; that he had to go around all over the city sometimes; had to go out to the park and Richmond, where the corporation was working at the time; had to go everywhere and see that the work was all right." From this it would appear that, in addition to being vice-president of the defendant, Nilson was also the general superintendent of its work, and that in the performance of his duties he was granted a roving commission which permitted him to look after the business of the defendant at the times and in the manner which best suited his own convenience.

[3] It is the accepted rule in this and other jurisdictions that where an employé is intrusted with the possession and operation of a vehicle with permission to use it at his discretion in the business of the employer, the latter will be held responsible in damages for injuries inflicted upon the person of another resulting from the negligence of the employé in the use and operation of the vehicle; and in such a case it is not necessary for the person seeking damages to prove that at the time of the injuries the employé was engaged in executing any particular business or specific command of his principal.

[4] That the employé at the time of the commission of the tort was acting within the general scope of his employment, and that the injury occurred as the result of his negligence, is all that need be shown in order to charge his employer with liability for such injury. Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959, 47 Am. Rep. 796; Rahn v. Singer Mfg. Co. (C. C.) 26 Fed. 913; Riordan v. Gas Consumers' Ass'n, 4 Cal. App. 646, 88 Pac. 809.

[5] This being so, it is clear in the present case that the testimony of Nilson, coupled with the admitted fact that the defendant was the owner of the horse and buggy, and had conferred upon Nilson the right of using the same in its business, sufficiently supports the trial court's finding that the horse and buggy were owned by the defendant, and "wholly in the possession and under the control of the defendant" at the time of the accident.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

18 Cal. App. 343

PEOPLE v. LILLARD. (Cr. 226.)

(District Court of Appeal, Second District, California. Feb. 24, 1912.)

1. Homicide (§ 72*)—Justifiable Homicide.

If accused saw decedent running at nighttime through a street, and heard persons pursuing him, crying, "Stop him!" "Catch him!" "He did it!" "He is the robber!" and ordered decedent three or four times to stop, and decedent continued his flight, accused had reasonable cause to believe that decedent had committed a felony, so as to justify him in killing decedent, if reasonably necessary in order to stop and arrest him.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 95; Dec. Dig. § 72.*]

2. Criminal Law (§ 823*)—Instructions—Harmful Error—Prejudicial Effect.

While an instruction in a prosecution for homicide, committed while accused was pursuing decedent to arrest him for a supposed felony, that to warrant a private citizen in making an arrest without a warrant there must exist a state of facts which would lead one of ordinary prudence to believe that the person was guilty, might of itself have misled the jury into believing that the question of probable cause was one of fact in the case, when the uncontroverted evidence showed that probable cause for making the arrest on a felony charge actually existed, it was not necessarily prejudicial, where the court also instructed, as a matter of law, that there was probable cause for making the arrest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

3. Criminal Law (§ 561*)—Evidence—Criminal Negligence.

Criminal negligence in killing a man must be established beyond a reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

4. Homicide (§ 242*)—Evidence—Criminal Negligence.

Evidence, in a prosecution for killing decedent while pursuing him under the belief that he had committed a felony, *held* not to show criminal negligence in killing decedent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 505; Dec. Dig. § 242.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Joseph Lillard was convicted of manslaughter, and he appeals. Reversed.

Thomas Scott, Fred J. Spring, and J. R. Dorsey, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. Defendant was informed against by the district attorney of the county of Kern for the crime of murder. Under a plea of not guilty, trial was had by a jury, which by its verdict found defendant guilty of manslaughter. By the judgment of the court, he was sentenced to the penitentiary for a term of 10 years. From this judgment, defendant appeals.

The undisputed facts presented by the record are these: About the 20th of January, 1911, one Rosa Brown, a prostitute, living in what is known as the tenderloin district of Bakersfield, was attacked in her house by deceased, who assaulted her with the evident intent of robbery, knocking her to the floor, and when the woman began to scream "Murder!" and "Police!" deceased ran from the house. The woman continued her screams of "Stop thief!' "Murder!" "Police!" and these cries were taken up by a crowd upon the streets. Deceased continued to run down the street, when defendant, who was a bartender in a saloon located in the same red light district, hearing the woman's cries, and, seeing the man running and the crowd following thereafter, and believing that a crime had been committed, and that the fleeing man was the criminal, took a pistol, which was lying upon a shelf behind the bar, and ran into the street, joining in the pursuit. The defendant seemed to be in the lead of the crowd, and deceased paid no attention to the demands to stop, and about the time he was reaching a dark place in the street, when at a distance of about 40 feet or more ahead of defendant, defendant fired a shot, from the effects of which deceased's death ensued. Immediately after firing the shot, a police officer and others came up, and defendant told them that the man was "lying over there," pointing to the place where the deceased was lying, and said, "I got him." Whether this last statement was voluntarily made, or was in response to a question of the police officer, is not clear. Defendant, however, said to the police officer: "If I am wanted, I will be at the Bowling Alley Saloon." He immediately returned to the saloon, replaced the weapon on the shelf, and a few minutes thereafter the officers came in and arrested him. There is and can be no question from the record that a felony had been committed; that the deceased had committed the felony; that the defendant had reason to believe and did believe these facts; and that he pursued the deceased with the intent to capture him, and for no other purpose. The defendant had no acquaintance with the woman who was the victim of the attempted highway robbery, no acquaintance with the deceased, and no fact even suggesting in the most remote degree any motive on the part of defendant, other than a lawful one of apprehending a felon, is to be found in the record.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] The court very properly charged the jury that if the defendant saw the deceased running at night, and heard persons crying out, "Stop him!" "Catch him!" "He did it!" "He is the robber!" and the deceased being ordered by defendant three or four times to stop, and he refused to do so and continued his flight, then the defendant had reasonable cause to believe the deceased had committed a felony. The jury were further instructed that a private person may arrest, without a warrant, one who has committed a felony, if he has reasonable cause for believing the person arrested to have committed it, and that an arrest may be made by a peace officer or by a private person. Further, that such peace officer or private person, in making the arrest, may use such force as is necessary to arrest the felon, even to the extent of killing him when in flight. Further, that to warrant a private citizen in making an arrest without a warrant there must exist a state of facts that would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the person is guilty. This last instruction, in view of the uncontradicted evidence establishing probable cause, might, if standing alone, have misled the jury through the suggestion that the question of probable cause, under such circumstances, was one of fact; but, considering such instruction with the first instruction given, which was to the effect that from the evidence, as a matter of law, probable cause for making the arrest existed, we can see no prejudice necessarily resulting. The only question of fact presented to the jury related to the matter of criminal negligence.

[3, 4] A careful examination of the record fails to disclose any evidence tending to establish criminal negligence, a fact which must be established beyond a reasonable doubt, in order to warrant conviction. Section 197 of our Penal Code provides that homicide is justifiable when necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed. Wharton on Homicide declares the rule, and quotes abundant authority in its support: "Even a private person is justified in killing a fleeing felon, who cannot otherwise be taken, if he can prove that the person is actually guilty of the felony." Section 492. We are of opinion that the uncontradicted evidence in this case fails to establish, beyond a reasonable doubt, or otherwise, criminal negligence upon the part of the defendant. If officers and citizens are to be punished for an effort to suppress crime and to bring to justice those who commit offenses against the law, it is but offering a premium for crime. The facts appearing in the record that the woman attacked was a prostitute, and that defendant was a bartender, have no signification. Whatever may have been their employment in life, they were and are entitled to the same protection of life and liberty as other citizens; and the defendant, regardless of such occupation, possessed the same right as any other private citizen to apprehend the deceased, who had been guilty of a felony.

We are of opinion, therefore, that there is no evidence in this case warranting the defendant's conviction and supporting the judgment, and the judgment is reversed.

We concur: JAMES, J.; SHAW, J.

18 Cal. App. 390

TALBOT et al. v. GINOCCHIO. (Civ. 955.)

(District Court of Appeal, First District, California. Feb. 29, 1912.)

1. Negligence (§ 142*)—Finding of Ultimate Fact.

The finding, in an action for negligent collision of a team, that it was being driven carelessly and negligently, is of an ultimate fact, and not one on a mixed question of law and fact.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 400–403; Dec. Dig. § 142.*]

2. Municipal Corporations (§ 705*)—Use of Streets—Collision of Team with Pedestrian—Negligence.

A finding of negligence, in the collision of a team with a pedestrian on a crossing, is justified by evidence that it was on the wrong side of the street, being driven without notice of the injured person, and its speed increased just as she was passing in front of it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705.*]

3. Municipal Corporations (§ 705*)—Use of Street—Collision of Team with Pedestrian—Contributory Negligence.

A finding of want of contributory negligence of a pedestrian, with whom a team collided on a crossing, is warranted by evidence that she was at the proper place, twice looked to see if danger threatened, and believed that she should safely cross, and that she could and would have done so, but for the driver increasing his speed just before the collision, which was while she was in the act of stepping on the curb.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515–1517; Dec. Dig. § 705.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Delia Talbot and husband against A. Ginocchio. From a judgment for plaintiffs, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Edwin T. McMurray, for appellant. Dudley Sales, for respondents.

HALL, J. Plaintiffs brought this action to recover damages for personal injuries received by plaintiff Delia Talbot from the negligence of defendant, committed by a servant of defendant in driving a team against the person of said plaintiff. The cause was tried by the court, without a jury, and resulted in a judgment in favor of plaintiffs in the sum of $350. From this judgment, and the order denying defendant's motion for a new trial, an appeal was in due time taken to this court.

[1] It is urged that the findings are insufficient to support the judgment, in that, as it is claimed, the "finding that 'the servant and employé of defendant in charge of said horse and wagon was driving the same carelessly and negligently' is a finding upon a mixed question of law and fact." Appellant cites no authority in support of this assertion. In an action to recover damages resulting from the negligence of the defendant, "a general allegation of negligence upon the part of defendant is sufficient." In such a case, "the negligence is the ultimate fact to be pleaded, and is not a legal conclusion." House v. Meyer, 100 Cal. 592, 35 Pac. 308. The finding in question is of an ultimate fact, and is unobjectionable.

[2] The main and only other contention of appellant is that the evidence does not show that appellant's employé was guilty of any negligence in driving the team that struck plaintiff, but that she was guilty of contributory negligence that resulted in her injuries.

There is ample evidence in the record tending to establish the following as the essential facts in the case: Upon the day in question, plaintiff Mrs. Talbot, with her friend, Mrs. Leahey, at about 4 o'clock in the afternoon, approached Point Lobos avenue from the north along the east side of Third avenue. Upon reaching the northerly side of Point Lobos avenue, the two ladies turned and crossed to the westerly side of Third avenue over the crossing upon the northerly side of Point Lobos avenue. Upon reaching the westerly side of Third avenue, they started to cross Point Lobos avenue from the north to the south side thereof over the crossing at the westerly side of Third avenue. As they stepped from the sidewalk to the roadway or street proper, they, especially Mrs. Talbot, looked up and down Point Lobos avenue to ascertain whether any cars or other vehicles were approaching, and saw the appellant's team approaching at a walk or slow jog, westerly, along the northerly side of Point Lobos avenue, between the northerly car track upon said avenue and the northerly curb line thereof, and just approaching the east line of Third avenue. Deeming that she could cross in perfect safety—as, indeed, she undoubtedly could, if the team had continued in its then course and pace—Mrs. Talbot and her friend continued their way across Point Lobos avenue along the usual path or crossing. Just before getting across the avenue, plaintiff again observed the team, and saw that it had changed its course and was crossing to the southerly side of Point Lobos avenue, within the lines of Third avenue, as if to pass to the south along Third avenue. Plaintiff, still apprehending no danger, continued in her course, and just as she was stepping to the southerly curb of Point Lobos avenue, following Mrs. Leahey, who was in advance, she was struck by the pole or shaft of the wagon and thrown to the ground and injured. There is testimony, given by Mrs. Leahey, that as the horse neared plaintiff its speed was increased. The driver of the horse and wagon testified that he did not see the ladies until his horse was within about five feet of them, at which time he also said they were on his southerly side. He was driving to the stable of his employer

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situate on the southerly side of Point Lobos avenue, about 75 feet westerly from Third avenue.

From the foregoing résumé of the facts, which find support in the evidence in the record most favorable to the respondents, we do not think that it can be doubted but that the trial court was justified in finding that the servant of defendant was guilty of negligence in the driving of the horse and wagon. It is manifest from his own testimony that as he swung across Point Lobos avenue from the north to the south side thereof, and approached the crossing at the westerly line of Third avenue, he gave little heed to what might be in front of him. He did not see the ladies until they had reached a point to the south of his path—in other words, not until they had substantially passed in front of his horse; for, notwithstanding that he says they were crossing from the south, there can be no doubt but they were crossing from the north to the south side of the street when the accident occurred. The court might well believe from the evidence that the driver was improperly upon the left-hand side of the road, and that he increased, or allowed an increase of, the speed of his team as the ladies were practically passing in front of his team, and but a few feet away.

Under the rule that when the evidence is conflicting, or when reasonable men might differ as to the inference which ought to be drawn from the undisputed or proven facts, the question of negligence or contributory negligence is one of fact for the jury or trial court, and is not one of law (Davies v. Oceanic Steamship Co., 89 Cal. 280, 26 Pac. 827; Redington v. Postal Tel. Co., 107 Cal. 317, 40 Pac. 432, 48 Am. St. Rep. 132; Wikberg v. Olson, 138 Cal. 479, 71 Pac. 511), we certainly cannot say that the court was not justified in finding that appellant's servant was guilty of negligence in driving the team, and that such negligence caused the injury to plaintiff.

[3] Under the same rule, we cannot say that the finding that plaintiff was not guilty of any contributory negligence is not supported by the evidence. She was crossing at the proper place, twice looked to see if danger threatened, believed that she could safely cross, and the court may well have believed that she could and would have crossed in safety, except that the driver increased the speed of his team just preceding the collision. As it was, she was only struck just as she was in the act of stepping to the curb. See McKernan v. Los Angeles Gas & Elec. Co., filed May 17, 1911, 16 Cal. App. 280, 116 Pac. 677, and Clark v. Bennett, 123 Cal. 278, 55 Pac. 908.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

18 Cal. App. 346

PATTERSON v. TORREY. (Civ. 1,054.)

(District Court of Appeal, Second District, California. Feb. 24, 1912. Rehearing Denied March 25, 1912; Denied by Supreme Court April 24, 1912.)

Brokers (§ 43*)—Contract of Employment—Sufficiency.

The instrument relied on as authority to sell property stated, "At your request I will give you the price wanted for my house," giving the price, and continued, "I will accept in exchange Mr. M.'s home on either proposition at a valuation" named, "balance in cash," and was signed by defendant. *Held*, that the instrument, merely fixing the price at which defendant would sell was insufficient as a contract employing plaintiff to sell defendant's home for a commission; Civ. Code, § 1624, subd. 6, making an agreement employing a broker to sell real estate for a commission invalid, unless in writing and signed by the party to be charged.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John L. Patterson against Clarence T. Torrey. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Watkins & Blodget, for appellant. Murphey & Poplin and Trusten P. Dyer, for respondent.

SHAW, J. Action by real estate broker to recover commissions for negotiating a sale and exchange of real property, valued at $20,000. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

It appears from the allegations of the complaint and findings of the court that defendant, after making an unsuccessful attempt to negotiate an exchange of his property with one Charles H. McFarland, signed and delivered to plaintiff a writing, as follows: "Mr. Patterson: At your request, I will give you the price wanted for my house 2659 Ellendale place. For the place bare of all hangings and draperies—$20,000 00/xx. For the place including hangings and draperies, window curtains and etc., $23,500.00. I will accept in exchange Mr. McFarland's home on either proposition at a valuation of $8,000-00/xx. Balance cash. [Signed] C. T. Torrey." And thereupon, as alleged and found by the court, requested plaintiff to see Mr. McFarland in regard to making the exchange. As requested by defendant, plaintiff saw McFarland, and procured from him an acceptance of the offer made by defendant to plaintiff, in accordance with which the sale and exchange was consummated.

While upon the record there can be no doubt as to the fact that plaintiff performed valuable services at defendant's oral request, nevertheless the law is too well settled to admit of controversy that there can be no recovery of compensation therefor, in the absence of some note or memorandum in writing, subscribed by the defendant, whereby plaintiff was employed or authorized to negotiate the sale or exchange. Subdivision 6, § 1624, Civ. Code. The writing does not purport to be other than a statement fixing the price at which defendant was willing to sell his property, and expressing his willingness to accept McFarland's home at a valuation of $8,000 in part payment of the price so fixed. It is impossible to construe the instrument as constituting an employment of plaintiff by defendant, or conferring upon him any authority to negotiate a sale or exchange for a compensation or commission. While the court finds that the instrument was made and delivered by defendant "for the purpose of authorizing the plaintiff, as such real estate broker, to make such sale and exchange of said property of defendant with said Charles H. McFarland, for commission, on the terms and price specified by defendant," nevertheless such purpose is wholly inconsistent with the plain import of the language used by the parties. The naked act of an owner of real estate in fixing a price at which he is willing to sell or exchange the same, given in writing at the request of a broker, does not constitute an employment of such broker by the owner, or bind him to pay the broker a commission for making a sale of the property.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

For the reason that the record discloses no employment of plaintiff evidenced by writing, under which defendant, either directly or by implication, agreed to pay him a compensation for his services, the judgment and order are reversed.

We concur: ALLEN, P. J.; JAMES, J.

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18 Cal. App. 367

PEOPLE v. LIGGETT. (Cr. 173.)

(District Court of Appeal, Third District, California. Feb. 26, 1912.)

1. Witnesses (§ 388*)—Impeachment—Foundation.

Evidence as to whether the parents of prosecuting witness told a witness for the state that she must testify against accused at the preliminary examination was immaterial, though her testimony at the trial that accused did not admit his guilt contradicted her testimony at the preliminary examination; the testimony at the preliminary examination not being before the jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1233–1242; Dec. Dig. § 388.*]

2. Rape (§ 43*)—Admission of Evidence.

Evidence by a physician as to whether prosecuting witness was suffering from a venereal infection was admissible as tending to show sexual intercourse.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 62, 65; Dec. Dig. § 43.*]

3. Rape (§ 40*)—Admission of Evidence—Reputation for Chastity.

Evidence as to prosecutrix's reputation for chastity was immaterial in a prosecution for raping a 12 year old girl on about July 20, 1911, as was evidence that some person other than accused had intercourse with her within a year prior to August 4, 1911, though a physician testified that there was evidence of venereal infection in prosecutrix.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55–59, 64; Dec. Dig. § 40.*]

4. Rape (§ 59*)—Instruction.

Where, in a prosecution for rape of a child 12 years of age, prosecuting witness testified to the criminal act, it was not error to instruct the jury to render a verdict of guilty if they believed the prosecuting witness.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88–100; Dec. Dig. § 59.*]

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

John Liggett was convicted of rape, and from the judgment of conviction and an order denying a motion for a new trial he appeals. Affirmed.

W. H. Carlin, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was convicted of the crime of rape alleged to have been commited about the 20th day of July, 1911, on a child of the age of 12 years, and was sentenced to serve 20 years in the Folsom penitentiary. Defendant appeals from the judgment of conviction and from the order denying his motion for a new trial.

It is claimed that the verdict of guilty rested on the testimony of the prosecuting witness and upon the testimony of her father and mother as to what occurred at a conference with the defendant about August 4th, following the alleged crime. The girl's testimony was direct and unmistakably established the charge, if believed by the jury, which we must assume it was. On August 4, 1911, the parents of the girl, having had their suspicions aroused of defendant's guilt, called him to account in the girl's presence and in the presence of one Mrs. Slaughter. These witnesses do not agree in all particulars as to what then occurred, but there was testimony of what took place at this interview with the defendant which justified the jury in believing that he admitted his guilt. This testimony, together with that of the prosecuting witness, amply supported the verdict. Some errors are claimed to have occurred in the rulings of the court to defendant's prejudice, which will be noticed.

At the interview with defendant, above referred to, Mrs. Slaughter was present. Called as a witness for the people, she testified that defendant, when charged with the crime, denied it. When asked whether he at any time during the conversation acknowledged that "he had anything to do with the child," she answered, "Well, I don't remember just exactly that he did." Some further examination of the witness showed to the satisfaction of the court that the district attorney was surprised by her answers, and permitted him to call her attention to her testimony at the preliminary examination at which she testified that defendant admitted his guilt. The court ruled that this testimony could not be used as evidence in the trial, but might be used to show that the district attorney was surprised by the answers of the witness, and could be used for purposes of impeachment. Counsel for defendant then asked some questions of the witness concerning what she said to him, previous to the trial, about this same interview with defendant, and whether she did not then say to counsel that defendant denied his guilt. It is not quite clear from the record whether or not counsel was laying the ground for the impeachment of the witness or desired to get her statement made out of court in the record. The court called counsel's attention to her testimony in which she had testified that defendant denied his guilt. Counsel then said: "If that is understood, all right."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The question put to the witness on cross-examination as to whether the parents of the prosecuting witness had not told her when she went to the preliminary examination she must testify against defendant was immaterial. The testimony given at the preliminary was not before the jury.

[2] Witness Dr. Miller was called by the people, and testified that he believed intercourse had been effected. He was asked if he discovered that the child was suffering from any disease. Defendant objected as immaterial and incompetent; that there is no issue involving the disease of the prosecuting witness, and there is no evidence that defendant ever had a disease. The court ruled that it was admissible for the same reason that absence of the hymen was shown; that is, as a circumstance tending to show intercourse. The witness answered that "there were evidences of venereal infection. We think the evidence was admissible.

[3] In this connection defendant calls attention to the testimony of a character witness, Mr. Pringle, who testified as to the reputation of the prosecuting witness for truth, honesty, and integrity, that it was bad. He was asked her reputation for chastity, to which the district attorney objected. Counsel for defendant urged that the testimony of Dr. Miller opened the way to this testimony; that defendant could now show that some other person "has done that act." "The Court: It does not make any difference whether the child was a moral or immoral child. It does not make any difference what her character was. If she was under the age of 16 years, and this defendant had intercourse with her, he violated the law. It does not make any difference whether she was a pure child or not. She may have been as immoral as it is possible for a child to be. That does not excuse him for doing it. Mr. Carlin: If he is guilty. The Court: Yes; I assume that he is not guilty. I have a right to assume that. It is no excuse for any one doing it, however. A man cannot justify himself for doing this crime by showing that the girl was immoral or impure. Mr. Carlin: Couldn't he show that probably some one else had done it? The Court: No; that does not give the defendant a right to do it. Mr. Carlin: We might show that some one else might have done it. Cannot we now account for the conditions which Dr. Miller found outside of this man? We want to account for that. Well, all right. (Exception.) We will offer to prove that some person or persons, not the defendant, within a year prior to the 4th day of August, 1911, had sexual intercourse with Mabel Millard. The Court: I assume that there had been evidence introduced on that question. The doctor's testimony went to prove that, that she had been tampered with. Mr. Carlin: But we offer to prove now that it was some one else, and not the defendant, that did it. The Court: You cannot prove that. Mr. Carlin: All right, take the witness. (Exception). The Court: You can prove that he did not do it, but you cannot prove that some one else did it." We perceive no error in the rulings. In People v. Currie, 14 Cal. App. 67, 111 Pac. 108, relied on by defendant, the prosecuting witness had testified that the defendant had sexual intercourse with her on a particular date, and that she gave birth to a healthy, perfectly formed child on a particular date, about eight months after the alleged assault on her. Pregnancy had been shown by the prosecution as evidence of defendant's guilt. It was held error not to allow evidence of her sexual relations with other men to test the truthfulness of this damaging fact of pregnancy. The reputation of the prosecutrix for chastity was immaterial as she was under the age of consent. The colloquy between counsel and the court as to what proof might be made in rebuttal of any inference that defendant was responsible for the diseased condition found by Dr. Miller does not raise the question of the admissibility of such rebuttal evidence. Counsel did not offer any evidence or state that he could produce evidence that this venereal condition was or might have been produced by some person other than defendant. His offer was "that some person or persons, not the defendant, within a year prior to the 4th day of August, 1911, had sexual intercourse with Mabel Millard." Such evidence was inadmissible.

[4] Error is claimed in giving the following instruction: "While it is the law that the testimony of the prosecuting witness should be carefully scanned, still this does not mean that such evidence is never sufficient to convict; and, if you believe the prosecuting witness, it is your duty to render a verdict of guilty. By the law of this state a female child under the age of 16 years is incapable of giving legal consent to an act of sexual intercourse, so that every act of carnal connection with such a child by one not her husband will constitute the crime of

rape, whether with or without the consent of such child, and in this case, if you believe from the evidence beyond a reasonable doubt that the defendant had sexual connection with the prosecuting witness on or about July 20, 1911, as alleged in the information and that at the time she was under the age of 16 years and not the wife of the defendant, then the defendant is guilty of rape, and the jury should so find." Defendant calls attention to the following paragraph: "And, if you believe the prosecuting witness, it is your duty to render a verdict of guilty"—as the basis of his objection, for the reason that it "singles out a particular witness," citing People v. Fernandez, 4 Cal. App. 314, 87 Pac. 1112; People v. Johnson, 106 Cal. 294, 39 Pac. 622; People v. Barker, 137 Cal. 557, 70 Pac. 617. The cases cited were instances of assault with intent to commit rape. There the question of intent with which the assault was made was the material element in the cases, and it was held that the court had no right "to put a state of facts to the jury which would bar them from finding the intent to be other than that charged by the information." Said the Court: "The defendant may have done all the things charged against him by the evidence of the prosecutrix, and still have been possessed of no intent to commit rape." People v. Johnson, supra. In the case here the act of copulation constituted the offense, and the intent with which the defendant committed the act is immaterial. The prosecuting witness testified to the act, and, if the jury believed her, his guilt must necessarily follow. There was therefore no error in the instruction.

The only remaining alleged error pointed out is the refusal of the court to give the defendant's proposed instruction on reasonable doubt. It was refused "because elsewhere given." The instruction given embodies most of the definition of reasonable doubt found in the oft-approved instruction given by Chief Justice Shaw. It also contains some explanatory comments or an elucidation which the learned trial judge conceived proper to aid the jury in their effort to comprehend Judge Shaw's definition. Defendant complains that: "The jury was by the instruction practically lectured upon the subject, and warned that they should be very careful about this reasonable doubt. In fact, they were practically told that our old friend 'reasonable doubt' is but a figment of the imagination, and not to be taken seriously. * * * Without intending to be facetious before this honorable court, we wish to say that it reads like an assault upon an old, a revered, and a valued friend." The Supreme Court has given many cautionary signals warning trial courts against attempting elaborate improvements on a definition which has met with universal approval needing no explanation. We have carefully examined the instruction in question, and, while we do not think it an improvement on the oft-given instruction, we find nothing in it to justify the reversal of the cause.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

18 Cal. App. 429

ABBOTT v. KELLOGG et al. (Civ. 1,038.)

(District Court of Appeal, Second District, California. March 1, 1912. Rehearing Denied April 29, 1912.)

1. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—TERMINATION OF TENANCY AT WILL.

The 30 days' notice provided by Civ. Code, § 789, for terminating a tenancy at will, not being essential where the tenant disclaims the tenancy, it is not necessary in such case as a condition precedent to an action of forcible detainer under Code Civ. Proc. § 1161.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217–1269; Dec. Dig. § 291.*]

2. APPEARANCE (§ 24*)—WAIVER OF DEFECTS IN PROCESS.

Defendant, treating the action as in ejectment, having appeared, demurred, and answered without question as to the time required in the summons so to do, waived the sufficiency of the summons.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118–143; Dec. Dig. § 24.*]

3. VENDOR AND PURCHASER (§ 105*)—FORFEITURE OF CONTRACT—LIABILITY FOR USE AND OCCUPATION.

The value of the use and occupation of premises by one after forfeiture of his rights under his executory contract of purchase, under which he entered, is recoverable of him as damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 183–187; Dec. Dig. § 105.*]

Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by O. L. Abbott against H. E. Kellogg and another. From a judgment for plaintiff, and from an order denying a motion for new trial, defendants appeal. Affirmed.

W. R. McQuiddy, for appellants. O. L. Abbott, in pro. per.

ALLEN, P. J. The facts are these: That on or about the 3d day of December, 1906, one Mallory and H. E. Kellogg, defendant, entered into a written agreement for the purchase and sale of real property in Kings county, under which agreement it was provided that a certain note should be paid on or before October 1, 1909; that certain interest upon other notes should be paid on or before such date; that Kellogg should pay all taxes and charges assessed against the property, as well as water taxes levied, on or before such date—time being made of the essence of the contract. It was further agreed that, if the second party should be in default in the performance of any of the terms and provisions of the agreement, his rights should be at an end, and, that if allowed to remain upon said premises thereafter, he should hold and occupy as tenant of the said Mallory. Possession of the premises was given at the time of the execution of the agreement. Kellogg made default in each and all of the obligations of the contract imposed upon him to be performed on or before the 1st day of October, 1909, and on the 5th day of October following, Mallory gave notice to him that his rights were forfeited under the contract, and that he (Mallory) was going to sell his right to said property. After such notice to Kellogg, Mallory sold the premises to plaintiff, who demanded possession thereof, which was refused, and Kellogg and Carl Witzke, holding under him, continued in possession. Accordingly, on October 18, 1909, Abbott made written demand for the surrender of possession and occupancy of the premises, and, upon defendant's failure and refusal to surrender possession within three days thereafter, this action was brought to recover possession. Defendant by his answer denied the seisin and right of possession of plaintiff, and averred an equitable ownership by him in the premises, disclaiming the title of the landlord and of his own relation as tenant. The trial court found the allegations of the complaint to be true, and those allegations touching want of ownership in plaintiff, and the denial of tenancy by defendant, to be untrue, found the valuation of the use and occupation of the premises, after notice, to be $120, and by its decree put plaintiff in possession, and gave judgment for $120 rent. Defendant appeals from the judgment, and from an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Under the allegations of the complaint, and from the express provisions of the contract, defendant, after his default in the performance of the covenants of the agreement, became a tenant at will of Mallory. Being such tenant at will, under section 789, Civil Code, 30 days' notice to remove from the premises within a period of not less than one month was essential to terminate the tenancy; and, under section 1161 of the Code of Civil Procedure, when one continues in possession, or by subtenant, of the property, or any part thereof, after the expiration of the term for which it is let, without permission of his landlord, or the successor in estate of his landlord, if any there be, and if the tenancy be one at will, and has been terminated by notice as prescribed in the Civil Code, the action of forcible detainer lies; and the three days' notice to quit after the termination of the tenancy is sufficient to entitle the landlord or owner to maintain an action in unlawful detainer. It is insisted by appellants that this action in unlawful detainer does not lie, because it affirmatively appears that the 30 days' notice provided by the Civil Code to terminate a tenancy at will was not given. "The defendant's answer expressly makes this denial of title and holding the possession as tenant, or that plaintiff was entitled to the possession. The effect of this denial was to make the defendant a trespasser. He was not entitled to notice to quit." McCarthy v. Brown, 113 Cal. 19, 45 Pac. 14. The 30 days' notice to quit not being essential in terminating the tenancy where the same is disclaimed by the tenant, it was not necessary to establish the same, in order to give plaintiff the rights guaranteed by section 1161 of the Code of Civil Procedure, or the right to maintain an action in ejectment, in each of which actions the superior court had jurisdiction; and its judgment being correct will not be disturbed, if its jurisdiction to render the same under the pleadings is established.

[2] Treating the action as one in ejectment, defendant appeared, demurred, and answered without question as to the time required in the summons so to do, and is not in a position to question the sufficiency of the summons, under the circumstances of the case.

[3] While the entry of defendant was lawful and not for any definite term, or with any liability for rent (Pomeroy v. Bell, 118 Cal. 637, 50 Pac. 683), nevertheless the value of the use and occupation of the premises for the period of possession after forfeiture was recoverable as damages; and the amount thereof, found by the court under the issues presented, will be assumed to be correct, nothing to the contrary appearing.

All matters involved in the forfeiture on account of the nonperformance of the conditions of the contract upon the defendant's part have been settled and determined adversely to defendant by our Supreme Court in Kellogg v. Mallory, 119 Pac. 937. It is unnecessary to review the rulings of the court with reference to such matters in this proceeding.

We see no merit in the claim of error in denying a new trial on account of the newly discovered evidence disclosed by the affidavits.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

18 Cal. App. 385

APPLESTILL v. GARY, County Auditor.
(Civ. 1,072.)

(District Court of Appeal, Second District, California. Feb. 27, 1912.)

1. SHERIFFS AND CONSTABLES (§ 29*)—SALARIES—CONSTRUCTION OF STATUTES.

When a sheriff was elected for Imperial county on November 8, 1910, it was in class 36½, under Pol. Code, § 4265a, and that section and section 4300b, fixed the compensation for sheriffs of counties of that class at $5,000 a year, with all mileage allowed by law. Act approved February 28, 1911 (St. 1911, p. 96), reclassified the several counties according to population, for the purpose of compensating the officers, and placed Imperial county in class 36. And act approved May 1, 1911 (St. 1911, p. 1265), fixed the compensation of sheriffs in counties of that class at $5,000 a year, with all the commissions, fees, and mileage for serving papers without the county, and, in addition thereto, provided that such sheriff should appoint an undersheriff at a salary of $1,500 a year, and a court deputy at a salary of $900 a year; and section 3 of the act made it to take effect immediately. *Held*, that the provision making the act to take effect immediately could not be construed as a legislative declaration that the act did not work an increase in the compensation of sheriffs of counties in class 36, on the theory that otherwise the act would apply to incumbents in office and increase their salaries, contrary to Const. art. 11, § 9, but, in so far as the act did not show on its face whether it increased the salaries of incumbents, it would be construed as only applying to sheriffs thereafter elected.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 46; Dec. Dig. § 29.*]

2. Officers (§ 100*) — Salaries — Increase During Term.

If a statute changes the compensation of a county officer in such a way that it cannot be determined whether it in fact increases the compensation, a declaration therein that it does not increase an incumbent's compensation would be conclusive of that fact, so that it would be applicable to incumbents when effective, whether at once or within 60 days.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152–157; Dec. Dig. § 100.*]

Appeal from Superior Court, Imperial County; George H. Hutton, Judge.

Action by C. M. Applestill against W. D. Gary, as Auditor of the County of Imperial. From an order issuing a peremptory writ of mandate, defendant appeals. Order reversed, with directions to deny application.

Phil D. Swing, Dist. Atty., for appellant. Conkling & Brown, for respondent.

SHAW, J. Appeal from an order issuing a peremptory writ of mandate, commanding defendant, as auditor of Imperial county, to issue to plaintiff his warrant upon the county treasurer for the sum of $70.16, claimed to be due petitioner as salary for the month of May, 1911, as deputy sheriff of said county, to which office he had been appointed on May 3, 1911, by Mobley Meadows, sheriff of Imperial county.

[1] When Meadows was elected sheriff, on November 8, 1910, Imperial county was in class 36½. Section 4265a, Pol. Code. The compensation fixed by law for the sheriffs of such counties was the sum of $5,000 and all mileage now allowed by law. Sections 4265a and 4300b, Pol. Code. By act approved February 28, 1911 (St. 1911, p. 96), the several counties of the state were reclassified according to population, for the purpose of regulating the compensation of officers. As so classified, Imperial county was declared to be a county of the thirty-sixth class, and by an act of the Legislature, approved May 1, 1911 (St. 1911, p. 1265), the compensation of the sheriff in the counties of such class was fixed at $5,000 per annum and all commissions, fees, and mileage for the service of papers and process issued without his county; in addition to which, it was provided that he should have an undersheriff at a salary of $1,500 per annum, and a court deputy at a salary of $900 per annum, both of whom should be appointed by the sheriff, and the salaries of whom were made a charge upon the county treasury.

Respondent concedes that, if, upon a comparison of the two acts, it appears that the change in compensation effects an increase thereof then to apply it to an incumbent would be obnoxious to section 9, art. 11, of the Constitution. If no change other than the allowance of deputies had been made, such fact, under the decision in Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161, would constitute an increase in compensation. Whether the salaries of deputies and the amount of fees and commissions on business arising outside his county, allowed in lieu of mileage on county business, and of which he is deprived, effected an increase in compensation cannot be determined by a comparison of the two acts. It is therefore insisted that, inasmuch as it does not appear that the effect of the amendment was to increase the compensation, and since the Legislature has, by section 3 of the act, declared it should take effect immediately, which, as to the compensation of sheriffs of counties of the thirty-sixth class, it could not do, except upon the hypothesis that the Legislature had determined it did not cause an increase, a conclusive presumption arises that, by reason of such urgency clause alone it did so determine, and thereby expressed an intent that the change should operate upon incumbents; that, in the absence of the existence of such fact, the declaration would not have been made.

[2] There is no doubt, we think, that, where an act changes the compensation of a county officer, the mode being such that it cannot be determined by a comparison whether such act does or does not result in an increase thereof, a declaration therein by the Legislature that it does not increase the incumbent's compensation would be conclusive of the fact so declared, and the act would be applicable to incumbents when the law went into effect, whether at the expiration of 60 days from its passage, or immediately by virtue of an urgency clause. Such appears to have been the opinion of the Supreme Court expressed by Angellotti, J., in Crockett v. Mathews, 157 Cal. 157, 106 Pac. 575, where the Legislature, in changing the compensation of officers, declared that, "except as to subdivisions 13 and 15, this act [St. 1909, p. 324, § 1] shall not take effect until the expiration of the present term of officers hereinabove enumerated." These subdivisions related to justices of the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

peace and constables, as to whom it was held the act changing their compensation took effect and became operative 60 days after its passage; there being no earlier date fixed. The only question, therefore, is whether the declaration that "this act shall take effect immediately" should be construed as a declaration to the effect that it did not constitute an increase, and should immediately apply to the incumbents of offices whose compensation was so changed.

The facts of the case at bar are almost identical with those involved in that of Smith v. Mathews, 155 Cal. 752, 103 Pac. 199, and the opinion there rendered must be deemed decisive of the points raised in this case. The subject of the amendatory act (Stats. of Cal. 1911, p. 1262) is the amendment of both section 4236, Political Code, relating to counties of the seventh class, and section 4265, Political Code, relating to counties of the thirty-sixth class. That the result of the amendment is to increase the compensation of some of the county officers mentioned therein is clearly disclosed by comparison. As to such officers, section 9, art. 11, of the Constitution, presents an insurmountable barrier to the act taking immediate effect, in the sense of being operative as to such officers. Clearly it was not the intent of the Legislature to increase the compensation of such officials, in violation of the Constitution, by merely declaring that the act should take effect immediately. Without such declaration, it would take effect in 60 days; hence such provision, as said by Beatty, C. J., is a false quantity in the consideration of the question. "Since the clause putting the statute into immediate effect clearly does not mean all that it says, it falls short of its literal import. If it was not intended to put in immediate operation provisions raising salaries, upon what ground are we to hold that it was intended to have immediate operation in those instances where it changes the compensation attached to an office, without disclosing whether the change effects an increase or reduction, and where, as far as the court can see, it is as likely to be an increase as a reduction? If in one case the old law continues to operate, why not in the other?" Smith v. Mathews, supra. Like the case from which we have just quoted, the urgency clause may be accounted for by the fact that the act in question (subdivision 17 of section 4236, Pol. Code) gives the board of supervisors power to authorize incumbents to employ special clerical help at a compensation to be fixed by such board, when deemed necessary to bring the work of the office down to date, in case of neglect in that regard by the incumbent's predecessor. This provision is entirely independent of the provisions changing the salaries of officers. In our opinion, the true construction of the act "is to treat all its provisions alike, and, knowing that such of them as increase salaries could have been intended to apply only to officers elected subsequent to the amendment, to conclude, in the absence of express and specific declaration to the contrary, that other amendments which may or may not have the effect of increasing compensation were likewise intended to operate only in favor of or against officers to be thereafter elected." The mere declaration that the act should take effect immediately cannot, under the facts presented, if in any case, be construed as a declaration on the part of the Legislature that no increase results from the change, and that it shall apply immediately to the present incumbents. In the absence of such declaration, quoting from the concurring opinion in the Smith Case, "it is to be inferred that an increase was contemplated, and that it was intended to apply prospectively only."

The order granting the peremptory writ is reversed, with instructions to the court to make an order denying petitioner's application.

We concur: ALLEN, P. J.; JAMES, J.

18 Cal. App. 354

RICH v. EDISON ELECTRIC CO.

(Civ. 1,018.)

(District Court of Appeal, Second District, California. Feb. 26, 1912.)

1. Corporations (§ 407*)—Employment of Physician—Compensation—Who Liable.

Plaintiff, who was a surgeon and the owner of a hospital, rendered valuable services to a person, injured by coming in contact with defendant's electric wires. After such services, a doctor retained by defendant, for the purpose of looking after injured employés, and who was authorized to make arrangements for their care in outside towns when injuries occurred, arrived and directed the hospital authorities to give the patient every possible care. Later the assistant to defendant's president and general manager told the hospital authorities to take every care of the patient, and that defendant would see to their compensation. *Held*, that the defendant was liable for the hospital charges; it being sufficient that the patient was injured through its instrumentalities, and that its officers or agents with ostensible authority directed the hospital authorities to care for him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1615–1619; Dec. Dig. § 407.*]

2. Physicians and Surgeons (§ 13*)—Employment—Right to Compensation—Who Liable.

The defendant was not liable, however, for the surgical services, rendered before any orders were given by the defendant's agent, without proof that the injuries were caused by its negligence.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. §§ 18–20; Dec. Dig. § 13.*]

3. Stipulations (§ 14*)—Construction.

A stipulation in the record of a subsequent action that an action for personal injuries was settled and dismissed by the payment by defendant of a specified amount does not establish defendant's legal liability for the injuries.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Helen May Rich, executrix of the estate of C. L. Rich, deceased, against the Edison Electric Company. From a judgment on a verdict for plaintiff, defendant appeals. Reversed, and remanded for new trial.

H. H. Trowbridge, for appellant. Williams & Rutan, for respondent.

ALLEN, P. J. There is evidence in the record tending to show the following facts: On the 26th of September, 1908, one E. H. Lapier received serious injuries at a water plant belonging to the Fullerton Domestic Water Company, of which company he was an employé; that the injury was occasioned by coming in contact with certain electric wires supplying electric current to the pumping plant, which wires were the property of the defendant, and were under the control of one Boone, an employé of defendant. Upon the occurrence of the injury, Boone called plaintiff to the scene, and upon plaintiff's arrival Lapier was immediately taken to a hospital at Fullerton, owned by plaintiff, and plaintiff, a skillful surgeon, immediately proceeded, with the assistance of other surgeons, to amputate a leg, and to perform other operations necessary for the preservation of the life of Lapier. About the time these operations were concluded, nothing remaining to be done, except to apply some dressings, one Dr. Stinchfield, acting at the time as or for the chief surgeon of defendant, arrived upon the scene, made a cursory examination of the injured man's condition, recommended that certain things be done, and directed the hospital authorities to give the patient every possible care. This was done at great expense and trouble to the hospital authorities, the services for which were reasonably worth $397, $70 of which was subsequently paid by check forwarded by A. L. Selig, assistant to the president and general manager of defendant, in the letter inclosing which check was a statement by said Selig that the payment was on account of the Edison Electric Company. Within a day or two after the injury to Lapier, Selig had told the hospital authorities to take every care of the patient, and that defendant would see to their compensation. The surgical services in connection with the amputation, and which were rendered before the representative of the general manager or chief surgeon of defendant arrived upon the scene, were necessary for the preservation of the life of the patient, and were well worth $1,000. Plaintiff, after a refusal upon the part of defendant to pay the bill, brought this action to recover the sum of $1,400, including the surgical services and the hospital charges. The case was tried by a jury, and a verdict returned against defendant for $827. From the judgment rendered thereon, the defendant appeals under the alternative method, and presents a transcript of all of the testimony offered or received, together with all rulings and instructions had during the progress of the trial.

[1] There is evidence in the record ample in support of the verdict as to the hospital charges. It matters not whether any legal or moral obligation rested upon defendant to care for this injured man; it is sufficient that his injury was occasioned through instrumentalities employed by the defendant, and that officers and agents of defendant with ostensible authority directed the hospital authorities to continue the service. The evidence is undisputed that a medical department of defendant, under the charge of Stinchfield, was maintained, by authority of the corporation, for the purpose of looking after persons who were injured on the system, and that the chief surgeon had been authorized to make arrangements for their care in outside towns, when injuries occurred. In addition to this, Selig was assistant to the president of the company, who was also its general manager, with authority to look after the interests of the company where special attention could not be given by the general manager at the time; and it must follow that, where he acted in the line of his employment, he was the representative of the general manager, and in an emergency of the kind here presented possessed the authority, in behalf of the company, to look after this injured man, even though technically no liability attached to the company on account of the injury. The rule, to our mind, is well established that even subordinate employés of a corporation, who, under ordinary circumstances, are not empowered to bind the corporation by contract, nevertheless possess power, where an urgent necessity exists for immediate employment by reason of injuries incident to the operations of the corporation, to employ medical help to alleviate the condition of persons so injured; and we are of opinion that the plaintiff in this case had the right to assume that these representatives of the heads of their respective departments possessed the authority which they assumed; and, it appearing that the general manager of the company had knowledge of the conditions, and took no action personally in the premises, his acquiescence and that of the corporation must be presumed.

[2, 3] A different question, however, is presented as to the surgical services performed before any instructions were given by the officers of the corporation. It may be true that, had the record disclosed the fact that

the injury to Lapier was occasioned through the negligence of the defendant company, from which would arise a legal obligation imposed by law (section 1714, Civ. Code), and surgical services were rendered to save the life of an injured one, thereby lessening the damages which would thereafter result to the corporation in the event of the death, the corporation would not be heard to say that such services, rendered for its benefit, were unauthorized, and thus avoid payment. But an examination of the record in this case fails to disclose that any legal liability existed on the part of defendant corporation by reason of this injury. It is true that a stipulation is found in the record to the effect that the injured man brought suit against the company, and that subsequently the same was settled and dismissed through the payment of $4,500. The mere settlement of an action for damages brought against a defendant does not of itself establish the matters involved in the question of legal liability. It may be, and often is, the case that actions of this character are settled and dismissed, where no liability exists; other considerations entering into the transaction. We think that, if the negligence of defendant occasioned the injury in this case, it should have been established, in order that it might be made to appear that plaintiff performed a duty devolving by law upon defendant, and for which, in equity and good conscience, he should be compensated. For aught that appears in this record, the surgical services were voluntarily performed, and that no legal duty rested upon defendant corporation to compensate him therefor. The verdict in this case, under the evidence, then, being much in excess of what we regard as a proper verdict, and which of necessity must have included a portion of the services rendered without instructions, should be reversed.

Judgment reversed, and cause remanded for a new trial.

We concur: JAMES, J.; SHAW, J.

(18 Cal. App. 359)

PEOPLE v. LEWIS. (Cr. 169.)

(District Court of Appeal, Third District, California. Feb. 26, 1912.)

1. Rape (§ 62*) — Prosecution — Appeal — Conclusiveness of Verdict.

The obvious and inherent improbabilities of prosecutrix's uncorroborated testimony must clearly appear before the appellate court will set aside a conviction of rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 103, 104; Dec. Dig. § 62.*]

2. Rape (§ 51*)—Sufficiency of Evidence.

Evidence *held* to sustain a conviction for rape.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–77; Dec. Dig. § 51.*]

3. Rape (§ 59*)—Instructions—Sufficiency.

The court refused to charge that one may be convicted of rape upon the uncorroborated testimony of a prosecutrix, but, if her testimony was not sustained by the facts and circumstances corroborating it, the jury should proceed with great caution, as, "in the absence of corroborating testimony, it is dangerous to find a verdict of guilty," and also refused to charge that the testimony of children should be received with great caution, especially when they were of tender years, and the events related happened long previous to the time of testifying. The court instructed that the jury were the sole judges of the weight of the evidence, and, in determining what weight to give the evidence of the prosecuting witness, the jury should consider her appearance on the stand, apparent interest, if any, her age and manner of testifying, and, in the light of her testimony and of all the other evidence, should give to her testimony such weight as they thought it was entitled to, and further instructed that in considering her testimony the jury should consider all of the surrounding circumstances, the place of the alleged crime as well as those at the time of and immediately after the offense. *Held*, that the instructions contained a sufficient caution as to convicting on prosecutrix's uncorroborated evidence, so that accused was not prejudiced by the refusal of his requested charges.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 88–100; Dec. Dig. § 59.*]

4. Criminal Law (§ 822*)—Instructions—Construing Together.

All of the instructions should be considered together in determining the impression they were calculated to convey to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

5. Criminal Law (§ 823*)—Instructions—Reasonable Doubt—Sufficiency.

An instruction in a rape case that, if the jury believed the prosecutrix, they could convict on her evidence alone, was not erroneous for not requiring a belief beyond a reasonable doubt, where the jury were elsewhere clearly instructed that every fact essential to the offense should be proved beyond a reasonable doubt and to a moral certainty; it not being necessary that the qualification should be repeated in every instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. § 823.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Elvi Lewis was convicted of statutory rape, and he appeals from the judgment of conviction and an order denying a motion for a new trial. Affirmed.

Ben Berry, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

CHIPMAN, P. J. Defendant was accused by information, tried by a jury, and convicted of the crime of rape committed on April 17, 1911, upon a child under the age of 16. He appeals from the judgment of conviction, and from the order denying his motion for a new trial. The verdict was: "Guilty of rape as charged. We recommend him to the mercy of the court." He was sentenced to imprisonment for 10 years. The defendant being unable to employ counsel, the court appointed Mr. Ben Berry as his attorney, who conducted the defense at the trial with zeal and ability and is prosecuting this appeal with apparent belief in the innocence of his client.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The prosecutrix is defendant's stepchild and at the time of the alleged offense was of the age of 13 years. Defendant was then and had long been afflicted with weak and inflamed eyes, nearly blind, and deprived of one leg, and was at times under treatment by a physician, although the evidence did not show lack of copulative capacity. He was living in Stockton with his mother, Mrs. Sarah Lewis, and his married sister, Mrs. Turner, and three younger brothers and sisters, before his marriage with the mother of the prosecutrix, Mrs. Emily Hamilton, then a widow. The mother and her child had lived in Lodi, and in the early part of 1909 moved to Stockton and took up their residence with Mrs. Lewis, defendant's mother. Both Mrs. Lewis and Mrs. Hamilton were working women, sometimes going out to families, and at other times doing washing at home for patrons. The prosecutrix went to public school with the other children. In September, 1909, defendant married Mrs. Hamilton while living in the family of his mother, Mrs. Sarah Lewis, and not long after moved to a house at a place called "the homestead," in another part of the city of Stockton. This was a house of three rooms, one of which was a kitchen, where there was also a bed. It was at this house and on this kitchen bed that the particular act is alleged to have occurred. Part of the time, prior to April 17, 1911, a Mrs. Johnson lived with the family at the homestead. The child, Angie, attended public school not far distant. Both Mrs. Lewis, defendant's wife, and Mrs. Johnson, while living with the family, worked out generally, but not always, on alternate days, one remaining at home to do the work. Mrs. Johnson was not living with them in April, 1911. The story told by the child involves the conduct of defendant while living at his mother's house, both before and after his marriage, as also in the house at the homestead. The verdict has no foundation other than the testimony of the prosecutrix, which is not corroborated by any circumstance or fact, except it be the result of the examination made by witness, Dr. Miller, and by him only to the extent of appearances, not necessary to mention, known by physicians to indicate sexual intercourse with some one. This fact, as corroborating evidence pointing to defendant, lost its force by admitted conduct of the prosecutrix with other persons. Counsel urge with earnestness that the verdict based upon the uncorroborated testimony of his accuser and upon a narrative of facts in itself unbelievable was the result of passion and prejudice, and was without substantial justification. The prosecutrix was permitted, without objection, to lay bare her life both on the examination in chief and on her cross-examination at the time she lived in Lodi, then but 10 or 11 years old, until the date of the particular act, in 1911, selected by the prosecuting attorney. The record shows that it was with great difficulty the witness was brought to the point of telling her story, and then only after much urging by the prosecuting attorney and intimations by the court that she must answer the questions or render herself liable to punishment. Apparently her hesitation was not from a sense of shame or delicacy of feeling or failure to understand the questions or from fear, and yet the substantial facts finally came out only in answer to leading questions in which the prosecuting attorney himself narrated the circumstances in their sequence and the witness answered "yes" or "no" as the question seemed to require. According to the testimony of the witness given at the preliminary, defendant's intercourse with her commenced six or seven months before his marriage to her mother and was kept up twice a week, on Mondays and Saturdays; that before that time he had conducted himself with her in a lascivious manner; that after his marriage he continued this intercourse twice a week up to April, 1911; at the trial she reduced the frequency of intercourse at Mrs. Sarah Lewis' house, before defendant's marriage, to once a month, but adhered to her statement that it had continued twice a week most of the time after his marriage and for six or seven months prior to April, 1911, at the homestead; that it occurred in every instance in the home where they were living at the time, at Mrs. Sarah Lewis' house, where six or eight people were living, young and old, and at the homestead where, at least, a considerable part of the time, Mrs. Johnson lived with the family: that the days were chosen, Mondays and Wednesdays, when her mother went out to work. She testified that she had once, while living in the Lewis house on Washington street and before the marriage of defendant. accused one Masterson of having intercourse with her, and she immediately told her mother of the fact. Some investigation followed, and she afterwards retracted and the investigation ceased. It appeared, also, that she had been approached by certain boys and certain suggestions were made to her by at least two other men, of all which she promptly told her mother. There seemed to be no lack of confidence between mother and child, and yet she admitted she never told her mother of defendant's advances either at the early stage of his alleged relations nor at any other time, although they were continued unintermittently for over two years. When asked why she did not tell her mother she answered: "I don't know." It was not until her conduct with certain boys with whom she associated led to her being taken before the juvenile court that she divulged her relations with defendant. There was no evidence that defendant had ever been seen in a compromising situation with the child; or that he had ever been seen to show her any affectionate or loving attention or she any towards him; indeed, on the contrary, she admitted that he had corrected her and at times restrained her from going to places he thought improper for her, though she said she bore him no ill will. The mother of the witness and the adult persons who had lived in the same house with defendant, at his mother's and at the homestead, testified that they never saw or heard of any act of impropriety of defendant towards this child. The story of the particular act, as brought out in the manner above stated, was that it occurred on Monday, April 17, 1911, in the kitchen; that her mother got up that morning, leaving her husband in bed, and about 8 o'clock went away to work; that witness was working in the kitchen, and defendant asked her to come to bed with him, which she did. The details of this incident as assented to by the witness, in response to the questions as put to her, are unprintable, and disclose a condition of mind in the participants which should shock the sensibility of persons not abnormally depraved. Her mother testified that her husband got up from the bed where they had been sleeping about the time she did on that April morning; that he went to the barn to do some work about making a chicken house and she went with him, and while there called to her daughter to bring some tool that was needed. Defendant told the same story. The prosecuting witness was asked if defendant had not called to her on that morning to bring this tool and her answer was she did not remember. This was Easter Monday and was by this circumstance fixed in the memory of all these witnesses. If the mother's testimony was true, the story told by her daughter was false—both could not be true. It need hardly be added that defendant as a witness denied ever having had sexual intercourse with this child. His testimony, generally consistent, while disclosing under a severe cross-examination no circumstance in any wise corroborating the story of his stepdaughter, was not calculated to make a favorable impression on the jury, but in the testimony of the mother there is, on the face of the record, nothing calculated to discredit her. Believing in her husband's innocence, it was natural that she would shield him so far as she could, and it was for the jury to judge how far this motive would lead her in an effort to save him.

In many respects the case presents to our minds the most perplexing problem on the question of the sufficiency of the evidence we have ever encountered in this class of crimes. It would seem almost incredible that the defendant could, in the midst of the surroundings disclosed, have kept up this almost unbroken, this frequent illicit cohabitation with this child for this long period of time, and no one have observed a single incriminating circumstance tending to corroborate her story. And yet it is shown that she early developed puberty; that she had a natural tendency to indulge her sexual passion, and showed no special aversion to improper advances; that there was opportunity notwithstanding the fact, strongly urged, of the many persons in the household; that on the witness stand she displayed no such weakness of mind as to arouse doubt of her fully understanding the gravity of the occasion and the consequences likely to follow to defendant from her testimony. Nor did she, under a very searching cross-examination, show malice towards the defendant or any motive to shield any other person by falsely fixing her relations with others upon him. The court allowed unusual freedom to counsel in his effort to penetrate and discredit the circumstances of this child's life and her relations with defendant as narrated by her. Her manner and deportment on the witness stand, her apparent intelligence and appreciation of what she was saying and its consequences, are tests of her truthfulness of which the reviewing court is deprived. We must assume, in the absence of something in the record upon which to base a contrary opinion, that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial.

[1] Cases have occurred—some are cited—where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury.

In People v. Kuches, 120 Cal. 569, 52 Pac. 1003, the court said: "By denying the motion for a new trial the learned judge of the court below has manifested his satisfaction with its sufficiency (the sufficiency of the evidence). His opportunity to form a correct conclusion upon the weight and effect of the evidence was far better than ours, and his conclusion cannot be disturbed." See, also, People v. Benc, 130 Cal. 168, 62 Pac. 404; People v. Logan, 123 Cal. 414, 56 Pac. 56.

[2] As above intimated, we must find in the record full justification for believing that the verdict was the expression of passion and prejudice, rather than deliberate judgment, before we should interfere. We cannot say that such a condition is here shown.

[3] It is claimed that the court erred in refusing to give the following instruction: "You are instructed that in the crime of rape a person may be convicted upon the uncorroborated testimony of the prosecutrix, but you are instructed that, should you find that the testimony of the prosecutrix is not sustained by facts and circumstances corroborating it, you should proceed in your deliberations with great caution, as in the absence of corroborating testimony it is dangerous to find a verdict of guilty."

The following instruction was requested by defendant and refused by the court: "The testimony of children should be received with great caution, and this is especially the case when the children are of tender years and the events they are relating happened a long time previous to the time they are on the stand." The court instructed the jury as follows: "The court instructs you that you are the sole judges of the weight of the testimony which has been introduced before you, and that in determining what weight to give the testimony of the prosecuting witness in this case you should take into consideration her appearance while on the stand, her apparent interest, or lack of interest in the proceedings, if any appear, her age and her manner of testifying, and in the light of all her testimony, and of all other evidence in the case, you should give her testimony such weight, and only such weight, as you think under all the circumstances it is entitled to. In the consideration of the testimony of the prosecuting witness, you should take into consideration all of the facts and circumstances surrounding the place where the crime is alleged to have been committed, and you should consider all the facts and circumstances at the time and immediately after the offense is charged to have been committed in determining the weight of her testimony and the reasonableness of her story, as tending to show to your minds the credit to be given the same."

[4] Just what effect on the verdict it would have for the court to tell the jury that it would be "dangerous to find a verdict of guilty" is difficult to conjecture. It is quite certain that the tendency of such a caution would be to greatly weaken the instruction, concededly correct, that the jury may convict on the uncorroborated testimony of the prosecutrix. To tell the jury that to do this "would be dangerous" would, we think, be an unwarranted suggestion to come from the court. As to the other instruction, the record shows that the trial occurred in June and the offense charged occurred in the previous month of April. The events narrated did not happen a long time previous to the trial, as the instruction assumes. The instructions given by the court, it seems to us, were sufficiently cautionary and admonitory, and defendant was not prejudiced by the refusal complained of. The court instructed the jury as follows: "The direct evidence of one witness who is entitled to full credit is sufficient for the proof of any fact, except perjury and treason. If the jury believe the prosecutrix, they can convict on her evidence alone. While it is true that the charge of rape is easily made and difficult to defend, yet, if you are convinced from all the facts and circumstances in evidence that the defendant is guilty, then it is your duty to so find." The court also instructed the jury that, before they could find the defendant guilty, they "must find that each and every fact essential to the establishment of his guilt has been proven beyond all reasonable doubt and to a moral certainty." The jury were given the usual definition of reasonable doubt.

[5] The above instructions were followed by the instructions first above considered, and all of them should be taken together in any fair attempt to understand their true significance and meaning and the impression they were calculated to make on the jury.

Appellant selects for his criticism the following: "If the jury believe the prosecutrix, they can convict on her evidence alone." The objection made is that, under such an instruction, "it was not necessary that the jury should believe the testimony of the prosecuting witness beyond a reasonable doubt in order to find the defendant guilty as charged." The jury were clearly instructed that every fact essential to the establishment of the charge should be proved beyond all reasonable doubt and to a moral certainty. It was not necessary that this phraseology should be used in every instruction. We must presume that the jury understood from the instructions given them that they were not at liberty to believe the prosecuting witness unless convinced of the truth of her statements beyond a reasonable doubt. If they did thus believe her, they could not have done otherwise than convict the defendant, for it was upon her uncorroborated testimony alone that conviction was based.

The judgment and order are affirmed.

We concur: BURNETT, J.; HART, J.

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18 Cal. App. 411

LININGER v. SAN FRANCISCO, V. & N. V. R. CO. (Civ. 909.)

(District Court of Appeal, Third District, California. Feb. 29, 1912.)

1. STREET RAILROADS (§ 75*)—ELECTRIC CARS—EQUIPMENT AND OPERATION.

Civ. Code, § 486, providing that a bell weighing 20 pounds must be placed upon each locomotive engine and rung at crossings, does not apply to electric cars.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 155; Dec. Dig. § 75.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. STATUTES (§§ 174, 175*)—CONSTRUCTION.
To determine whether a subject falls within the general description of a statute, resort must be had to the words used, the context, the object in view, and the evils intended to be remedied.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 164, 165; Dec. Dig. §§ 174, 175.*]

3. PLEADING (§ 11*)—EVIDENTIARY MATTERS.
A city ordinance regulating the movement of trains through the city was evidentiary matter not required to be pleaded, and hence was properly stricken from a complaint for injuries by a street car at a street crossing.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 31; Dec. Dig. § 11.*]

4. STREET RAILROADS (§ 74*)—ORDINANCE—CONSTRUCTION—SPEED OF CARS.
Under the rule that an ordinance open to two constructions will be given that construction most consistent with sound public policy, an ordinance regulating the speed of cars "within one thousand feet of any drawbridge" means "within one thousand feet when approaching any drawbridge."

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 154; Dec. Dig. § 74.*]

5. NEGLIGENCE (§ 93*)—IMPUTED NEGLIGENCE.
Where one was injured by a collision between a street car and an automobile in which she was riding as a guest without any control over the driver, the street car company could not set up the negligence of the automobile driver to relieve it from liability for its own negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 147–150; Dec. Dig. § 93.*]

6. STREET RAILROADS (§ 114*)—COLLISION AT STREET CROSSING—NEGLIGENCE—EVIDENCE.
In an action for personal injuries from a collision between an electric car and an automobile in which the plaintiff was riding as a guest, evidence *held* to show that at the time of the accident the car was going at an excessive speed without the warning the law requires, and to raise a reasonable inference that such negligence was the proximate contributing cause of the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 239; Dec. Dig. § 114.*]

7. APPEAL AND ERROR (§ 927*)—REVIEW—MOTION FOR NONSUIT.
On review of the granting of a nonsuit, all evidence in favor of the plaintiff must be taken as true, and evidence contradictory thereto disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

8. STREET RAILROADS (§ 84*)—COLLISION AT STREET CROSSING—EXCESSIVE SPEED—SPEED ORDINANCE.
To run a car over a crossing at speed in excess of that limited by statute or ordinance is negligence per se.

[Ed. Note.—For other cases, see Street Railroads, Dec. Dig. § 84.*]

9. STREET RAILROADS (§ 90*)—OPERATION—NEGLIGENCE—SPEED.
Regardless of any city ordinance, where an electric car is being run over eight miles per hour when it collides with an automobile at a crossing in the business section of the city, the railroad company is negligent; the speed being such as an ordinarily prudent man, under the circumstances, would deem dangerous to others.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190–192; Dec. Dig. § 90.*]

10. STREET RAILROADS (§ 81*)—OPERATION—WARNING.
A motorman in charge of an electric car approaching a public crossing should give all reasonable warning of the approach of the car, although there is no statute or ordinance requiring it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172–177; Dec. Dig. § 81.*]

Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

Action by Harriet Lininger against the San Francisco, Vallejo & Napa Valley Railroad Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Clarence N. Riggins, for appellant. John T. York, for respondent.

BURNETT, J. The action was for damages for personal injuries as the result of a collision between one of defendant's electric cars and an automobile in which plaintiff was riding as a guest.

[1] Certain portions of the complaint were stricken out, on motion of defendant, and a nonsuit was granted at the close of plaintiff's evidence. The complaint was constructed upon the theory that section 486 of the Civil Code applies to electric cars, and the ruling of the court upon the motion to strike out involved that consideration. The section was enacted in 1872 and provides that "A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad crosses any street, road or highway, and be kept ringing until it has crossed such street, road or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect. * * * The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train or cars, when the provisions of this section are not complied with." Electric cars were not in existence, and it does not appear that they were contemplated, at the time this law was passed. It could therefore hardly be said that they could have been in the mind of the Legislature, but rather that the legislative intent was to require such a bell to be used upon the "locomotive engine" that, 40 years ago, was familiar in transportation history. It may be said, also, that the alternative provision in reference to the "steam whistle" is significant in this connection as indicative of the legislative intent to confine the application of the law to "steam locomotives." Of course, the absence of actual intention to make the provision applicable to electric cars may not be conclusive of the question, but it is, manifestly, an important consideration. The subject received careful attention in San Francisco, etc., R. Co. v. Scott, 142 Cal. 222, 75 Pac. 575, wherein the question con-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cerned the application to street railroads of a provision in the Constitution in reference to "railroads," etc. Through Mr. Justice Shaw, the court said: "There was therefore clearly an absence of actual intention in using the phrase 'railroads operated in more than one county' to make a provision which also should apply to street railroads, if, peradventure, in the future one should come within the description. If the word 'railroads' is to be extended so as to include street railroads, it is not because of the actual intention of those who framed and adopted the Constitution to give the word that meaning, but because of the rule of law that where a provision is made by law for a certain class of subjects, and thereafter a new but similar subject is created, coming within the general description, and within the particular purpose and object of the law, it is to be considered as having been intended to be included within the original description. Thus, for illustration, a statute which imposes a penalty for 'feloniously driving any sort of carriage' was held to include and apply to bicycles, although at the time the statute was adopted bicycles had not yet come into existence. Taylor v. Goodwin, L. R. 42 B. D. 228."

[2] To determine whether the subject falls within the general description, resort must be had, as stated in the Scott Case, supra, to the "words used, the context, the object in view, and the evils that were intended to be remedied." It is contended by appellant that the words used, "locomotive engine," are comprehensive enough to include the vehicle involved herein consisting of a locomotive and passenger car combined in one. It may be conceded that the description of the car given by one of the witnesses brings it within the scope of the definition of the words, "locomotive engine," quoted from Webster's New International Dictionary of 1910; but when we consider the object to be accomplished by the statute and the evil intended to be remedied, we are satisfied that it would be unreasonable to give it the interpretation contended for by appellant. It is, no doubt, true that the purpose of the Code section is the protection of the public. The Legislature intended that the danger of accidents at railroad crossings should be obviated as far as practicable. To subserve a public need in this respect, the provision in question was enacted. But in consequence of the comparatively recent important development in the industrial application of electricity, we have this new and better motive power requiring a peculiar mechanical contrivance for the purpose of transportation, and it is found that the steel gong and the compressed air "whistle" are the simplest and most effective devices for giving warning at the approach to a crossing. To require a 20-pound bell to be installed in an electric car would impose an unnecessary burden upon the owner and—what is more important—would not inure to the safety or benefit of the public. There is no reason why, therefore, the provision in question should be extended, beyond the obvious intention of the Legislature, to include the situation that confronts us here. Some cases are cited to the point by both parties, but we deem it unnecessary to review them in detail. They involve somewhat different circumstances.

In Fallon v. West End St. Ry. Co., 171 Mass. 249, 50 N. E. 536, however, the Supreme Court of Massachusetts says: "But we think that by the words 'locomotive engine or train upon a railroad' must be understood a railroad and locomotive engines and trains operated and run, or originally intended to be operated and run, in some manner and to some extent by steam. This, undoubtedly, was the sense in which the words were used by the Legislature when the statute was enacted; and we do not feel justified now in giving to them the broad construction for which the plaintiff contends."

[3] We think there was no error in striking from the complaint the ordinance regulating the movement of trains through the city. It constituted evidentiary matter, and it was not necessary to plead it. Cragg v. Los Angeles Trust Co., 154 Cal. 663, 98 Pac. 1063, 16 Ann. Cas. 1061.

[4] A portion of ordinance 460 of said city provides that "no person shall run or propel any railroad car, locomotive, hand car, or any train of cars, or any trolley car, in the city of Napa, at a greater rate of speed than four miles per hour within one thousand feet of any drawbridge." The trial court construed this to mean "within one thousand feet when approaching any drawbridge." We think this is the rational view of the provision. In its enactment the legislative body had in mind the crossing of a drawbridge by a train of cars and the peril that is incident thereto. In the construction of the ordinance, to ascertain the legislative intent, regard must be had not simply to the exact phraseology, but to the general tenor and scope of the legislative scheme embodied in the statute. Oakland v. Oakland Water Front Co., 118 Cal. 189, 50 Pac. 277. "If the act is susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consistent with justice, sound sense, and wise policy, the former shall be rejected and the latter adopted." In re Mitchell, 120 Cal. 386, 52 Pac. 800. As stated by respondent: "Section 460 requires a more restricted rate of speed when the car or train is within 1,000 feet of any drawbridge, than when it is passing through any other portions of the city, and while the drawbridge and the distance of 1,000 feet on either side of it may be in the most sparsely settled portion of the city, and might be located wholly without the congested traffic centers, and indeed while the track might be wholly located on private rights of way and

be not crossed by any highway or other grade crossings, yet if the construction sought to be given it were to prevail, the city council intended to limit the speed for 2,000 feet, without any reason whatever therefor. Such an ordinance would be void. Burg v. Chicago, etc., R. R. Co., 90 Iowa, 106 [57 N. W. 680, 48 Am. St. Rep. 419]; Evison v. Chicago, etc., R. R. Co., 45 Minn. 370 [48 N. W. 6, 11 L. R. A. 434]; Meyers v. Chicago, etc., R. R. Co., 57 Iowa, 555 [10 N. W. 896, 42 Am. St. Rep. 50]."

It is matter of common knowledge that, more or less frequently, frightful accidents occur at these crossings in consequence of the draw being open, and it was to minimize this peril that the ordinance was passed. The trial court's construction of the provision is the only reasonable one, as we view it, and it is consistent with the best interests of the public.

Another more serious question remains to be considered. As to the law of negligence involved in the case, there seems to be no serious controversy between the parties. It cannot be maintained from the evidence that the plaintiff herself is chargeable with contributory negligence. As already stated, she was the guest of other parties and she had no control over the driver of the automobile. She was not aware of the approach of the car until it was too late for her to escape. But if there were a conflict in the evidence as to this, we would, of course, on the appeal from the judgment of nonsuit, be required to give full credit to every circumstance in her favor. Among other things, she testified that she sat on "the left back seat," that she knew nothing "about the running or management of automobiles," that she had never been in Napa before, that she knew nothing about the streets or location of the car lines, that she did not remember of either seeing or hearing defendant's car, that during the entire ride she said nothing to the driver in reference to the manner of driving the automobile, and she could not recall the immediate circumstances surrounding the accident.

[5] The only other theory upon which the order granting the motion for a nonsuit can be justified is that all of the evidence shows that the accident was due totally to the negligence of Mr. Wisecarver, the owner and chauffeur of the automobile. It is not sufficient, manifestly, that the evidence may disclose that his negligence contributed to the accident, as his want of care cannot be imputed to plaintiff. In this respect the law admittedly is, as stated by the Supreme Court of the United States, in Little v. Hackett, 116 U. S. 366, 16 Sup. Ct. 391, 29 L. Ed. 652. There the party injured hired a public hack, but there is no difference in principle between that case and this. Through Mr. Justice Field the court said: "A person who hires a public hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, nor prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both the managers of the train and of the driver." It must be true, as stated therein, that "responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must have some way co-operated in producing the injury complained of before he incurs any liability for it."

[6, 7] But it is not denied that this is the law. This feature of the case may therefore be dismissed from further consideration. The vital inquiry remaining is: Does the record contain any evidence from which a rational inference may be drawn that the negligence of respondent contributed to the accident? We think this must unquestionably be answered in the affirmative. The law as to a nonsuit has been so frequently declared as to hardly need repetition. It is fully considered by this court in Re Daly's Estate, 15 Cal. App. 329, 114 Pac. 787. Nowhere, probably, has the rule been stated more strongly than in the Estate of Arnold, 147 Cal. 583, 82 Pac. 252. The gist of it is that all the evidence in favor of the one resisting the motion must be taken as true, and if contradictory evidence has been given it must be disregarded. In the application of this rule to the evidence we must bear in mind that there are two features involved in the consideration of the question of respondent's negligence. These relate to the speed with which the car was traveling and the presence or absence of any warning given as the car approached the crossing.

[8, 9] An ordinance of the city limits the speed within the corporate limits to the rate of eight miles an hour. "Where a train is run at a crossing at a rate of speed in excess of that limited by statute or ordinance, it is in most jurisdictions negligence per se." 33 Cyc. 976. That is the law in this state. James v. Oakland Traction Co., 10 Cal. App. 799, 103 Pac. 1082. But, regardless of the ordinance, it was clearly the duty of defendant to use ordinary care in the operation of its cars for the purpose of avoiding injury to others and not to run them at a rate of speed which an ordinarily careful man would deem dangerous to others. 33 Cyc. 971. The accident occurred in a business section of the city and at a point where vehicles were frequently crossing the railroad and danger of collision was naturally to be apprehended. If there is any evidence, therefore, that the car was approaching the

crossing at a rate of speed in excess of eight miles per hour, it would be a justifiable inference that defendant was negligent.

[10] As to the second point, it is not disputed that the law is as stated in 33 Cyc. 956, as follows: "It is the common-law duty of those in charge of a train of cars, for nonperformance of which the railroad company is responsible, when approaching a public crossing, to give notice of the approach by all reasonable warnings, such as by blowing a whistle, ringing a bell, signal lights, or by such other devices as may be sufficient to give timely warning to travelers of their approach, so as to afford time for all approaching to stop in a place of safety. * * * This duty to give timely warning exists, notwithstanding there is no statute or ordinance requiring it." There is evidence in the record, which cannot be ignored, of negligence on the part of the railroad company in each of these respects. Without segregating it as to these two features, we proceed to exhibit a portion of said evidence. It was shown by the testimony of the general superintendent that the company required its cars to be run according to a certain schedule or time-table calling for a speed of more than 9 miles an hour if they traveled continuously. With a proper allowance for stops, it is a fair inference that this schedule would demand a speed of 11 miles or more. Robert Woods, who was near the scene of the accident, testified that the car came down the street at the rate of "about 11 or 12 miles an hour and the automobile was going about 8 or 10 miles an hour"; that he did not hear any alarm bell at any time from the time the car started at Main street until after the accident, except he thought he heard the bell just at the moment of collision, believing that it was caused by "a mud fender or wheel or something" striking the bell. Mabel Smith also testified that "the car was coming pretty fast" and she did not hear any alarm. Charles Steere was asked the question, "Did you hear any noise at all?" and he answered: "Nothing only the rumble of the car. I think if the bell had rung, from where I was standing I could have heard it. I don't think there was any bell rung at all, because if there was I would have heard it, because I was within 5, I guess, or 10 feet of the corner." Other witnesses testified to the same effect, but we will not quote any further except to give a part of the testimony of C. L. Wisecarver, the driver of the automobile. He said he approached the railroad at the rate of 8 or 10 miles an hour; that the defendant's car when he first saw it was six or seven feet from the corner; that he did not hear any bell; that he was about 25 or 30 feet from the railroad track when he first saw the car; that when he saw the car he didn't think he could stop, he had new tires and was afraid that they wouldn't hold, that he "would slide across onto the track in front of the car," and therefore he put on speed and tried "to get across the track in front of the car." In judging of his conduct we must, of course, view the situation as it appeared to him. Being suddenly put into peril "without having sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an immediate choice under this disturbing influence, although if his mind had been clear he ought to have done otherwise." Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 Pac. 734. But, as already seen, his negligence is not attributable to plaintiff, and, as far as this appeal is concerned, we may admit that he was negligent, and the result will not be affected in the least.

Indulging, therefore, as we must, every favorable inference fairly deducible from the strongest showing made by plaintiff, we must hold as established facts that at the time of the accident defendant was operating its car at an excessive rate of speed and without giving the warning, as it approached the crossing, that the law exacts. From these premises it is at least a rational conclusion that the negligence of defendant constituted a proximate contributory cause of the injury to plaintiff. In other words, giving full credit to the showing made by plaintiff, it is not an unreasonable inference that the injury to appellant was a natural and probable consequence of the wrongful act of the railroad company, and that if the negligence of the driver of the automobile may be regarded as precipitating the disaster, this latter should not be regarded as the sole, independent, but conjointly with the continuous negligence of respondent, as the concurring cause of the accident. Pastene v. Adams, 49 Cal. 87; Tompkins v. Clay St. Ry. Co., 66 Cal. 163, 4 Pac. 1165; Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 Pac. 534, 139 Am. St. Rep. 134. As we view it, therefore, the question of defendant's liability should have been submitted to the jury.

It is needless to add that if upon the same evidence the case had been submitted and decided by the jury in favor of defendant, or if a verdict in favor of plaintiff had been set aside by the court, we could not say that the decision was unsupported; but, in view of the well-established rule in reference to a motion for a nonsuit, we can see no escape from the conclusion that the case was improperly withdrawn from the jury.

The judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART. J.

(18 Cal. App. 373)

STOCKTON IRON WORKS v. WALTERS.

(Civ. 905.)

(District Court of Appeal, Third District, California. Feb. 26, 1912.)

1. Appeal and Error (§ 867*)—Review—Scope—Order Denying New Trial.

Questions as to the sufficiency of the complaint, rulings on demurrers, sufficiency of the findings to support the judgment, the striking out of counterclaims and portions of the answer, and the refusal of leave to amend, cannot be considered upon an appeal from an order denying a new trial, but only such matters can be considered as have made grounds upon which the superior court is authorized to grant or deny the motion; nor does Code Civ. Proc. § 670, as amended by St. 1907, p. 720, making certain orders part of the judgment roll, enlarge the scope of an appeal from an order denying the motion for new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

2. New Trial (§ ½,* New vol. 9, Key No. Series)—"Trial."

"Trial," as used in Code Civ. Proc. § 656, declaring that a new trial is a re-examination of an issue of fact in the same court after a trial and decision by jury or court, refers to an investigation of the issues of fact raised by the pleadings.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7095–7103; vol. 8, p. 7821.]

3. Appeal and Error (§ 1032*)—Harmless Error—Ruling on Application to Amend—Burden of Showing Prejudice.

The denial of leave to file an amended answer and counterclaim, where defendant does not suggest why he desires to amend or that he could improve his answer by amendment, is not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047–4051; Dec. Dig. § 1032.*]

4. Sales (§ 181*)—Action for Price—Sufficiency of Evidence.

Evidence, in an action to recover the contract price of a steel shaft for marine use, defended on the ground that such shaft was defective and imperfect, *held* sufficient to sustain a finding that the alleged defect did not impair the strength or usefulness of the shaft.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473–491; Dec. Dig. § 181.*]

5. Trial (§ 321*)—Deliberations of Jury Retiring from Courtroom.

After the jury came into court with a request for instructions as to interest, counsel waived any interest, and the court instructed that they might exclude that question. The foreman on inquiry stated that it was not necessary to return to the jury room, and after a short pause the jury rendered its verdict for the amount claimed without interest. *Held* that, as the jury had reached a conclusion except as to the item of interest before coming into the courtroom, it was competent, on the waiver of that question, for the jury to return their verdict without retiring from the courtroom.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 760–763; Dec. Dig. § 321.*]

6. Trial (§ 76*)—Objections—Time for Objection.

An objection to the admission of evidence, not made until the witness has answered, cannot be sustained.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 172, 183–190, 237; Dec. Dig. § 76.*]

7. Witnesses (§ 240*)—Examination—Leading Question.

In an action for the contract price of a shaft for a vessel, where the principal issue was whether the shaft as delivered met the requirements of the contract, a question to plaintiff's witness whether the shaft on delivery was in the condition required by the contract was objectionable as leading.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837–839, 841–845; Dec. Dig. § 240.*]

8. Appeal and Error (§ 1048*)—Harmless Error—Admission of Evidence.

Error in admitting the answer to a leading question on the principal issue in the case was without prejudice, where such issue was afterwards gone into fully by both parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

9. Sales (§ 358*)—Action for Price—Evidence.

In an action for the contract price of a shaft which plaintiff had contracted to "furnish," it was immaterial whether plaintiff informed defendant that he had contracted with a third person to make the shaft.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049–1055; Dec. Dig. § 358.*]

10. Evidence (§ 471*)—Opinions—Admissibility.

In an action for the contract price of a shaft for a vessel, in which the defense was that the shaft was defective, and the court ruled that the declarations of defendant's captain and engineer, who were not experts, were not admissible, a question to plaintiff's president whether the captain and engineer, at the time the declarations were made, had informed him that the shaft was not fit for the use for which it had been ordered, was objectionable as an attempt to get before the jury an opinion which neither the captain nor the engineer were qualified to give.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

11. Evidence (§ 513*)—Opinion Evidence—Subjects of Expert Testimony—Machinery.

Expert knowledge is necessary to qualify a witness to give an opinion upon the safety of a shaft ordered and made for use upon a vessel, and claimed to be defective by reason of a "pipe" or hollow at one end.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317–2318; Dec. Dig. § 513.*]

12. Evidence (§ 114*)—Relevancy—Facts in Issue—Speculative Matters.

In an action to recover the contract price of a shaft ordered for a vessel, where the defense was that the shaft was defective, a question as to what effect the breaking of the shaft would have on the steamer was properly excluded; the effect being dependent on so many other circumstances that the answer would have been purely speculative.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 125–132; Dec. Dig. § 114.*]

13. Appeal and Error (§ 1033*)—Right to Complain—Error Favorable to Party Objecting.

An appellant cannot complain of the admission of evidence favorable to himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. § 1033.*]

14. Witnesses (§ 329*)—Cross-Examination—Testing Memory.

Much latitude is permitted in testing the recollection of a witness as to what took place at a conversation between himself and a third person.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1104, 1105; Dec. Dig. § 329.*]

15. Witnesses (§ 248*)—Examination—Responsiveness of Answers.

Answers of a witness not responsive to the questions put to him are properly stricken out.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861–863; Dec. Dig. § 248.*]

16. Evidence (§ 397*) — Parol Evidence—Terms of Written Contract.

Parol evidence is inadmissible to vary the terms of a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756–1765; Dec. Dig. § 397.*]

17. Sales (§ 358*)—Action for Price—Evidence—Materiality.

In an action for the contract price of a shaft for a vessel furnished to defendant, evidence as to defendant's ability to pay for the shaft at any time was immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049–1055; Dec. Dig. § 358.*]

18. Sales (§ 358*)—Action for Price—Evidence—Materiality.

In an action for the contract price of a shaft furnished for use upon defendant's vessel, defended on the ground that it was defective, evidence as to whether defendant had entered into a new contract with any one for a shaft was immaterial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1049–1055; Dec. Dig. § 358.*]

19. Evidence (§ 539*)—Opinion Evidence—Competency of Expert.

In an action for the contract price of an engine shaft for a vessel, defended on the ground that it was defective, a witness, who had qualified as an expert foundryman in making shafts, was qualified to testify as to whether the condition of the shaft was an unusual one.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2349–2352; Dec. Dig. § 539.*]

20. Sales (§ 181*)—Action for Price—Burden of Proof.

In an action for the contract price of an engine shaft for a vessel, defended on the ground that it was unfit for such use, in which the evidence on that issue was conflicting, the burden of proving such issue was on the defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 473–491; Dec. Dig. § 181.*]

21. Principal and Agent (§ 103*)—Authority.

In an action for the contract price of an engine shaft for defendant's vessel, an instruction that statements by plaintiff's representatives at the time they met defendant's captain, in the absence of defendant and in the absence of the captain's authority to act for him, could not be received as going to the establishment of any agreement between the parties, touching a new shaft or any guaranty concerning it, was proper.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 278–293, 353–359, 367; Dec. Dig. § 103.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Action by the Stockton Iron Works against Benjamin Walters. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur L. Levinsky, for appellant. C. W. Miller and R. C. Minor, for respondent.

CHIPMAN, P. J. This is an action brought by plaintiff against defendant to recover the sum of $1,460, alleged to be owing for work performed and materials furnished in the repairing of a steamer called the "H. E. Wright." In his amended answer defendant admitted that plaintiff performed certain work and furnished certain materials, but denied that they were for the "repair of said steamer H. E. Wright," but alleges that plaintiff entered into an agreement with defendant whereby plaintiff agreed to construct and place in said steamer a certain steel shaft and its necessary attachments (describing them), "which said shaft was to be a first-class shaft and in a perfect condition, and fit for the purposes for which it was ordered, * * * for the sum of $1,460"; that prior to the placing of said shaft in said steamer defendant discovered that the said shaft "was not in first-class and perfect condition, but, on the contrary, said shaft was improperly made, and the same was defective, and had a serious flaw and defect therein" (particularly describing it), by reason of which it was "not reasonably fit for the purposes for which it was ordered and to be used" and defendant refused to accept said shaft; that plaintiff then and there agreed to make a new shaft, "perfect and first-class, in the place and stead of said imperfect and defective shaft, and requested defendant to temporarily receive the said defective shaft and its attachments, and to use the same until a new, first-class and perfect shaft and its attachments could be made and placed in said steamer"; that, relying on said promise and not otherwise, "defendant received said shaft temporarily and until said new shaft could be made; that at said time plaintiff guaranteed defendant against all loss or damage he might suffer by his use of said imperfect shaft," while it was making for him a new and perfect shaft; that thereafter defendant demanded of plaintiff a new and perfect shaft in place of said defective shaft, but plaintiff refused and ever since has refused to comply with defendant's said demand. Defendant admitted that no part of said $1,460 or alleged interest has been paid, but denied that the whole or any part thereof is now due or owing from defendant to plaintiff. Paragraph 7 of the amended answer is a denial that the said shaft "was of the value of $1,460, or any other sum of money whatsoever, or at all, by reason of its imperfect condition and by reason of the said defect aforesaid." Paragraph 8 is an offer or tender of said shaft to plaintiff and a demand that plaintiff "detach and strip said shaft from the wheel and every part and portion of said steamer" and remove the same therefrom "without damage or injury to said steamer." These two paragraphs were, on motion of plaintiff, stricken out of the answer. Defendant, by way of counterclaim, set up a somewhat similar state of facts and claimed damages by reason thereof. On motion of plaintiff this counterclaim was stricken out. The damages claimed rest upon plaintiff's alleged violation of its agreement to furnish defendant a shaft free from the alleged imperfections. It was claimed by plaintiff at the trial, and admitted by defendant, that the materials and labor referred to in the complaint and answer were furnished pursuant to the following offer and acceptance, which appeared in evidence but were not specifically pleaded: "May 1, 1909. Captain Walters, Steamer H. E. Wright, Stockton, Calif.—Dear Sir: We will furnish you with one 8" hammered steel shaft completely machined with two new forged steel cranks (and divers other fittings as part of said shaft, and not necessary to be enumerated) complete, delivered on our wharf for the sum of $1,460. [Signed] Stockton Iron Works." Defendant replied May 3, 1909, as follows: "We hereby accept your proposal of May 1st for one hammered steel shaft complete and you may proceed to get this shaft out at once. [Signed] Benj. Walters." The cause was tried by a jury, and plaintiff had the verdict for the sum of $1,460, without interest, and judgment passed for plaintiff accordingly. Defendant appeals from the order denying his motion for a new trial on bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] 1. Appellant claims that the court erred in striking out his counterclaim and portions of his answer and also in refusing his application for leave to amend. Respondent makes the point that, there being no appeal from the judgment, the rulings of the court cannot be reviewed, citing Spence v. Scott, 97 Cal. 181, 31 Pac. 52, 939; Sutton v. Stephan, 101 Cal. 547, 36 Pac. 106; Mock v. Santa Rosa, 126 Cal. 330, 58 Pac. 826. In each of those cases the appeal was on the judgment roll without a statement or bill of exceptions. The record showed in each case a motion to strike out portions of defendant's answer and the rulings thereon. The court held that the proceedings formed no part of the judgment roll, and, there being no bill of exceptions or statement, the rulings could not be reviewed. We have here, however, the judgment roll and bill of exceptions in both of which the proceedings on the motion are set forth, and it is contended by appellant that the cases cited do not apply. Section 670, Code of Civil Procedure, was amended in 1907 (Stats. 1907, p. 720), making "all orders striking out any pleading in whole or in part" part of the judgment roll. But the amendment does not enlarge the scope of the appeal from the order denying a motion for new trial. Questions relating to the sufficiency of the complaint, rulings upon demurrers, and sufficiency of the findings to support the judgment cannot be considered upon an appeal from an order denying a new trial. Great Western Gold M. Co. v. Chambers, 153 Cal. 307, 95 Pac. 151. Only such matters can be considered as are made grounds upon which the superior court is authorized to grant or deny the motion. Crescent, etc., Co. v. United Upholsterers, 153 Cal. 433, 95 Pac. 871. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." Code Civ. Proc. § 656. It is pointed out in Hayne on New Trial, Revised Edition, p. 5 et seq., that the statutory definition consists of several elements: (1) That a new trial is a re-examination of an *issue of fact*; (2) that the re-examination of the *issue of fact must be in the same court*; (3) that the re-examination of the issue of fact must take place *after a new trial and decision.* The author says: "The word 'trial,' as used in the definition under consideration, refers to an investigation of the issues of fact raised by the pleadings." The granting of a motion to strike out parts or all of a pleading is not one of the grounds for new trial. Code Civ. Proc. § 657. Since "all orders striking out any pleading in whole or in part" (Code Civ. Proc. § 670) are part of the judgment roll, it would seem no longer necessary to present the matter by bill of exceptions, as was the case when such orders formed no part of the judgment roll (cases supra): but however this may be, we are satisfied that such orders can only be reviewed on appeal from the judgment.

[3] 2. Defendant complains that he was denied leave to file a second amended answer and counterclaim. The request was made upon the granting of a motion to strike out and the overruling of defendant's demurrer to the complaint. Defendant did not, at the trial, nor does he now, suggest why he desired to amend his answer nor show that he could improve it by amendment. In short, no injury is made to appear by the ruling.

[4] 3. It is urged that the verdict was contrary to the evidence. As is quite often the case, appellant rests his argument largely on testimony adduced in support of his theory, ignoring the fact that this testimony was in conflict with that submitted by the plaintiff or, if not in conflict, might have been discredited by the jury. We cannot undertake a full review of the evidence, making, as it does, a somewhat voluminous record. Briefly stated, there was evidence that when the shaft was delivered at plaintiff's wharf and after it had been put on timbers aboard the steamer, defendant discovered in it what he regarded as a serious defect, impairing its strength and safety, and refused to accept it. This defect consisted in what is technically called a "pipe"—a small hole in the center of the end of the shaft, "where the crank is shrunk on," which was explored with a wire about the size of a knitting needle or ordinary hairpin to the depth of nearly nine inches. A wire of the size of

a 20-penny wire nail was inserted about 5½ inches. There was considerable discussion between defendant and his engineer and representatives of plaintiff as to the effect of this blemish, which resulted in defendant's installing the shaft. He claims that he consented upon the conditions set forth in his answer. As to just what representations were made there is much conflict. There was evidence that defendant was given assurances that the shaft was not weakened by this defect, that it was fit and would do the work it was intended for, that plaintiff would guarantee it for a year, and that if after trial for a reasonable time it proved unfit plaintiff would replace it with a new one. Defendant attempted to show that plaintiff conceded the unfitness of the shaft and promised unconditionally to replace it with a new one, but plaintiff's witnesses denied this and testified that no such admission and no such promise was made. Witnesses for the plaintiff, who showed their qualifications as experts, testified that this so-called "pipe" had no appreciable effect on the shaft to weaken it or impair its usefulness or length of service. Witness Pennington testified: "I have had a lot of experience in these things, what is a good and what is not a good shaft. I have made shafts that go to sea, and for vessels that are inland shafts, such as the steamer H. E. Wright. I saw the shaft here in the steamer H. E. Wright in Stockton. I consider the shaft was in perfect condition. Of course, there was in one end what we call a 'pipe,' probably caused by lapping from drawing out the end of the shaft. This pipe I don't think a particle of detriment to the shaft. I thought the shaft was a perfect shaft for the work it was intended for." He was asked the difference between a pipe and a crack, and answered: "Well, a crack is something on the surface; this was something in the center of the shaft that may have been caused by the hammer." He testified that this was not an unusual condition and "did not impair its usefulness at all for the purposes for which it was intended." There was much testimony of like import. It appeared that the shaft had been in constant use for about 16 months at the time of the trial and it showed no indications of weakness. We think there was sufficient evidence to justify the verdict.

[5] 4. Some time after the case had been given to the jury, they came into the courtroom, and, on being asked if they had agreed upon a verdict, the foreman answered: "Not exactly, your honor. We want instruction in regard to the interest, whether the jury could cut out the interest, or have anything to do with the interest. The printed instruction says interest from a certain date." The court replied that all it could do was to call attention to the instructions. Counsel for plaintiff thereupon waived the interest, and, with consent of both parties, the court instructed the jury orally that, inasmuch as interest had been waived in open court, "if the jury see fit they may cut the interest out of the verdict." The court then asked the jury if they desired to return to the jury room. The foreman answered, "I don't think it would be necessary." After "a short pause," the jury passed up the verdict for the sum of $1,460 without interest, and on being polled answered that it was their verdict. The error now claimed is that the verdict was rendered "without retiring from the courtroom to find a verdict." Apparently the jury had reached a conclusion before coming into the courtroom except as to the item of interest, and when plaintiff waived that item, as it had a right to do, it was competent for the jury to return their verdict without retiring from the courtroom. Besides, defendant has not shown, inferentially or otherwise, that he was injured by the conduct of the jury. Apparently he profited by the alleged error.

5. Defendant assigns 50 or more errors in rulings upon the evidence. Some of these are given scant notice by counsel; many of them are mere references to pages of the transcript and the number of the exception there shown, with no explanatory statement in the brief. Others appear to be particularly relied upon, and such of these latter as seem to call for comment will be noticed.

[6-8] Witness Tretheway, president of plaintiff company, was asked whether the articles, at the time of delivery at plaintiff's wharf, were "in the condition required by the proposal and offer of acceptance." He answered, "Yes," after which defendant objected as leading, suggestive, and a conclusion. The court allowed the answer to stand. The objection should have been sustained if it had been made in time, and the answer should have been stricken out if defendant had asked to have it done. The principal issue involved the condition of the shaft at the time of its delivery and whether it met the requirements of the proposal and acceptance. But this whole subject was later gone into very fully by both sides and in great detail. We think the error was without prejudice.

[9] 6. It appeared that plaintiff contracted with Pennington & Co., of San Francisco, to forge the shaft. On cross-examination Tretheway was asked if he informed defendant of this fact, and, on objection of plaintiff as immaterial, the court so ruled. Plaintiff's offer was to "furnish" a shaft such as was described, not personally to manufacture it. The fact was immaterial.

[10] 7. Tretheway had testified, on cross-examination, that his foreman had informed him that objection was made to the shaft; that he sent for Pennington (one of the firm of Pennington & Co.), and they together went on board the vessel where the shaft then was and there met her engineer and Capt. Curry, her commander; that they tried to convince Capt. Curry and the engineer that the shaft was in every way suitable for the work. "Q. Then the engineer and Capt. Curry had, be-

fore or at that time, informed you the shaft was not fit for the purposes for which it had been ordered?" The court sustained plaintiff's objection to the question. It appeared that defendant was not present at this meeting with Curry and the engineer. The court had previously ruled that what was done by the parties present could be shown, but that the declarations made in the absence of defendant were not admissible, and defendant declined to be bound by what was said in his absence. Plaintiff objected because neither the engineer nor Curry had qualified as experts and the question was calculated to get from them by indirection what they could not testify to directly. The tendency of the question was to get before the jury an opinion which neither Curry nor the engineer was qualified to give.

[11] 8. The question was asked by defendant of witness Burnett, who was an engineer of experience, but did not show expert knowledge of shafts, whether this particular shaft was "a safe or unsafe shaft." Defendant admitted that witness was not an expert but contended that expert knowledge was not necessary to qualify the witness to give an opinion upon the safety of this shaft. We do not agree with defendant in this contention. It is argued that later on the court allowed plaintiff to submit expert testimony by witness Burns, who, it is alleged, admitted that he was not an expert. Of course, any subsequent error of the court cannot affect the question now before us. It seems, however, that the court, after Burns was examined as to his qualifications, held that he was qualified to give an opinion as to the effect a so-called "pipe" would have on such a shaft as is in question.

[12] 9. Defendant's witness Purington was asked what effect would this shaft have upon the steamer if it should break. An objection by plaintiff was sustained. Purington had never worked a shaft on a steamboat, though he had expert knowledge in making shafts and could and did testify as to the effect a "pipe" would have in a shaft. We cannot see that any answer he might have made would meet any issue in the case. The effect which the breaking of the shaft might have would depend upon so many other facts that any answer would be purely speculative. There was no issue as to the damage which might result from the breaking of the shaft.

[13] 10. On cross-examination this witness was allowed to answer certain questions put by plaintiff as to whether after a year's use any defect in the shaft would be likely to develop itself. Defendant objected on the ground that the witness had not qualified except to a limited extent as an expert. The answers were favorable to defendant, and hence he was not injured.

[14] 11. The cross-examination of defendant's witness Curry, as to what Pennington said when he and Tretheway met Curry on the steamer, was fairly within the rule which permits much latitude in testing the recollection of the witness as to what took place on the occasion referred to.

[15] 12. Witness Donaher was defendant's engineer who was present when Pennington and Tretheway went aboard the steamer to examine the shaft. He was one of the class of witnesses, frequently met with, who wander at will and volunteer irresponsive answers. In his cross-examination by plaintiff he several times exhibited this disposition, and, on motion of plaintiff, his answers were stricken out. We discover no error in these instances. On redirect, an objection to a leading question was sustained. No error is apparent. His answer: "We had a defective shaft, and always expected and looked for it to break; even when I would go to bed I would think about it"—was properly stricken out.

[16] 13. Defendant was called as a witness and was asked to state what changes, if any, were made in the contract at the time it was signed. The court properly refused to allow the terms of the written contract to be varied by parol.

[17] 14. Evidence of defendant's ability to pay for the shaft at any time was immaterial. His ability was not questioned; it was rather his disposition to pay.

[18] 15. Whether or not defendant had entered into a new contract with any one for a shaft was not material.

16. Witness Gavigan, for plaintiff in rebuttal, was foreman of plaintiff's works and was quite fully examined as to his expert knowledge and capacity to judge of the effect this "pipe" would have and whether it weakened the shaft. The court admitted his testimony and we cannot say that its ruling was error.

[19] 17. Witness Pennington was called in rebuttal by plaintiff and was asked whether the condition under which he found the shaft was an unusual condition and, over defendant's objection, answered: "Not at all. In my judgment it did not impair its usefulness at all for the purpose for which it was intended." He had qualified as an expert foundryman in making shafts and was qualified to testify as to whether the condition of this shaft was an unusual one.

We think it safe to say that the evidence which went to the jury, taken in its entirety, fairly presented the theories of the respective parties and was free from prejudicial error. Defendant presented his defense with zeal and ability and, it seems to us, was given every reasonable opportunity to place before the jury every material fact at his command. Nor can we discover that plaintiff was permitted to sustain its case by evidence not legally admissible or, at least, which was erroneously admitted to defendant's prejudice.

[20] 18. The court instructed the jury that, if they believed from the evidence that the articles were furnished under the written offer of plaintiff and written acceptance of

defendant, then "these two papers constitute a contract between the parties, and the plaintiff is entitled to recover the amount sued for herein, unless your minds are satisfied by a preponderance of the evidence that the said articles were not reasonably fit for the purposes intended." The court charged the jury that "a person who sells machinery manufactured by him is held by law to impliedly warrant such machinery to be reasonably fit for the purpose for which it was intended," and that "there is no legal requirement that such machinery should be perfect, unless it be so expressly agreed between the buyer and seller"; and, further, that "all that is required, in the absence of an express agreement to the contrary, is that such machinery is reasonably fit for the purpose for which it is intended." Also, that "an imperfection in such machinery that does not render it reasonably unfit for the use for which it was intended will be insufficient to justify the refusal of the buyer of such machinery to accept and pay for the same, and in this case, if you find from the evidence that the machinery sold by plaintiff to defendant was reasonably fit for the purposes for which it was intended, then you must find for the plaintiff." Defendant complains that, under these instructions, he was compelled, by a preponderance of the evidence, to show that the shaft was not reasonably fit and that when he showed that there was an imperfection the burden at once shifted to plaintiff to show, by preponderance of the evidence, that the shaft was reasonably fit for the purposes for which it was intended. It is also claimed as error in instructing the jury that, unless expressly so agreed, there was no legal requirement of plaintiff to furnish a perfect shaft; defendant claiming that under section 1768 of the Civil Code, it was plaintiff's duty to furnish a "perfect" shaft. Defendant made the alleged imperfection in the shaft the subject of his defense in his answer, and his evidence was directed in a large degree to that issue. It was met by plaintiff in rebuttal, and it seems to us that the court did not, although it might properly have done so, instruct the jury that the burden of proof on this issue was on defendant. The court correctly stated the duty of plaintiff, as provided by section 1770 of the Civil Code; that is, that it must appear that the machinery was reasonably fit for the purpose for which it was intended. On the issue raised by defendant the jury were instructed to be guided by the preponderance of the evidence, as to which there was much conflict. In modifying one of defendant's proposed instructions, which was framed in view of section 1778, Civil Code, to make it conform to the rule stated in section 1770 of the same Code, the court did not err.

[21] The court did not err in instructing the jury that statements made by Pennington and Tretheway, at the time they met Capt. Curry on the steamer, "cannot be received as going to the establishment of any agreement between the parties touching a new shaft or any guaranty or promise concerning it." Defendant was not present, and no one there at the time had any authority to speak or act for him in the making of any contract. The court did not take the evidence away from the jury any further than this.

The instructions, taken as a whole, fairly and correctly, we think, presented all the issues raised by the pleadings.

The order is affirmed.

We concur: HART, J.; BURNETT, J.

(18 Cal. App. 324)

TITLE INS. & TRUST CO. v. WILLIAMSON et al. (Civ. 867.)

(District Court of Appeal, Second District, California. Feb. 23, 1912. Rehearing Denied by Supreme Court April 23, 1912.)

1. Assignments (§ 86*)—Validity of Assignment.

A contractor erected a building under an agreement that a trust company should retain part of the contract price for 35 days after notice of completion at the expiration of which time, if no liens were filed, it was to pay over the balance to the contractor. After notice of completion was given, but before 35 days had elapsed, the contractor gave an order to a materialman directing the trust company to pay over the balance to him. *Held* that, despite lack of notice to the owner, this order operated as a valid assignment and defeated any right sought to be gained by a later attachment of the funds with the trust company, for the rights under a contract, save those of personal services, may be assigned without notice to the debtor, except that a creditor cannot, without the consent of his debtor, require by assignment payment to be made to divers persons.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 152–154; Dec. Dig. § 86.*]

2. Assignments (§ 50*)—Validity—Form of Assignment.

No express words are necessary to constitute an equitable assignment of a debt, and so an order upon one who holds the money of another operates as an assignment where it is intended as such by the creditor.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99–105; Dec. Dig. § 50.*]

3. Assignments (§ 41*)—Validity.

Where the owner of property upon which a building was being constructed deposited the purchase money with a trust company, with directions to pay it over to the contractor after the lapse of a certain time, an order by the contractor directing the trust company to pay over the money to the contractor's assignee is not invalid because addressed to the trust company, instead of the owner.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76–77; Dec. Dig. § 41.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Interpleader by the Title Insurance & Trust Company against F. B. Williamson, E. S. Williams, trustee in bankruptcy of the estate of F. B. Williamson, the Carpenter & Biles Mill & Lumber Company, and the San Pedro Lumber Company and others. From a judgment for the Carpenter & Biles Mill & Lumber Company, the San Pedro Lumber Company appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Rehearing denied by Supreme Court (123 Pac. 247).

O'Melveny, Stevens & Millikin and E. B. Coil, for appellant. Sheldon Borden and George H. Moore, for respondent Carpenter & Biles Mill & Lumber Co.

JAMES, J. [1] The defendant San Pedro Lumber Company, a corporation, appeals from the judgment entered in this action, and from an order denying its motion for a new trial. In the year 1907, defendant Williamson, as contractor, erected a house for S. H. Dunham and wife. The contract price was to be paid in installments, and the amount in money was deposited with the plaintiff corporation, which was instructed to act as the agent of the Dunhams in the distribution thereof. Such amount of money as might be in the hands of the agent of the Dunhams upon the completion of the house was to be retained for a period of 35 days after notice of completion had been filed, at the expiration of which time, if no liens were filed against the structure, plaintiff was directed to pay over the remaining balance of the money to the contractor, Williamson. Notice of completion of the building was filed on or about the 1st day of November, 1907, and there then remained in the hands of plaintiff, and which it was required to pay over to Williamson, in the event no liens were filed, the sum of $450. Williamson was then indebted to respondent Carpenter & Biles Mill & Lumber Company in a sum of money exceeding $450 for material furnished, a portion of which, at least, was used in constructing the Dunham house. He made a written order upon the plaintiff to pay the amount of the last payment provided to be paid to him to the Carpenter & Biles Company. This order was presented to plaintiff, and the bearer was told, at the office of the former, that the order should be signed by the Dunhams. The order was taken away, and was not returned until the 11th day of December thereafter. The 35 days ensuing subsequent to the filing of notice of the completion of the building expired on the 9th day of December, 1907. On the 10th day of December, 1907, one day before the order of the Carpenter & Biles Company was returned to plaintiff, appellant, which was then a judgment creditor of the contractor Williamson in an amount in excess of $300, caused a levy to be made under a writ of execution against the interest of Williamson in the fund of money held by plaintiff. These conflicting claims having arisen affecting the $450 held by it, the plaintiff brought this action in order to have it determined which of the defendants was entitled to the money. The trial court held that, the order given to the Carpenter & Biles Company having been executed and delivered prior to the date of the levy made under the writ of execution, an assignment of the debt was worked thereby, and gave judgment in favor of the respondent last named. On this appeal the only parties in contest are the appellant and respondent Carpenter & Biles Mill & Lumber Company. It is contended on behalf of appellant that the order given by Williamson did not operate as an assignment of the fund, nor change title thereto in any respect, and that, at the time attachment thereof was attempted to be made under the execution, Williamson was the owner of the money or credit, and that appellant by the service of the process mentioned acquired a right to have the money paid over for its benefit. At the time the order was given the building had been fully completed. Williamson, as contractor, had earned the right to have paid to him the full amount of the contract price, and he was then entitled to receive it all, except that payment was to be withheld for 35 days after notice of completion was filed, in order that the time within which liens might be perfected against the property of the Dunhams should have expired. The debt, therefore, to our minds, was one which was the subject of assignment, and that, too, without the consent of the Dunhams. Williamson had the right to assign the whole of the balance of indebtedness due to him from the Dunhams, although he could not have divided that balance into fractional amounts and make an assignment of the same in such a manner. It is a general rule of contracts that the benefits thereof, where they do not involve the expenditure of personal effort of services, are the subject of assignment without the consent of the debtor being first obtained, with the reservation, however, that the creditor in such a case cannot, without the consent of his debtor, require by assignment payment to be made to divers persons; in other words, the assignment in such case must be made of the full amount due.

The purported assignment in this case answers fully these requirements, and, if it sufficiently appears from the writing and in testimony that the intention was of Williamson at the time he executed the order to transfer all right to the $450 to respondent Carpenter & Biles Company, then this assignment, having been made on a day prior to the time when levy was attempted to be made under appellant's execution, left the plaintiff without any money in its hands belonging to Williamson to which appellant's levy might attach. The following decisions are in point: Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462, and the general subject, with digest of various cases, as found in Donohoe-Kelly Banking Co. v. S. P. Co. et al., 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28.

[2] It cannot be said from the testimony as it is set out in the bill of exceptions that it was not the intent of Williamson and the Carpenter & Biles Company that an assignment should be made of the $450 at the time

the order was executed. Williamson testified, in effect, that his intention was to transfer his right and title to the money, and the Carpenter & Biles Company at all times insisted that they were entitled to it. It is very clear from the circumstances surrounding the transaction that, had the money been paid over to the Carpenter & Biles Company, Williamson would have had no legal right to demand that the same be delivered by that company to him or diverted in any way from its possession. As it was said in McIntyre v. Hauser, 131 Cal. 11, 63 Pac. 69: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." See, also, Lawrence Nat. Bank v. Kowalsky, 105 Cal. 41, 38 Pac. 517.

[3] As we view the case, it is not material that the order was addressed to the plaintiff, instead of to the Dunhams, with whom the building contract was made. The plaintiff was the duly authorized agent of the Dunhams for the purpose of holding the fund and making payment of the contract price to Williamson, and we can see no good reason why an order addressed to an executive agent, as this plaintiff was, should not be sufficient and binding. Aside from this, as to whether the assignment was in fact made or not, as has been before noted, depended, not upon the question of notice to the debtor, but upon the intention of the alleged assignor and assignee. No questions are here involved as to any damage resulting to a debtor who has paid his debt without notice of assignment made by his creditor.

Upon the record as it is shown, we are of opinion that the findings made by the trial court must be sustained.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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18 Cal. App. 324

TITLE INS. & TRUST CO. v. CARPENTER & BILES MILL & LUMBER CO. et al. (L. A. 2,800.)

(Supreme Court of California. April 23, 1912.)

Banks and Banking (§ 315*)—Trust Company—Deposit—Notice—Sufficiency.

Where the balance due under a contract was deposited with a trust company which was to pay it over at the expiration of a certain time, it was the agent of the debtor, and notice to it of an assignment of the fund was sufficient notice to the debtor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 1219–1221; Dec. Dig. § 315.*]

In Bank. Interpleader by the Title Insurance & Trust Company against the Carpenter & Biles Mill & Lumber Company and the San Pedro Lumber Company and others. The Court of Appeal affirmed a judgment for the first-named defendant (123 Pac. 245), and the second petitions to transfer the cause to the Supreme Court for rehearing. Petition denied.

O'Melveny, Stevens & Millikin, and E. B. Coil, for plaintiff. Sheldon Borden and George H. Moore, for defendant Carpenter & Biles Mill & Lumber Co.

PER CURIAM. The petition to transfer this cause to the Supreme Court for rehearing is denied.

We do not think it was necessary to say, as intimated by the District Court of Appeal, that the assignment to the Carpenter & Biles Company would be good against a levy made upon the fund after the assignment and before notice thereof to the debtors, the Dunhams. But, if such notice to the debtors was necessary to make the assignment good against a subsequent execution or attachment levy, the notice given to the plaintiff, who was the trustee and holder of the fund and agent of the Dunhams to pay it to Williamson or to his assignee as the case might be, was a sufficient notice to the debtor, and operated to perfect the transfer of the title to the fund.

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162 Cal. 433

LUSCOMB et al. v. FINTZELBERG et al. (L. A. 2,745.)

(Supreme Court of California. March 28, 1912.)

1. Wills (§ 705*) — Action to Construe — Conclusiveness of Decree.

Where a decree of distribution construing a will was not appealed from, the rights of the parties were foreclosed by the decree, and could not thereafter be determined by other construction of the will itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1682; Dec. Dig. § 705.*]

2. Executors and Administrators (§ 315*) — Distribution of Estate — Determination.

Under Code Civ. Proc. § 1666, providing that the superior court in proceedings for the administration of estates shall determine on final distribution the persons and the proportions or parts to which each shall be entitled, where a will purported to create a trust of the residue of testator's property after the termination of the widow's life estate, the court on final distribution must determine whether the trust was valid and to declare the terms thereof, and select the trustees and make distribution to them, as well as determine what other persons had rights in the distributable property of the estate, and the nature of their interests.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. § 315.*]

3. Executors and Administrators (§ 315*) —Decree for Distribution — Collateral Attack.

A decree of distribution is conclusive as to the rights of heirs, legatees, and devisees, unless corrected on appeal, and is not subject to collateral attack or to be impeached by resort to the terms of the will.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1298–1314; Dec. Dig. § 315.*]

4. Wills (§ 616*) — Construction—Life Estate—Limitation—"For Her Own Use."

Testator devised to his wife all his property, to have and to hold, sell, lease, and otherwise dispose of for her own use during her life, with power to dispose of the household fixtures and personal property by will, and all property remaining at her death to be distributed in a specified manner. The decree of distribution distributed the property to the widow for the term of her natural life, with power to sell and convey the same in fee as she might see fit "for her own use" with remainder over. *Held*, that the widow was only entitled by the words "for her own use" to sell the property for her personal use, and maintenance during life, and she only acquired a life estate subject to a valid limitation over.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418–1430; Dec. Dig. § 616.*

For other definitions, see Words and Phrases, vol. 3, p. 2864.]

5. Wills (§ 616*)—Construction—Life Estate—Limitation Over.

Where a life estate only is expressly given to the first taker with power of disposition of the property for a certain purpose with a devise over, the life estate is not enlarged into either a fee or an absolute right of property, and the limitation is valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418–1430; Dec. Dig. § 616.*]

6. Executors and Administrators (§ 430*) —Assets—What Constitutes.

Testatrix by a decree of distribution of her husband's estate was awarded the residue for life with power to sell for her own use, but all the property remaining at her death was to be distributed to two persons in trust to distribute the same to certain designated persons under her husband's will. *Held*, that immediately on the widow's death all that remained of the property, whether in the specific form in which it had been distributed to her, or in any changed condition, with the increase, immediately vested in the trustees, and was no part of the widow's estate, so that an action was properly brought by them against the widow's executors individually, and not in their representative capacity, to recover the property.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1683–1688; Dec. Dig. § 430.*]

Department 2. Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by C. E. Luscomb and another, as executors and trustees of the estate of Charles J. Fox, deceased, against Theodore Fintzelberg and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Luce, Sloane & Luce and Wright, Schoonover & Winnek, for appellants. John B. Mannix and E. S. Torrance, for respondents.

LORIGAN, J. This is an appeal by defendants from a judgment entered against them after a trial of the cause. The only points raised by the appellants are based upon their demurrer to the complaint which was overruled.

The complaint alleged: That Charles J. Fox died on September 21, 1898, a resident of San Diego county, in this state, leaving a will which was duly admitted to probate and letters testamentary issued to the plaintiffs herein. The said will provided that: "After paying all my just debts and liabilities, I bequeath and devise to my beloved wife, Susie Staples Fox, all my property, real and personal, of every description, to have and to hold, sell, lease and otherwise dispose of for her own use and behoof during her life. And my said wife may by will dispose of all household furniture, books, fixtures and other personal belonging, as she may desire, notwithstanding these may have been bequeathed by me. All of my property remaining at her death shall be distributed as follows." (Here follows specific legacies of personal property owned by decedent at his death.) It is then provided that: "All the remainder of my property, real and personal, shall be converted into money as soon as in the judgment of my executors can be judiciously done, and divided into four equal portions and distributed as follows: One portion to the brother of my said wife before mentioned, residing in San Francisco, California; one portion to my old friend and former business associate, Niles Meriwether, residing No. 14 Talbot St., Memphis, Tenn., or his legal heirs; one portion to the children of my late sisters, to wit: Mrs. James King, Charles F. Clark, Arthur G. Clark, and William S. Clark, share and share alike; one portion to my brother, Arthur G. Fox, residing in Marshall, Mich., in trust to be equally divided between his children, share and share alike." That in due course of administration all the personal property immediately above referred to and specifically bequeathed was set apart by the court to the widow of deceased, and thereby withdrawn from administration. That on December 8, 1899, a decree of distribution was entered distributing the residue of the estate then remaining in the hands of the said executors as follows: "To Susie Staples Fox, the widow of said testator, for the term of her natural life, with power to sell and convey the same in fee, as she might see fit, for her own use, and all of said property remaining at her death to the plaintiffs, C. E. Luscomb and F. W. Stewart, in trust, to convert the same into money as soon as in their judgment the same could be advantageously done, and to divide the proceeds thereof into four equal portions to be paid and distributed by them as follows, to wit: One of such portions to Alpheus D. Staples, of San Francisco, California; one of such portions to Niles Meriwether, of Memphis, Tennessee, or his legal heirs; one of such portions to the children of the late sister of said Charles J. Fox, deceased, to wit: Mrs. James King, Charles F. Clark, Arthur G. Clark and Wil-

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liam S. Clark, share and share alike, and one of such portions to Arthur G. Fox, brother of said Charles J. Fox, deceased, in trust to be equally divided between his children, share and share alike."

The complaint then describes particularly the personal and real property of the estate (consisting principally of real property) contained in the decree of distribution, possession of which was delivered to said Susie Staples Fox under said decree on December 9, 1899; that on December 11, 1899, by decree of court the plaintiffs were discharged from their trust as such executors; that on August 29, 1901, said Susie Staples Fox married George S. Watson, who died December 21, 1905; that she died April 2, 1907, leaving a will, which was thereafter duly admitted to probate, the defendants herein being named as her executors, and to whom letters testamentary were duly issued; that on November 6, 1908, by order of court, plaintiffs herein were again appointed the executors of the will of said Charles J. Fox, and letters testamentary were again issued to them; that said Susie Staples Fox and Charles J. Fox were married in February, 1897, she being his second wife; that there was no issue of said marriage and neither of them leaving any children; that all the property so distributed as aforesaid was owned by said Charles J. Fox prior to his marriage and was his separate property, his wife having no property when she married him nor any at the time of her death, other than her interest in said residue of her said deceased husband's estate under said decree of distribution; that she was of simple, frugal, and economical habits, and after the death of her said husband, Charles J. Fox, her expenditures for her own use did not exceed the sum of $100 per month for all proper purposes of her living and comfort up to the time of her decease.

The complaint then proceeds to allege that, after she came in possession of said property, she converted and transferred nearly all of said residue of said estate and received the avails and proceeds thereof, exceeding in amount the sum of $50,000, a large portion of which avails and profits remained unconsumed and unexpended at the time of her death; that defendants on their appointment as executors of her will took possession of all the residue of said estate distributed to her and all such avails and profits, which included among other property, the nature of which was unknown to plaintiffs, deposits in various banks, aggregating $7,861.50, and three promissory notes for $10,000 each particularly described in the complaint, and which were secured by mortgage; that plaintiffs are entitled to the possession of all the property, avails, and profits of the estate of Charles J. Fox, deceased, remaining at the time of the death of said Susie Staples Fox Watson which were distributed to her for the term of her natural life, and prior to the bringing of the action demanded of said defendants possession thereof and an accounting respecting such property, and defendants have refused either to deliver said property or account therefor.

The prayer was for a judgment that plaintiffs are entitled to the possession of all the property, avails, and profits of the estate of Charles J. Fox distributed to said Susie Staples Fox for the term of her natural life remaining at the time of her death; that defendants be declared to hold said property, avails, and profits in trust for plaintiffs; and that defendants disclose, account for, and deliver to plaintiffs all of said property, together with the avails and proceeds.

A demurrer, general and special, was interposed by defendants and overruled, and the only points made on this appeal, as we have already stated, are addressed to the correctness of that ruling,

The questions which appellants assert are the principal ones for consideration, in reviewing the ruling on the demurrer, relate to whether a valid trust, or a valid limitation over under the decree of distribution was created under the will of C. J. Fox. In that regard it is insisted that the trust which the will purported to create was invalid because (following the argument of appellants), in order to constitute a valid trust, there must be among other essentials, a reasonable certainty in the subject-matter of the trust; that the devise of the property is to the widow for life with absolute power of disposal; that the trust attempted to be created applies to the "property remaining at her death," which may be all the property taken by her in the first instance, or a less quantity, or none at all, depending on the use by her of the power of disposition and hence there is no certainty as to the subject-matter of the trust and it is invalid for that reason. In addition it is claimed—and this is the particular point to which counsel for appellants address themselves—that under the will the widow of deceased is given an absolute power of disposition of the property taken by her, and that, notwithstanding the use of the words "for her own use and behoof during her life," such power of absolute disposition given her by the will had the effect of vesting her with an estate in fee, and the limitation over by way of a devise in trust, or otherwise, is void as repugnant to such estate in fee. This last point, as we understand the argument of counsel for appellants, is also made under the decree of distribution; the claim being that in legal effect the distribution to her of the property was absolute, and, as to the real property, vested her with an estate in fee.

[1] But, as far as these points are addressed to the provisions and terms of the will itself, any construction of that instrument in this action is foreclosed by the decree of distribution, and the rights of the parties must be measured solely by a consideration of that

decree. If it were conceded (which, of course, it is not) that the construction of the terms of the will for which appellants now contend is the construction which should have been given by the superior court in the distribution of the estate of Fox, the proper and appointed time for the widow to have insisted on a distribution of the property to her absolutely, on the theory that the trust was invalid for uncertainty, or void for repugnancy, was upon the hearing for distribution, and, if the construction of the will was adverse to her contention, to have had it corrected on a direct attack on appeal from the decree of distribution.

[2] Under our system, it is the province and duty of the superior court in its jurisdiction over the administration of estates to determine on final distribution the "persons and the proportions or parts to which each shall be entitled." Section 1666, Code Civ. Proc. It was necessary, therefore, for the court, as an incident to this duty, to determine whether or not a valid trust had been created by the testator Fox. It could not make complete distribution unless it passed upon that question. It was equally within the jurisdiction of the court, and its duty, to determine and declare in the decree the scope and terms of such trust as it found valid; to select the trustees and to make distribution to them of the trust property, as well as to determine what other persons had legal or equitable rights to the distributable property of the estate, and the extent and nature of their interests.

[3] Having jurisdiction to determine these matters on distribution, when the decree does so determine them, although the determination may be incorrect, it is conclusive as to the rights of heirs, legatees, and devisees unless corrected on appeal. It is not subject to collateral attack or to be impeached by resort to the terms of the will. The rights of the parties must thereafter be determined by resort to the decree of distribution alone as a final and conclusive adjudication of the testamentary disposition which the deceased made of his property.

This is so well settled by a uniform current of authority as to render further particular discussion unnecessary. Estate of Hinckley, 58 Cal. 457; Daly v. Pennie, 86 Cal. 552, 25 Pac. 67, 21 Am. St. Rep. 61; Morffew v. S. F. & S. R. R. Co., 107 Cal. 587, 40 Pac. 810; William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Crew v. Pratt, 119 Cal. 131, 51 Pac. 44; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; Goad v. Montgomery, 119 Cal. 552, 51 Pac. 681, 63 Am. St. Rep. 145; Estate of Trescony, 119 Cal. 568, 51 Pac. 951; Keating v. Smith, 154 Cal. 186, 97 Pac. 300; Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351; Estate of Learned, 156 Cal. 309, 104 Pac. 315; Hardy v. Mayhew, 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73. Under these authorities, the appellants are precluded from making an attack on the decree of distribution. It is conclusive on the validity of the trust and that the widow was entitled to take the property distributed to her for use only during her life. In most of the cases cited the attack was just such a one as appellants here attempt to make. It was insisted that certain trusts declared in the will were invalid for various reasons, and should have been disregarded in the distribution of the estates and were to be disregarded notwithstanding their validity was established by the decree, and necessarily it was sought to impeach the decree of distribution by resort to the will. In some of the cases it was conceded that the trusts created by the will were invalid, but it appeared that distribution had been made upon the theory that they were valid. In all of them, however, as the decree of distribution had become final, it was held that the validity of the trust, the power of the trustees, and the extent of their title was conclusively determined by the decree of distribution, and not subject to collateral attack by resort to the will.

The only case relied on by appellants in support of their claim is McCloud v. Hewlett, 135 Cal. 361, 67 Pac. 333. But this decides nothing in conflict with the authorities cited above, nor does it question the correctness of the doctrine announced in them. In the case cited the decree of distribution entirely failed to state the purpose of the trust, which is one of the essentials to a valid trust, and resort being had to the will in aid of the decree, as might be done (Goad v. Montgomery, supra), it was found that the will itself created no trust; hence the decree of distribution, in as far as it attempted to raise a trust, was a nullity. Here, however, the decree on its face declares a trust valid as to its purpose and certain and definite in its terms, and hence is conclusive against any attempt to resort to the will to impeach or disturb the decree in that respect.

[4] As to the point that in legal effect, under the decree of distribution, absolute title to the property was vested in the widow The doctrine under which appellants assert this claim and seeks to have it applied to the decree of distribution is that where a devise (using this term as applied to the decree of distribution) is accompanied by an unlimited power of disposal of an estate given to the devisee, to be exercised in any manner the devisee may see fit, a limitation over is void, as being repugnant to the principal devise, which by virtue of the absolute power of disposition vested in the devisee the estate absolutely.

Numerous cases are relied on by appellant in support of this doctrine, but they need not be cited, nor even particularly discussed, because that rule and the authorities apply to a devise cast in very different terms from the devise we are considering here. In many of the cases relied on there was a general devise of the estate to the first taker, with an absolute power of disposal and a limitation over, and it was held that the limitation over was requgnant to the general devise and void. In others there was language used by the testator which might indicate an intent to create a life estate, but, as there was an absolute power of disposition given and no limitation over, it was held that the devisee took the estate in fee. In some (clearly not applicable) the devise to the first taker was absolute in terms, followed by trust provisions of a precatory nature, or by words of recommendation, or desire as to contingent remainders. In none of the cases cited, as we construe them, is it held, where the estate of the first taker is in terms expressly defined to be a life estate, with a power of disposition annexed, to be exercised for a specific purpose only, with a limitation over, that the power of disposition enlarges the life estate into a fee.

Here there is no general devise to the widow, nor any language indefinite or indeterminate as to the quantity of estate she took. By the express terms of the decree it is defined to be an estate for life. While she is given a power of disposition of the property in fee, it is not a power of disposition with an unqualified right to the use of the proceeds for any and all purposes, but for the particular purpose that the proceeds may be devoted by her "for her own use"; such use meaning, of course, personal use by her for her support, comfort, and maintenance during life. There is also an express limitation over of "all of said property remaining at her death."

[5] The authorities are uniform to the effect that where such are the terms of a devise—a life estate only being expressly given to the first taker, with power of disposition of the property for a certain purpose, with a devise over—the life estate is not enlarged into either a fee or an absolute right of property, and a limitation over will be good. In the case of Hardy v. Mayhew, supra, which involved the construction of the terms of a decree of distribution in several respects similar to that involved here, it is said: "The distinction between the case of an intended gift of an absolute title to one with an attempted gift over of simply 'what remains unexpended' by the donee at the time of his death, where the gift over is void because in derogation of the absolute fee given the first taker, and the case of a gift of a life estate with a power of disposition for a particular purpose only, with an express gift over of what remains unused for such purpose, is recognized by all the authorities." After citing and quoting from authorities, the court proceeds as follows: "It appears to be settled by the overwhelming weight of authority that the mere fact that the first taker is invested with the power to dispose of or consume the whole of the property for certain purposes does not invest him with the absolute ownership thereof and render the gift over void, where, taking the whole instrument together, it is concluded that the intent was to give only an estate for life, with limited power of disposal or consumption." Counsel for appellants claim that, in considering the validity of a devise over, a distinction is to be made between a devise which gives the use and disposition during life of personal property only, as in Hardy v. Mayhew, and the devise here, which applies to real property in which a life estate is given with power of disposition of the fee.

We are referred to no authority by counsel which makes any such distinction. On the contrary, it is said in 2 Underhill on Wills, § 687: "If it is clearly apparent that the testator intended that he (the life tenant) should take only a life estate, and the property is to be used for his support and maintenance, his interest, at least where real property is concerned, will be confined to that, though he will have power of disposition over the fee and a right to use the proceeds during his life for his support or for other purposes intended by the testator." Also 4 Kent's Com. (18th Ed.) p. 371. No such distinction either is made in the following cases, among numerous others which might be cited, sustaining the validity of a devise over of the remainder of the estate devised after the death of the first taker who is given a life interest and a life estate in both personal and real property, with full power of disposition thereof during life for his personal comfort, maintenance, and support: Douglass v. Sharp, 52 Ark. 113, 12 S. W. 202; Steiff v. Seibert, 128 Iowa, 746, 105 N. W. 328, 6 L. R. A. (N. S.) 1186; Hamlin v. U. S. Express Co., 107 Ill. 443; McCullough's Adm'r v. Anderson, 90 Ky. 126, 13 S. W. 353, 7 L. R. A. 836; Pennock v. Pennock, L. R. 13 Eq. 144; Herring v. Barrow, L. R. 13 Ch. Div. 144; Richards v. Morrison, 101 Me. 424, 64 Atl. 768; Welsh v. Woodbury, 144 Mass. 542, 11 N. E. 762; McMillan v. Farrow, 141 Mo. 55, 41 S. W. 890; Parker v. Travers, 74 N. J. Eq. 812, 71 Atl. 612; Terry v. St. Stephens, etc., 79 App. Div. 527, 81 N. Y. Supp. 119; Kennedy v. Kennedy, 159 Pa. 327, 28 Atl. 241; In re Tilton, 21 R. I. 426, 44 Atl. 223.

[6] It is insisted further in this action that the defendants as they hold the property as executors of the estate of Mrs. Fox Watson should have been sued as such, and not as individuals. But the property remaining on her death constituted no part of her estate. She had no interest therein which she could dispose of by will or to which her heirs would have succeeded in case she had died intestate. She had but a life estate in the property, with power of disposition for a specific purpose, namely, "for her own use." Immediately on her death all that remained of the property, whether in the specific form in which it had been distributed to her, or in any changed condition, the result of sale, exchange, in-

vestment, or the like, with the increase, accumulations, and profits, plaintiffs were immediately entitled to have possession of, and to maintain an action to recover it from the defendants. While the latter were the executors of the will of Mrs. Fox and on her death took possession of the property here involved, it was their duty, on demand of the plaintiffs, to deliver it to them. It was not property of the estate of their testatrix, nor as her personal representatives were they entitled to hold it, and the suit was properly brought against them in their individual capacities. The general rule is thus stated in 18 Cyc. 884: "If a personal representative takes property not belonging to the estate, he has no right to it in his representative capacity. His refusal to restore it to the rightful owner renders him individually liable, and he cannot be sued in his representative capacity for his individual tort. A personal representative is liable in his individual capacity, even though the property has passed from the possession of the decedent into his possession." "Property which the testatrix in her lifetime held in trust, or in which she had merely a life interest, are not assets of her estate, and no act of her executor as to such property will render him or his sureties liable upon his bond." Probate Court v. Williams, 30 R. I. 144, 73 Atl. 388, 19 Ann. Cas. 554; In re Stuart's Will, 115 Wis. 294, 91 N. W. 688; Nickals v. Stanley, 146 Cal. 724, 81 Pac. 117; Hardy v. Mayhew, 158 Cal. 95, 110 Pac. 113, 139 Am. St. Rep. 73.

Several other objections were raised by special demurrer, relating principally to defect in parties defendant, nonjoinder or misjoinder of parties. We do not think these points have any merit, and hence do not discuss them.

The judgment appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

(162 Cal. 379)

CANTY v. STALEY. (S. F. 5,196.)

(Supreme Court of California. April 20, 1911. On Rehearing, March 25, 1912.)

1. TAXATION (§ 549*)—DELINQUENT TAXES—COSTS.

Since improvements are classified as real estate by Pol. Code, § 3617, and though, under section 3627, they are assessable separately from the land, a tax collector is entitled to only one fee, and not two fees, of 50 cents against delinquent land containing improvements, under section 3770, requiring him to collect 50 cents on each lot and on each assessment of personalty.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1043–1050; Dec. Dig. § 549.*]

2. WORDS AND PHRASES—"LOT," "PIECE," AND "PARCEL."

The words "lot," "piece," and "parcel" apply peculiarly to the land itself, and are never employed to describe improvements.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, pp. 4239–4245; vol. 8, p. 7710; vol. 6, pp. 5166, 5167; vol. 6, p. 5377.]

3. TAXATION (§ 667*)—DELINQUENT TAXES—SALES—VALIDITY.

A sale for delinquent taxes in excess of the amount authorized by law is void, if the excess equals the smallest fractional coin authorized by law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1350; Dec. Dig. § 667.*]

4. TAXATION (§ 795*)—TAX SALES—AVOIDANCE—RETURN OF PAYMENTS—NECESSITY.

To defeat a suit to quiet title, plaintiff claiming under void tax deeds, it was unnecessary for defendant to tender plaintiff's expenditures or interest thereon.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1577; Dec. Dig. § 795.*]

On Rehearing.

5. TAXATION (§ 679*)—TAX SALE—NOTICE—SUFFICIENCY.

Under Pol. Code, § 3897, as amended by Act March 1, 1905 (St. 1905, p. 31), effective May 1, 1905, which requires notice of a proposed sale by the state of land bought at tax sale to be given by mail, notice of a sale on May 5, 1905, given by publication, was insufficient.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361–1362; Dec. Dig. § 679.*]

6. TRIAL (§ 397*)—FINDINGS—NECESSITY.

In a suit wherein defendant's title was quieted against plaintiff's tax deeds, it was unnecessary to find on an issue of tender to plaintiff of his expenditures, where there was no evidence of expenditures.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Consolidated actions by D. J. Canty against W. S. Staley. Judgment for defendant, and plaintiff appeals. Affirmed.

Stanton L. Carter, Carter & Carter, and Royle A. Carter, for appellant. Frank Kauke, for respondent.

MELVIN, J. Plaintiff, asserting title under tax deeds, sued to quiet his title to two parcels of land in Fresno county. Defendants answered, and the two actions were consolidated and tried together. At the trial it was admitted "that the title to the real property described in each of the complaints was, at the time of the commencement of each of said actions, vested in each of the defendants therein named, respectively, * * * unless the same had been divested by the tax sales and proceedings under which plaintiff claims title; and that subsequent to the commencement of this action the defendant, W. S. Staley, who has been substituted as defendant in each of said actions in place of said William H. Hersperger and Samuel Hersperger, acquired from said William H. Hersperger and Samuel Hersperger all the right, title, and interest in and to said real property which said William H. Hersperger and Samuel Hersperger had or held at the time of the commencement of said actions, in, and to said real property described in the complaints in said two actions." Judgment in each case was entered in favor of the defendant Staley. The District Court of Appeal of the Third Appellate District handed down a decision reversing the judgments, but the prayer of the petition for rehearing was granted by this court. In the opinion of the District Court of Appeal, two main points were considered; one being the description of the property in the tax deed and the other being the amount for which the land was sold to the state. The court held that the description was sufficient, and that the property was sold for the exact amount provided by law. We agree with the district court upon the first point, but hold a different view in regard to the other.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The recitals in both tax deeds are the same. From them we find that each piece of property was assessed for $225. The amount of the tax levied on each parcel was $3.37 and the costs and charges since accrued amount, according to the recital of each deed, to $2.42; the selling price being $5.79. Defendant at the trial objected to the introduction of each of the deeds upon the ground, among others, that: "It affirmatively appears from the deed itself that the sale was for excessive amount. It appears therefrom that the tax levied, or computed, was $3.37, and that the costs and charges accrued are set forth as $2.42, whereas the costs, penalties, and charges on a tax levy of $3.37 could not be more than 91 cents, making a total of only $4.28." Before the court had ruled upon said objection, plaintiff offered in evidence the delinquent assessment roll for the appropriate year, showing the assessed value of the land as $200, of the improvements as $25, and the tax and costs amounting to $5.79, itemized as follows:

Special school tax....................	$ 99
Tax on personal property and half of real estate	1 69
Fifteen per cent. additional on first installment	25
Five per cent. additional on first installment	09
Tax on remaining half of real estate....	1 68
Five per cent. tax on remaining half of real estate.........................	09
Costs	1 00
Total amount delinquent tax and cost	$5 79

The court sustained the objection to both the deeds and to the delinquent assessment roll. Respondent's position with reference to the deeds was that, rejecting the fractions of a cent as provided in section 3731 of the Political Code, each installment of the tax would be $1.68. On the first installment there would be a penalty of 15 per cent. amounting to 25 cents, and thereafter there would accrue a penalty of 5 per cent. on both installments, or 5 per cent. of $3.37 amounting to 16 cents. Section 3756, Pol. Code. Adding to this the sum of 50 cents chargeable under section 3770 of the Political Code, the entire penalty and charges, according to respondent, would be 91 cents, which added to $3.37 would amount to $4.28, instead of $5.79. Therefore, according to respondent, the sale was for an amount $1.51 in excess of that lawfully chargeable. The District Court of Appeal held that, as the statute requires no statement in the deed of the amount of the tax (Pol. Code, § 3787), resort may be had to the delinquent tax list. But respondent contends that, even conceding the admissibility of the delinquent tax list, the property was sold for an excessive amount. The District Court of Appeal upon that subject said: "The only controversy that can arise is in reference to the $1 charged as costs. We must assume, of course, that the special school tax of 99 cents was legally levied. The amount of the costs depends upon the proper construction of said section 3770 of the Political Code. Respondent takes the position that the charge should have been only 50 cents as there was but one piece of real estate and no personal property assessed. The assessor, though, is required to assess real estate and the improvements thereon separately, and the auditor in his statement must show them in separate columns (section 3738, Pol. Code), and they so appear upon the deliquent list. Whether these improvements are to be regarded as personal property or a part of the realty, we think it is clear, within the contemplation of the statute, that the assessment must be considered as of two parcels of real or one of real and one of personal property. Since the two entries are required to be made, the tax collector, as we view it, is entitled to 50 cents for each. The property would seem, therefore, to have been sold for the exact amount provided by law. In dismissing the subject, we must say that the uniform practice, as shown by the records in the state controller's office, is to charge 50 cents for the entry of the improvements, and we have no doubt it is justified."

[1] We are unable to agree with this construction of section 3770 of the Political Code. By said section it is provided that "the tax collector must collect, in addition to the taxes due on a delinquent list, together with the penalties for delinquency, fifty cents on each lot, piece or parcel of land separately assessed and on each assessment of personal property." It is clear that improvements are not personalty. They are expressly classified as "real estate" (Pol. Code, § 3617); and, while they are to be assessed separately from the land (Pol. Code, § 3627), they must be assessed against the particular section, lot, or tract of land upon which they are located. Technically, then, the land and the improvements are in one sense two parcels of real property, but this does not justify a charge of 50 cents against each by the assessor because section 3770 of the Political Code authorizes that charge upon "each lot, piece or tract of land separated assessed." There is nothing either in the section itself or in the use of the words "land" and "real estate" in that part of the Political Code relating to taxation which justifies the conclusion that the word

"land" was here intended to be used interchangeably with the term "real estate."

[2] The words "lot," "piece," and "parcel" apply peculiarly to the land itself and are never employed to describe improvements. That a separate column must be used for the valuation of improvements does not justify the additional charge. It requires two entries to show the division of the tax into installments, yet no extra charge is permitted for that clerical labor. While this additional imposition for the assessment of improvements may be customarily noted by assessors, as indicated by the District Court of Appeal, we cannot let that fact distort the plain, simple English of the statute making the charge of 50 cents applicable to each subdivision of land separately assessed. Each of the respondent's two lots of land was therefore sold for at least 50 cents in excess of the proper amount. Respondent contends that the charge of 5 per cent. on each of the installments should have been 8 cents instead of 9 cents, and that the excess therefore amounts to 52 cents. In either view of the matter, whether we hold that the property was sold for 50 cents or 52 cents above the price authorized by law, we must find, under the decisions of this court, that the excessive charge invalidated the transaction, and that the deeds and delinquent tax list were therefore properly denied admission in evidence by the trial court.

[3] This court has consistently held that, where a sale for delinquent taxes is in excess of the amount authorized by law, the party claiming by virtue of said sale can acquire no rights thereunder. Miller v. Williams, 135 Cal. 184, 67 Pac. 788; Treadwell v. Patterson, 51 Cal. 638; Boston Tunnel Co. v. McKenzie, 67 Cal. 489, 8 Pac. 22; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Knox v. Higby, 76 Cal. 267, 18 Pac. 381; Simmons v. McCarthy, 118 Cal. 625, 50 Pac. 761; Harper v. Rowe, 53 Cal. 235; Warden v. Broome, 9 Cal. App. 174, 98 Pac. 252. In these cases the rule stated in Treadwell v. Patterson has been uniformly sustained. In that case the court adopted the language of Judge Cooley in his work on Taxation (page 344), as follows: "A sale for anything more than is lawfully chargeable is a sale without jurisdiction and therefore void." And the court also said: "In such cases the maxim, 'De minimis non curat lex,' does not apply, except in a limited sense. The rule, as established by the authorities, is that, if the excess be as much as the smallest fractional coin authorized by law, the sale is void. Glidden v. Chase, 35 Me. 90 [56 Am. Dec. 690]; Thayer v. Mayo, 34 Me. 139; Grosvenor v. Chesley, 48 Me. 369; Boyden v. Moore, 5 Mass. 365; Pickett v. Breckenridge, 22 Pick. (Mass.) 297 [33 Am. Dec. 745]; Chenery v. Stevens, 97 Mass. 77." If anything in Flannigan v. Towle, 8 Cal. App. 230, 96 Pac. 507, seems to be opposed to the views here expressed, that case is, to that extent, overruled.

It is but fair to the learned District Court of Appeal of the Third District to state that in the case of Rimmer v. Hotchkiss, Civ. No. 759, in which the court's final opinion was filed March 15, 1911, the same interpretation of section 3770 of the Political Code as that which we have adopted was set forth by Mr. Presiding Justice Chipman, speaking for the court. In that case the appellant's contention was that a charge of $1.50 was proper for the separate assessments of the land, personal property, and improvements—that is, 50 cents for each item—and it was held that: "There is no ground for holding 'improvements' to be personal property. Section 3617, subd. 4, Political Code, expressly classifies 'improvements' as included in the term 'real estate,' and section 3650 of the same Code requires the assessor 'to prepare an assessment book * * * in which must be listed all property, within the county, under the appropriate head: * * * (2) Land, * * * and the improvements thereon. * * * The improvements to be assessed against the particular section, tract or lot of land upon which they are located.' The fact that they must be separately assessed, as required by section 3627, does not authorize a penalty of 50 cents to be charged under section 3770, for that section authorizes such penalty only 'on each lot, piece or tract of land separately assessed, and on each assessment of personal property.' It would be unreasonable to hold that the language thus used means that 'improvements,' apart from the land, constitute 'a lot, piece, or tract of land.' In the case of Warden v. Broome, supra, the assessment showed but two assessments, one of the land and one of the improvements. 'The costs to be added' were held to be 50 cents, and not for an additional 50 cents. If appellants' contention be correct, the additional 50 cents in that case could have been upheld. The decision impliedly holds that the penalty of 50 cents, under section 3770, cannot be imposed for nonpayment of the tax on improvements."

[4] Appellant contends that the trial court committed error in failing to find upon defendant's allegation of a tender of repayment to the former of all amounts expended by him in the attempted purchase of the title from the state, together with interest on said expenditures. Such a finding would have been immaterial. In this case it was the plaintiff who challenged the title of defendant and it was admitted that unless divested by the tax deeds the title to the property was in the latter. In such cases the maxim "He who seeks equity must do equity" does not apply, for it is doubtful whether a suit of this kind brought under the Code to test appellant's asserted title is an action in equity. Harper v. Rowe, 53 Cal. 238. But,

whether we consider it an action in equity or not, nothing can be said to be due from respondent to appellant in view of the fact that the tax sale is void. The payment made to the state was purely voluntary, was not authorized by respondent, and the maxim caveat emptor should be applied with all emphasis. As was said in Greenwood v. Adams, 80 Cal. 78, 21 Pac. 1135: "The defendants offered in evidence the deed made to them during the trial, but on objection of plaintiff it was excluded. No copy of the deed is found in the bill of exceptions, but it is urged that this and all the other rulings complained of were erroneous, because, when defendants purchased the land at the tax sales, the lien of the state vested in them, and could only be divested by a repayment of the purchase money, and that they were entitled to have the amount so paid out repaid before any decree could be entered against them. We fail to see any force in this point. Parties who purchase property at tax sales acquire the title to the property if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law; but, if not so, they acquire no rights to the property which either a court of law or equity can enforce." See, also, Dranga v. Rowe, 127 Cal. 509, 59 Pac. 944; Clark v. San Diego, 144 Cal. 361, 77 Pac. 973; Paine v. Germantown Trust Co., 136 Fed. 527, 69 C. C. A. 303; Mitchell v. Minnequa Town Co., 41 Colo. 368, 92 Pac. 678; I. & D. Land Co. v. Barnes County, 6 N. D. 601, 72 N. W. 1019.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; SLOSS, J.

On Rehearing.

ANGELLOTTI, J. These are appeals from the judgments in favor of defendants, and from the orders denying plaintiff's motion for a new trial in two actions to quiet plaintiff's alleged title to two parcels of land in Fresno county, which actions were consolidated and tried together.

Plaintiff asserted title under certain tax proceedings based on assessments for state and county taxes for the year 1894, culminating in deeds from the state to plaintiff for the property involved. These alleged proceedings were set forth in plaintiff's complaints. The answers of the defendants sufficiently denied the allegations of plaintiff's complaints to present the questions we shall discuss. They also contained allegations on the subject of an attempted tender, made after the commencement of the action, to plaintiff, of the amount alleged by plaintiff to have been expended by him in connection with his attempted purchases from the state, but the trial court made no finding thereon, no evidence having been introduced in regard thereto, so far as the record shows. Judgment was given in each case denying plaintiff any relief, and decreeing defendant to be the owner of the property involved and quieting his title thereto as against plaintiff. It was stipulated at the trial "that the title to the real property described in each of the complaints was, at the time of the commencement of each of said actions, vested in each of the defendants therein named, respectively, * * * unless the same had been divested by the tax sales and proceedings under which plaintiff claims title."

[5] In the matter of the attempted sales by the state, the facts present the same question that was decided in the recent case of Buck v. Canty, 121 Pac. 924. Such sales were made on May 5, 1905, the day noticed therefor in the published notice, four days after the legislative act of the year 1905, approved March 1, 1905 (St. 1905, p. 31), amending section 3897, Political Code, so as to require notice of such proposed sale by the state to be given by mailing a copy of the notice "to the party to whom the land was last assessed next before the sale if such address be known" went into effect. The deeds from the state affirmatively showed that the only notice of such sales that was in fact given was the notice by publication in a newspaper, and there is no pretense that any other notice was given. If we assume that evidence aliunde would have been admissible in support of the deeds to show that notice by mailing was in fact given, it still remains that no such evidence was offered. For the reason stated in the opinion in Buck v. Canty, supra, it must be held that the ruling of the trial court refusing to admit in evidence the deeds from the state, based on such sales, one of the specified objections to which was the want of proof of such notice by mail, was correct. Without valid deeds from the state, plaintiff showed no title or interest whatsoever in the land.

[6] In view of what we have said, it is unnecessary to consider any of the numerous other points made in the briefs of learned counsel for plaintiff, save the single one relating to the failure of the trial court to find upon the allegations of the answers relative to tender. As to this, it is sufficient to say that a finding upon this matter would have been altogether immaterial, in view of the conditions shown by the record. There is no evidence tending to show that plaintiff ever expended any sum whatever in this matter, and nothing to indicate that he offered any evidence in this behalf. The allegations in that regard in the complaints were squarely denied by the answers, and the trial court found against plaintiff's allegations. The burden of proof being on plaintiff to show such payments and no evidence at all being introduced on the question, the findings of the trial court thereon cannot be held to be without legal support. Under these circumstances, it is entirely im-

material whether the defendant made any tender of the amounts claimed to have been expended by plaintiff. A finding against the allegations of such tenders could not affect the judgment. We therefore are not here concerned with any question as to the right of a purchaser from the state at a sale of land made by the state on account of unpaid taxes to insist that as a condition precedent to the granting of equitable relief to the owner on account of some defect in the tax proceedings, he shall be reimbursed the amounts expended by him.

The judgments and orders denying a new trial are affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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162 Cal. 385

RIMMER v. HOTCHKISS et al. (S. F. 5,404.)

(Supreme Court of California. March 25, 1912.)

1. Taxation (§ 788*) — Tax Deeds — Recitals.

The recitals of a tax deed to the state cannot be looked to for evidence of the amount of taxes, costs, and charges actually due.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

2. Taxation (§ 549*)—Delinquent Taxes—Charges.

Pol. Code, § 3770, which requires a tax collector to collect, in addition to the taxes due on a delinquent list, together with the penalties, "fifty cents on each lot, piece, or tract of land separately assessed and on each assessment of personal property," does not authorize a separate 50-cent charge on account of improvements.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1043–1050; Dec. Dig. § 549.*]

3. Taxation (§ 667*)—Tax Deeds—Validity—Excessive Charges.

A tax deed is invalid where the amount for which the land was sold includes an unauthorized charge of 50 cents as a separate charge on account of improvements.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1350; Dec. Dig. § 667.*]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Otis E. Rimmer against W. J. Hotchkiss and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Carter & Carter and Royle A. Carter, for appellants. Frank Kauke, for respondent.

ANGELLOTTI, J. This is an appeal by defendants from a judgment in favor of plaintiff in an action brought by him to quiet his alleged title to two parcels of land in Fresno county, and from an order denying defendants' motion for a new trial.

The complaint contained simply the general allegations appropriate in an action to quiet title to land. The answer of defendants denied these allegations, and alleged ownership in fee in them by virtue of certain alleged tax sales to the state and an alleged sale by the state to one R. M. Barthold, their predecessor in title. They asked for a decree adjudicating their ownership of the property, and "such other and further relief as is meet and proper, and agreeable to equity." The trial court found that each and all of the allegations of the complaint are true, and that each and all of the denials and allegations of the answer are untrue, and gave judgment decreeing plaintiff to be the absolute owner of the land, free and clear of any claim of defendants.

Evidence introduced by plaintiff was sufficient to show that he is the absolute owner of the property, unless his title "is affected or divested by tax sales or purported tax sales and proceedings under which defendants claim title."

The property consisted of two parcels of land, one assessed for the year 1895 to Elizabeth Hurst, the other assessed for the same year to W. W. Hurst. Defendants offered in evidence two deeds from the tax collector to the state of California, each dated July 8, 1901, purporting to be based on sales of said land to the state made July 3, 1896, for the taxes delinquent on such assessment. Objection was made to each deed on the ground, among others, that the sale to the state was for an excessive amount. The trial court sustained the objection to the deed based on the Elizabeth Hurst assessment, and overruled it in the case of the deed based on the W. W. Hurst assessment. Defendant also offered two deeds from the state to R. M. Barthold, dated April 15, 1905, purporting to convey said lands to said Barthold in pursuance of sales made by the tax collector at public auction. The trial court sustained the objection to the deed of the Elizabeth Hurst land, and overruled the objection to the deed of the W. W. Hurst land. In rebuttal the plaintiff then showed by the assessment roll of the county, the assessment of the lands involved for the year 1895, and the taxes levied thereon. The assessment of W. W. Hurst was one of land, the improvements thereon, and various items of personal property. The tax shown was on personal property and half of real estate $10.06, on remaining half of real estate $3.91, a total of $13.97. The deed to the state specified that the costs and charges which had accrued at the time of the sale to the state amounted to the further sum of $3.71, making a total of $17.68, which was stated in the deed to the state as the amount for which the land was sold to the state. Pol. Code, § 3785, as it stood at the time of the making of the deed, and which required a statement in the deed of the amount for which the property was sold. The assessment of Elizabeth Hurst was also one of land, the improvements thereon, and various items of personal property. The tax shown was on personal property and half of real estate $5.91, on remaining half of real estate $3.08, a total of $8.99. The deed to the state specified that the costs and charges which had accrued at the time of the sale to the state amounted to the further sum of $2.84, making a total of $11.83, which was stated in the deed to the state as the amount for which the land was sold to the state.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] We cannot look to the recitals in the deeds to the state for evidence of the amount of taxes, costs, and charges actually due. See Campbell v. Shafer, L. A. No. 2,598, 121 Pac. 737. There was, therefore, nothing in either deed to show that the sale to the state was for an excessive amount, or, in other words, that the amount named therein as the amount for which the property was sold to the state was in excess of the actual amount due for taxes, costs and charges. Campbell v. Shafer, supra. The trial court was correct in its ruling admitting the deed of the W. W. Hurst land, and erred in its ruling excluding the deed to the Elizabeth Hurst land. But, if the latter deed had been admitted in evidence, it could not have properly affected the result as to the question of title. Each deed was required by law to show the amount for which the property was sold to the state, and, as we have said, the W. W. Hurst deed showed $17.68 as such amount, and the Elizabeth Hurst deed showed $11.83 as such amount. From the evidence afforded by the assessment roll we are able to ascertain whether either or both of said amounts were excessive, for the costs and charges authorized are all expressly prescribed by law. Consideration of this evidence and of the provisions of our statute relative to costs and charges demonstrates that the amount was excessive in each case by at least 50 cents, unless, under the provisions of section 3770, Pol. Code, providing that "the tax collector must collect, in addition to the taxes due on the delinquent list, together with the penalties for delinquency, fifty cents on each lot, piece, or tract of land, separately assessed, and on each assessment of personal property," the tax collector was authorized to collect $1.50 in each case in addition to the taxes due and the penalties for delinquency, instead of $1 which admittedly he was entitled to charge and collect, 50 cents on the land and 50 cents on the personal property.

The precise question presented is whether a separate 50-cent charge was authorized on account of the improvements assessed in each case. This exact question was presented to this court in Canty v. Staley, 123 Pac. 252, and the majority of the court decided that no such charge was authorized under such circumstances as exist in this case. Referring to the claim made in that case in support of such a charge, the court, through Mr. Justice Melvin, said: "We are unable to agree with this construction of section 3770 of the Political Code. By said section it is provided that 'the tax collector must collect, in addition to the taxes due on the delinquent list, together with the penalties for delinquency, fifty cents on each lot, piece, or tract of land separately assessed and on each assessment of personal property.' It is clear that improvements are not personalty. They are expressly classified as 'real estate' (Pol. Code, § 3617), and, while they are to be assessed separately from the land (Pol. Code, § 3627), they must be assessed against the particular section, lot, or tract of land upon which they are located. Technically, then, the land and the improvements are, in one sense, two parcels of real property, but this does not justify a charge of 50 cents against each by the assessor because section 3770 of the Political Code authorizes that charge upon 'each lot, piece, or tract of land separately assessed.' There is nothing either in the section itself or in the use of the words 'land' and 'real estate' in that part of the Political Code relating to taxation which justifies the conclusion that the word 'land' was here intended to be used interchangeably with the term 'real estate.' The words 'lot,' 'piece,' and 'tract' apply peculiarly to the land itself, and are never employed to describe improvements. That a separate column must be used for the valuation of improvements does not justify the additional charge. It requires two entries to show the division of the tax into installments, yet no extra charge is permitted for that clerical labor. While this additional imposition for the assessment of improvements may be customarily noted by assessors, * * * we cannot let that fact distort the plain, simple English of the statute making the charge of 50 cents applicable to each subdivision of land separately assessed. Each of the respondent's two lots of land was therefore sold for at least 50 cents in excess of the proper amount." While a rehearing was granted in that case, it was not because of any doubt as to the correctness of the views above quoted, and the justices participating therein are of the opinion that the same correctly state the law on this question.

[3] It follows that it must be held that the amounts for which the two parcels of land were declared to be sold to the state and the amounts specified in the deeds as the sums for which they were so sold were excessive by at least 50 cents in each case. The effect of a sale to the state for an excessive amount is also declared in the opinion in Canty v. Staley, supra, as follows: "In either view of the matter, whether we hold that the property was sold for 50 cents or 52 cents above the price authorized by law, we must find, under the decisions of this court, that the excessive charge invalidated the transaction, and that the deeds and delinquent tax list were therefore properly denied admission in evidence by the trial court. This court has consistently held that,

where a sale for delinquent taxes is in excess of the amount authorized by law, the party claiming by virtue of said sale can acquire no rights thereunder"—citing cases. As to this, it is to be said that the rehearing was not granted on account of any doubt as to the correctness of these views, and that the justices who participated therein are of the opinion that it correctly states the law. It follows that the sale to the state was void as to each parcel of land, and that defendants have acquired no interest in the land by reason of the attempted deeds of the state to their predecessor in title which are based thereon.

Upon the question of the right of the defendants to be reimbursed on account of money expended by their predecessor in title, the facts are substantially the same as those stated in the opinion in Buck v. Canty, 121 Pac. 924, as modified February 21, 1912. Upon the authority of that case, it must be held that the failure of the trial court to provide for reimbursement does not warrant a reversal.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

162 Cal. 366

HOLLAND v. HOTCHKISS et al.

(S. F. 5,710.)

(Supreme Court of California. March 25, 1912.)

1. Taxation (§ 750*)—Tax Sales—Validity—Want of Notice.

Under Pol. Code, § 3785, as amended by St. 1891, p. 134, which required 30 days' notice to the owner of land before applying for a tax deed, deeds by a tax collector to the state, made November 1, 1898, and July 18, 1899, respectively, and deeds from the state thereunder, made April 14, 1905, were void where such notice was not given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.*]

2. Taxation (§ 610*)—Tax Sales—Cancellation—Prerequisites — Reimbursement of Purchaser.

Where a property owner applies for equitable relief against the public authorities, as, for example, to restrain proceedings for the collection or enforcement of taxes assessed against it, or to enjoin the execution of a tax deed, or to cancel a lien or charge for taxes, of record against his land, and it appears that all or some part of the tax charged is justly and equitably due from the plaintiff, or chargeable upon the land, he must, as a condition of obtaining such relief, first pay or offer to pay the amount justly due, or he must be required to do so before the relief to which he shows himself entitled is given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1244; Dec. Dig. § 610.*]

3. Taxation (§ 734*) — Tax Sales—Validity.

A tax sale is invalidated by any material irregularity in the assessment or in the subsequent proceedings.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470–1473; Dec. Dig. § 734.*]

4. Taxation (§ 819*)—Invalid Tax Sales—Caveat Emptor.

The rule of caveat emptor will be strictly applied against a tax sale purchaser who sues for possession of the land, or to recover the tax paid as money paid to the owner's use.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1619, 1620; Dec. Dig. § 819.*]

5. Taxation (§ 800*)—Tax Sales—Cancellation—Reimbursement of Purchaser.

One seeking relief in equity or under Code Civ. Proc. § 738, against an invalid tax deed, should be required to repay to the tax purchaser or his grantee or assignee, as a condition precedent to relief, the taxes, penalties, interest, and costs justly chargeable on the land and paid by the purchaser at the sale, or afterwards upon the faith of it, with legal interest from the time of such payment, less any rents received by the purchaser in possession.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586; Dec. Dig. § 800.*]

6. Taxation (§ 800*)—Invalid Tax Sales—Cancellation — Reimbursement of Purchaser.

Reimbursement to a tax sale purchaser for his outlay on cancellation of the sale can be secured by requiring the repayment to be made or deposited before judgment, or by inserting in the judgment a clause that it shall not take effect until such repayment.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586; Dec. Dig. § 800.*]

7. Acknowledgment (§ 36*)—Sufficiency.

An officer's certificate that a grantor "acknowledged to me" the execution of the deed is not bad on account of the words "to me," though they were not contained in the statutory form then in force.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 181, 182, 184–198, 221–223; Dec. Dig. § 36.*]

8. Acknowledgment (§ 57*)—Acknowledgment in Other States—Validity.

The provision of Civ. Code, § 1189, making the certificate of the clerk of a court of record of the county where a foreign acknowledgment is made, to the effect that the acknowledgment was taken according to the laws of the place where it was made, sufficient proof of such conformity, applies only to certificates of acknowledgment which do not show acknowledgment good under the local statutes.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 264; Dec. Dig. § 57;* Evidence, Cent. Dig. § 1572.]

9. Acknowledgment (§ 36*)—Acknowledgment in Other States—Validity.

A foreign acknowledgment to a deed, reciting that the grantor "appeared before me, being personally known to me to be the same person described in and who executed the foregoing instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned," sufficiently conforms to the form prescribed by Civ. Code, § 1189.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 181, 182, 184–198, 221–223; Dec. Dig. § 36.*]

10. Taxation (§ 800*)—Tax Sales—Cancellation — Reimbursement of Purchaser — Tender.

The sufficiency of the amount tendered to a tax sale purchaser as reimbursement on cancellation of a tax sale is important only upon the question of the stoppage of interest and the imposition of costs, which in such cases is largely discretionary with the trial court.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1586; Dec. Dig. § 800.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by W. G. Holland against W. J. Hotchkiss and another. From a judgment for plaintiff from orders refusing a new trial, and to vacate the judgment and render a different judgment on the findings, defendants appeal. Judgment vacated, order denying new trial reversed, and cause remanded.

Carter & Carter, for appellants. Geo. Cosgrave and Frank Kauke, for respondent.

SHAW, J. This is an action to quiet title and determine adverse claims to a section of land. The plaintiff proved a title derived from the United States. The defendant Hotchkiss claims title solely under two deeds from the state of California to one Barthold, executed by the county tax collector of Fresno county, purporting to be made in pursuance of sales and deeds to the state for delinquent taxes. Barthold afterward conveyed the land to Hotchkiss. The defendant Canty claims a right to purchase from Hotchkiss the undivided one-half of the land.

The judgment of the court below was that the plaintiff is the owner of the land, and that his title thereto be quieted as against the defendants, that the defendants have no right, title, or interest in the land, and that they be enjoined from asserting any title, claim, or equity thereto. It further adjudged that the plaintiff be required to pay to the defendant Hotchkiss within 30 days the sum of $327.58. That sum is the amount, without interest, of the sums paid by Hotchkiss and Barthold to the state as purchase money and for taxes on the land accruing after the sale to the state. Plaintiff alleged a tender thereof by him before suit, and refusal by defendant to accept the money. Hotchkiss set up these payments in his answer, and asked that, if plaintiff was adjudged the owner, the judgment for him "be made upon the condition" that he repay these sums, with interest, to the said Hotchkiss. The judgment was not made conditional, nor was Hotchkiss given interest on the money paid, or any lien upon the land for the sum the judgment requires plaintiff to pay to him. Hotchkiss and Canty appeal from the judgment, also from an order refusing a new trial, and from an order denying their motion to vacate the judgment and render a different judgment upon the findings.

[1] The original tax sales upon which the defendants' claim rests were made in 1893 and 1894. That for the north half of the section was in July, 1893; that for the south half in July, 1894. At these respective dates the law provided that, if property sold for delinquent taxes was not redeemed within the time allowed by law, no deed could be made to the purchaser in pursuance of such sale, unless the purchaser had, 30 days before applying for such deed, given notice to the owner or occupant of the land of the amount due and the time when he would apply for the deed. Pol. Code, § 3785; St. 1891, p. 134. The deed by the tax collector to the state for the north half of the section was made on November 1, 1898; that for the south half was made on July 18, 1899. The deeds from the state to Barthold, based on these tax sales and deeds to the state were made on April 14, 1905. The notice required by section 3785, as aforesaid, was not given in either case. The failure to give these notices makes the deeds of the tax collector to the state and his subsequent deeds, based thereon, on behalf of the state to Barthold, inoperative and void. They conveyed no title. This proposition was fully considered and decided in Johnson v. Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181. See, also, King v. Samuel, 7 Cal. App. 63, 93 Pac. 391; Wetherbee v. Johnston, 10 Cal. App. 264, 101 Pac. 802. The appellants concede this. Their principal point is that as successor of the purchaser at the tax sales Hotchkiss is entitled not only to reimbursement of the sums paid by him and Barthold in discharge of taxes regularly levied and assessed against the land and which had become valid liens thereon, but also to interest thereon from the respective dates of such payments, and that the repayment thereof should have been enforced before judgment, or at least that it should have been made a condition precedent to the taking effect of the judgment in favor of the plaintiff. The question is whether the rule that he who seeks equity must do equity applies to suits in equity to set aside a tax sale or tax deed, or to suits under section 738 of the Code of Civil Procedure in which a judgment for the plaintiff will, in effect, cancel or annul such sale or deed. The decisions on the subject in this state are inconsistent. The same point is involved in several other cases filed of even date herewith. We therefore deem it proper to consider the question at some length.

[2] It is now firmly settled by our decisions that where a property owner applies for equitable relief against the public authorities, as, for example, to restrain proceedings for the collection or enforcement of taxes assessed against it, or to enjoin the execution of a tax deed or to cancel a lien or charge for taxes, of record against his land, and it appears that all or some part of the tax charged is justly and equitably due from the plaintiff, or chargeable upon the land, he must, as a condition of obtaining such relief, first pay or offer to pay the amount justly due, or he must be required to do so before the relief to which he shows himself entitled is given. Couts v. Cornell, 147 Cal. 560, 82 Pac. 194, 109 Am. St. Rep. 168, and cases there cited; Grant v. Cornell,

147 Cal. 565, 82 Pac. 193, 109 Am. St. Rep. 173; Trippet v. State, 149 Cal. 530, 86 Pac. 1084, 8 L. R. A. (N. S.) 1210; Savings, etc., Soc. v. Burke, 151 Cal. 616, 91 Pac. 504; San Diego, etc., Co. v. Cornell, 151 Cal. 198, 200, 90 Pac. 1130.

The rule applicable in suits by a property owner against the purchaser at a tax sale, or his grantee or assignee, to quiet title, or to cancel the certificate of sale or the deed thereon, or a suit against such parties, under section 738 of the Code of Civil Procedure, to determine the adverse claim, is not so well established. In some such cases the application of the rule has been denied, in others it has been limited, and in still others the rule has been enforced.

The question first arose in Hibernia Soc. v. Ordway, 38 Cal. 679, a suit to foreclose a mortgage. The defendant Anderson held a tax title, and in virtue thereof had obtained judgment against the mortgagors, in ejectment, for possession. The tax title was held invalid because of irregularities in the sale. The court said: "That where the tax is valid, but the sale irregular, equity will not cancel the tax deed at the suit of the owner of the land without a tender of the taxes to the purchaser, is not denied." Such relief was there denied because Anderson had fraudulently conspired with the two mortgagors to hold the tax title for them in order thereby to bar the mortgage lien, thus violating the other maxim that equity will not relieve one who does not come into court with clean hands.

In Harper v. Rowe, 53 Cal. 233, the defendant claimed under a tax deed which was void because the state tax for the year 1863, included in the charge for which it was sold, was wholly unauthorized. He also claimed under a tax sale for taxes of 1875 which was invalid because the sale was for a sum greater than the legal charges. The action was brought to determine adverse claims, under section 738, Code of Civil Procedure. The court declined to say whether or not this was an action in equity, but, conceding that it was, said: "If the sale is absolutely void, the payment of the tax by the purchaser stands on the footing of a voluntary payment, not made at the request of the owner of the land, and which he is under no obligation to refund. If the tax sale was not void, but only irregular in some respects, and if the owner should go into equity to cancel the sale, and to compel a purchaser in good faith to surrender the evidences of his title, it is possible that the court would not grant relief except on condition that the purchase money was refunded. But that would be a very different case from the present." It is somewhat difficult to understand this reasoning.

[3] No proposition is better settled than this, that proceedings to sell property for taxes are to be strictly followed, and that, if there is any material irregularity in the assessment or in the subsequent proceedings, the sale, and the certificate and deed based thereon, are absolutely void. In view of this principle, the phrase, "if the tax sale was not void, but merely irregular in some respects," seems meaningless in the connection in which it is used. If there is no material irregularity, the grantee in the tax deed will have the title, and cannot, nor need he, ask reimbursement. If there is a material irregularity, his deed is void. The only explanation is that the court was referring to cases where the tax itself was void, so that, in point of law, the land had not been relieved of any burden by the tax sale. In that case, this was true of only a part of the tax in question. The remark seems to have no application except to that part.

Greenwood v. Adams, 80 Cal. 74, 21 Pac. 1134, denies the right to repayment or to a conditional judgment, in these words: "Parties who purchase property at tax sales acquire the title to the property if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law; but if not so, they acquire no rights *to the property* which either a court of law or equity can enforce." (Italics ours.) The sale in question was void because of an irregularity in the assessment; the owner not having been properly named therein. In Kittle v. Bellegarde, 86 Cal. 556, 25 Pac. 55, the judgment canceling a street assessment sale, but not directing reimbursement to the purchaser for money paid, was affirmed, but the equity rule aforesaid was not discussed or mentioned, and it appears that the assessment upon which the sale was made was utterly void. Dranga v. Rowe, 127 Cal. 506, 59 Pac. 944, was a suit against the city of San Diego and others to quiet title. The city answered separately, alleging a lien for taxes assessed upon the property, and praying that no judgment be made quieting plaintiff's title, except on condition that the tax be paid. The city was the sole appellant. It was held that the tax was void. The opinion then states that the appellant claims reimbursement under the equity rule, as if the purpose was to discuss and decide the point. But it then decides the case by affirming the judgment, without further mention of the question. It decides the case, but does not decide the question except by implication. It may be added that the appeal presented a case against the city alone and the decision is directly in the teeth of Couts v. Cornell and the other like cases first above cited, and it must now be considered as overruled by those cases.

The last decision of this court on the precise point is Ellis v. Witmer, 134 Cal. 249, 66 Pac. 301. Witmer had bought a lot at a sale by the city treasurer to satisfy a bond issued upon a street assessment. The owners sued Witmer and the treasurer to cancel the certificate, and restrain the execution of a deed thereon to Witmer. It was held that the assessment and bond were valid, but that the sale was void. The judgment was reversed because the plaintiffs had not offered to pay the amount due on the bond, and because the court below had not inserted such condition in the judgment. The court said that the plaintiffs "cannot successfully invoke the assistance of a court of equity against the irregularities in the sale complained of, unless on the condition of paying what is due from them."

There are two decisions on the subject by the District Court of Appeal of the Third District. In the first—Flanagan v. Towle, 8 Cal. App. 229, 96 Pac. 507—the court quoted and followed the rule as stated in Ellis v. Witmer, supra. In the other case—Hotchkiss v. Hansberger, 15 Cal. App. 603, 115 Pac. 957—that court overruled Flanagan v. Towle and followed the decision of the Supreme Court in Greenwood v. Adams, supra. It distinguished Couts v. Cornell and other similar cases, including Ellis v. Witmer, by the statement that they were suits against public officials where some tax was justly owing to the state or city, apparently failing to observe that Ellis v. Witmer was a suit against a purchaser and the city treasurer, and that the assessment was owing to the purchaser, and not to the city.

[4] The confusion thus apparent seems to have arisen from the failure to observe the difference between the cases where the tax purchaser is the actor and those in which relief in equity is sought against him. If the purchaser, claiming title under his tax deed, sues for possession of the land, or if, perceiving that the deed is invalid, he sues the owner to recover the tax paid, as money paid to his use, the general rule is that he cannot prevail, that the rule of caveat emptor will be strictly applied against him, that a proceeding to assess and collect taxes creates no contract by the owner to pay the tax assessed, and that the law will not imply a contract by the owner to refund such tax to one who has paid the same upon a tax sale which is void, and this is true in cases where the tax was legally assessed but the proceedings to sell defective, as well as where the assessment, itself, is unauthorized and void, or where the tax had been previously paid. Mr. Pomeroy says: "In the first place, the rule only applies where a party is appealing as actor to a court of equity in order to obtain some equitable relief. * * * The rule may apply, and under its operation an equitable right may be secured or an equitable relief awarded to the defendant which could not be obtained by him in any other manner—that is, which a court of equity, in conformity with its settled methods, either would not, or could not, have secured or conferred or awarded by its decree in a suit brought for that purpose by him as the plaintiff." 1 Pom. Eq. Jur. § 386. The doctrine is thus stated in Cooley on Taxation: "The rule of caveat emptor applies to tax purchasers. The purchaser at a tax sale will therefore lose what he had paid if his deed is subject to fatal infirmity. This is the rule unless the statute recognizes an equity in him and provides for it. * * * Unless the statute in terms gives it, the purchaser will have no lien on the land for the sum paid on the purchase." Pom. Eq. Jur. p. 1017. The author here speaks concerning rights which the purchaser can enforce by action, not of limitations in equity upon the right of the owner to sue for a cancellation of the sale or deed. As to the latter, he says: "In vacating a tax or a sale for taxes as a cloud upon title, it is proper to require the complainant to pay any sum that is either a legal or an equitable charge against him, and which will be affected by the decree. And this will be required, although an action against him for such sum would be barred by the statute of limitations. If the tax were wholly illegal in its essentials, of course, no such requirement could be made, for it would not be supported by any equity." 2 Pom. Eq. Jur. p. 1455. And further: "As in removing cloud, he who seeks relief against a tax deed must pay or offer to pay whatever taxes, interest, costs, etc., are justly chargeable against the land, and payment will be required by the decree; otherwise, where the taxes were absolutely void." 2 Pom. Eq. Jur. p. 1458. These we consider accurate statements of the true rule. A large number of cases are cited in the footnotes. We have not deemed it necessary to examine them all. The following will be found to support the text: Farwell v. Harding, 96 Ill. 32; Gage v. Nichols, 112 Ill. 269; Phelps v. Harding, 87 Ill. 445; Barnett v. Cline, 60 Ill. 205; Adams v. Castle, 30 Conn. 404; Lancaster v. Du Hadway, 97 Ind. 566; Morrison v. Jacoby, 114 Ind. 84, 14 N. E. 546, 15 N. E. 806; Montgomery v. Trumbo, 126 Ind. 332, 26 N. E. 54; Peckham v. Millikan, 99 Ind. 355; Knox v. Dunn, 22 Kan. 683; Browne v. Finley, 51 Neb. 468, 71 N. W. 34; Dillon v. Merrian, 22 Neb. 152, 34 N. W. 344; Wood v. Helmer, 10 Neb. 65, 4 N. W. 968; Boeck v. Merriam, 10 Neb. 201, 4 N. W. 962; Powers v. Bank, 15 N. D. 469, 109 N. W. 361; Lohr v. George, 65 W. Va. 249, 64 S. E. 609; Toothman v. Courtney, 62 W. Va. 185, 58 S. E. 915. We have found no well-considered case to the contrary. For statements of the general rule that "he who seeks equity must do equity," see 1 Story, Eq. Jur. (13th Ed.) § 64e; 1 Pom. Eq. Jur. §§ 385, 388.

[5] In view of this weight of authority and the inconsistency of our own cases on the subject, the decisions which deny the applications of the rule to tax cases should be deemed overruled, and the correct principle declared. Where the owner comes into equity asking equitable relief to remove or cancel a tax deed or sale as a cloud upon his title, or to obtain a judgment which, in ef-

fect, will invalidate such sale or deed, the court should refuse any relief except upon the condition that he first repay to the tax purchaser, or his grantee or assignee, the taxes, penalties, interest, and costs justly chargeable upon the land and which the purchaser has paid at the sale, or afterward upon the faith of it, with legal interest from the time of such payment, less rents received, if any, if the purchaser has been in possession.

Respondent suggests that this rule is applicable only in suits which, under the division of actions between courts of law and equity formerly prevailing in England, would have been cognizable only in equity, that an action to determine adverse claims under section 738, Code of Civil Procedure, being an action authorized by statute, is an action at law, in which the equity rule cannot be enforced. It is sufficient to say on this point that the decisions hold that the rule applies in such actions to the same extent as in suits of the character formerly cognizable in equity to remove a cloud or cancel an instrument. Benson v. Shotwell, 87 Cal. 60, 25 Pac. 249; Hancock v. Plummer, 66 Cal. 338, 5 Pac. 514; Brandt v. Wheaton, 52 Cal. 433.

[6] It will be observed from the statements of the rule above given that the defendant who has removed incumbrances or paid claims which the plaintiff ought justly to repay to him as a condition of obtaining the equitable relief sought by the suit is entitled to interest on the sums so paid, and to have the repayment secured to him in some manner. This may be done either by requiring such repayment to be made or deposited in court before giving the judgment, or by inserting in the judgment a clause that it shall not take effect until such repayment be made. The judgment in the present case did not do either. The latter mode may properly be adopted in cases where the defendant is directed by the judgment to do something himself, as to execute a prescribed deed, or release, or where the judgment directs the officers of the court to cancel a deed or enter satisfaction of a lien of record, as and for the defendant in case he refuses. But in cases where the judgment declares and adjudges the title outright the more convenient and effective method is to require restitution to be made by the plaintiff before or at the time of rendering the judgment. The defendant Hotchkiss was entitled to a judgment allowing interest in addition to the principal and by inserting a clause which would have made his claim for restitution effectual and the judgment conditional and dependent upon reimbursement to him.

[7] Appellant makes the further objection that the plaintiff's evidence did not show that the title to the land was vested in him. This objection is based on alleged defects in the certificates of acknowledgment of two deeds comprising a part of plaintiff's chain of title. The objections are without merit. In one of the deeds the officer certified that the grantor "acknowledged to me" the execution of the deed. The statutory form for such certificates in force at that time did not contain the words "to me." The effect is the same and variation is immaterial.

[8, 9] The other deed was acknowledged before a notary public of the state of Washington. Our law authorizes a notary of another state to take acknowledgments of deeds conveying lands within this state. Civ. Code, § 1182, subd. 4. Section 1189 of the Civil Code provides that an acknowledgment taken without the state in the manner provided by the law where it is made is good in this state. It further provides that the certificate of the clerk of a court of record of the county where such foreign acknowledgment is made, to the effect that such acknowledgment was taken in accordance with the laws of the place where it was made, is sufficient proof of such conformity. Compliance with this formality was not made in the case of this deed. The provision of section 1189 in regard to certificates of the clerk is applicable only to cases where the certificate of acknowledgment does not show an acknowledgment which would be good under our own statutes. If it would be good here, and the officer is one authorized by our statutes to take proof of acknowledgments without the state, no certificate from the clerk of the other state is required. The notary certified that the grantor "appeared before me, being personally known to me to be the same person described in and who executed the foregoing instrument and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned." As acknowledgment seldom succeeds, or even accompanies, actual delivery to the grantee, it is clear the word "executed" in the statutory form prescribed (Civ. Code, § 1189) should not be construed to include such actual delivery. But the words used, taken altogether, mean substantially the same thing as the word "execution" and the certificate is sufficient. Jamison v. Jamison, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; McIntire v. Board, 5 Bin. (Pa.) 296, 6 Am. Dec. 417; Hall v. Thompson, 1 Smedes & M. (Miss.) 443, 489; Davar v. Cardwell, 27 Ind. 478; Woodruff v. Garner, 27 Ind. 4, 89 Am. Dec. 477. Substantial compliance with the statute is sufficient, and, if the words used are equivalent in meaning to those prescribed, the certificate is good. Reed v. Bank of Ukiah, 148 Cal. 96, 82 Pac. 845; Duckworth v. Watsonville, etc., Co., 150 Cal. 534, 89 Pac. 338. The fact that it also certified to the sealing of the instrument does not vitiate the acknowledgment, although such sealing is unnecessary in this state.

[10] There are no other points requiring notice. The record shows the amounts paid by the defendant as taxes on the lands to be $327.58. This does not include interest.

It includes payments of taxes accruing after the sales, amounting to $134.80, but the dates of these payments do not appear, and the interest accrued thereon cannot be computed. Enough appears, however, to show that the amount tendered by the plaintiff did not cover the principal and interest of the purchase money and the subsequent taxes paid by defendant and his grantor. This is important only upon the question of the stoppage of interest (Civ. Code, § 1504; Leet v. Armbruster, 143 Cal. 668, 77 Pac. 653), and the question of the imposition of costs, which, in such cases rests largely in the discretion of the trial court (Gray v. Dougherty, 25 Cal. 282). A new trial will be necessary, but it should be limited to the inquiry as to the amount of the payments made by Hotchkiss and Barthold and interest thereon, to which defendant is entitled before judgment quieting plaintiff's title is made. All other facts involved in the case were fully tried and found by the court, and the evidence shows that as to them no other result should follow. The court, upon rendering judgment, will, of course, again consider the question who should pay the costs of suit in the trial court, and may take additional evidence on that point.

The judgment is vacated, and the order denying a new trial is reversed, so far as the question of the amounts paid by the defendant and his grantor and interest, the deposit of the same in court, and the right to recover costs of suit are concerned. The cause is remanded for a new trial of these issues alone. The findings on all other issues are to stand. The court below is directed, after determining these questions, to proceed with the case, and to render judgment in accordance with this opinion.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(162 Cal. 391)

JOHNSON v. CANTY. (S. F. 5,738.)

(Supreme Court of California. March 25, 1912.)

1. Taxation (§ 788*)—Tax Deeds—Validity—Evidence.

One relying on a tax deed that can be issued only after notice to the owner is bound to establish the giving of such notice as part of his proof of title; the deed itself not being even prima facie proof that the notice was given.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

2. Taxation (§ 750*)—Tax Deeds—Notice to Purchaser—Necessity.

A deed executed to a state for delinquent tax lands is void if 30 days' notice in writing to the owner of intention to apply for the deed was not given, as required by a then existing law.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.*]

3. Taxation (§ 679*)—Tax Sales—Purchase by State and Resale—Validity—Notice to Owner.

A deed from the state under a sale by a tax collector of lands purchased by the state at delinquent tax sale is void where the sale was made May 5, 1905, where notice of the sale was not given by mail as required by Pol. Code, § 3897, as amended by Act March 1, 1905 (St. 1905, p. 31), effective May 1, 1905.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

4. Courts (§ 35*)—Probate Courts—Presumption of Regularity.

The same presumption exists in favor of the acts of the superior court when exercising its probate jurisdiction as in ordinary litigation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 140, 141, 145; Dec. Dig. § 35.*]

5. Judgment (§ 495*)—Probate Courts—Proceedings—Presumption of Regularity.

Under Code Civ. Proc. §§ 1704, 1706, 1719, which require a certified copy of a decree of distribution to be recorded, and provide that from such filing notice of the contents is imparted, and under section 1704, which provides that a probate order or decree need not recite the facts or performance of acts upon which jurisdiction depends, a decree of distribution affords presumptive evidence of the court's jurisdiction to render it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

6. Taxation (§ 829*)—Tax Sales—Cancellation—Reimbursement of Purchaser.

On cancellation of an invalid tax sale, the purchaser is not entitled to reimbursement for a survey of the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1643, 1644; Dec. Dig. § 829.*]

7. Taxation (§ 739*)—Tax Sales—Cancellation—Charge Against Purchaser.

On cancellation of an invalid tax sale, the purchaser is chargeable with net profits received from the land.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1476, 1477; Dec. Dig. § 739.*]

8. Taxation (§ 814*)—Tax Sales—Cancellation—Judgment.

A judgment canceling an invalid tax sale should have awarded the purchaser absolute reimbursement for his proper charges, it being improper to provide for return of the money to plaintiff if not accepted by the purchaser within 30 days.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1612, 1613; Dec. Dig. § 814.*]

In Bank. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by J. K. Johnson against D. J. Canty. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed in part and remanded, with directions.

Carter & Carter and William A. Barnhill, for appellant. Frank Kauke and Geo. Cosgrave, for respondent.

ANGELLOTTI, J. This is an appeal from a judgment in favor of plaintiff and from an order denying defendant's motion for a new trial in an action brought by plaintiff to quiet his alleged title to certain lands in Fresno county. The action was commenced May 12, 1909. The complaint contained, in addition to the general allegations ordinarily used in such complaints, allegations substantially as follows: On May 7, 1909, plaintiff tendered and offered to pay to defendant $150 and such further sums as defendant may have expended in the matter of the payment of taxes and other incumbrances on said land, with interest thereon, demanding at the same time that defendant release the land from his alleged claim thereto, or in any appropriate form or manner quitclaim the same to plaintiff, offering to pay the reasonable costs and charges for making such release or quitclaim. Defendant refused to accept such money so offered in satisfaction of his claim. Plaintiff offers to pay any such sum as the court may find should be paid. The defendant by his answer denied plaintiff's claim of ownership, denied that he had no interest in the land and denied the alleged tender, but admitted that he refused to release his claim. He further set up the tax proceedings under which he claimed, and alleged himself to be owner of the land by virtue thereof. He asked for a decree quieting his alleged title against plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The trial court found all the allegations of the complaint to be true and all the allegations of the answer and cross-complaint to be untrue. It further found in response to the allegations of tender, etc., that "prior to" May 7, 1909, defendant expended by reason of taxes and purported taxes, etc., the sum of $168.75, and had received as income from the products of the land $52.35, leaving the sum of $116.40 which had not been repaid to him, but all of which was offered and tendered by plaintiff on May 7, 1909. Plaintiff, in compliance with the views expressed by the trial court to that effect in its conclusions of law, having deposited said sum of $116.40 with the clerk of the court for defendant, judgment was given in favor of plaintiff, reciting said deposit, and decreeing that plaintiff is the owner of the property, that defendant has no interest therein, and that defendant be enjoined from asserting any interest therein. It was further ordered therein that said sum of $116.40 be paid to defendant upon his accepting the same and giving a receipt therefor in full payment of any claim by reason of the said expenditures by him, and that, in the event that said money is not accepted and receipted for within 30 days from date, the right of the defendant to said sum shall cease upon the expiration of said 30 days, and the same shall be returned to plaintiff. This judgment was given and entered on November 30, 1909, and the appeal from the judgment was taken May 28, 1910.

[1, 2] Upon the trial, plaintiff, having introduced his evidence tending to show absolute title in himself, and the tender alleged in his complaint and defendant's refusal thereof, rested. Defendant thereupon attempted to establish title under his alleged tax proceedings. He offered in evidence two purported deeds to the state, one dated July 18, 1899, based upon a sale made to the state in the year 1894 for the taxes for the year 1893, and one dated February 1, 1896, based upon a sale made to the state in the year 1886 for the taxes for the year 1885. At the date of the respective sales to the state shown by these deeds, namely, July 3, 1894, and March 9, 1886, a statute of this state required as a condition precedent to the execution of a deed to the purchaser that the purchaser must give to the owner of the property 30 days' notice in writing of his intended application for a deed on account of the sale to him, and make proof of such service to the tax collector, and that no deed "shall be issued by the tax collector" to the purchaser in the absence of such proof. No evidence was offered in connection with these deeds to show that any such notice was given by the purchaser (the state) to the owner before the execution of the deeds, and no pretense is made that any such notice was ever given. It is settled that one relying on a tax deed that can be issued only after the giving of such notice is bound to establish the giving of the notice as a part of his proof of title, and that the deed itself is not even prima facie proof that the notice was given. Miller v. Miller, 96 Cal. 376, 31 Pac. 247, 31 Am. St. Rep. 229; Reed v. Lyon, 96 Cal. 501, 31 Pac. 619. That the giving of such notice was essential in the case of these deeds, because the law in force at the time of the respective sales required it, even though the state was the purchaser, is settled by Johnson v. Taylor, 150 Cal. 201, 88 Pac. 903, 10 L. R. A. (N. S.) 818, 119 Am. St. Rep. 181, where the whole matter is exhaustively discussed. The trial court sustained the objections interposed to the deeds, one of which was the want of proof of such notice. In view of what we have said, the ruling was correct.

[3] Defendant also offered in evidence a deed from the state of California to himself based upon a sale made by the tax collector on May 5, 1905, under authorization from the state controller. As in Buck v. Canty, 121 Pac. 924, and Canty v. Staley, S. F. No. 5,196, 123 Pac. 252 (this day filed), no showing was made as to the giving of such notice by mail as was required by section 3897, Political Code, as amended March 1, 1905 (St. 1905, p. 31); the deed affirmatively showing that the only notice given was the notice by publication in a newspaper. Objection to the introduction of such deed was sustained by the trial court, one of the specific grounds of objection being the want of proof of such notice by mail. Upon the authority of the cases last cited, it must be held that the objection was properly sustained.

[4, 5] The property involved was originally the property of one Lucio M. Tewksbury, under whom plaintiff claimed as a successor in title. A link in plaintiff's chain of title was the decre of distribution in the matter of the estate of said Tewksbury, who died intestate, made by the superior court of Alameda county, Cal., on August 10, 1886. To show this, plaintiff offered in evidence a certified copy of such decree, to which defendant objected on various grounds, the only one warranting notice being that there was no showing that the court had acquired jurisdiction of the estate. The trial court overruled the objection, and this ruling is assigned as error. It is well settled in this state that the same presumption exists in favor of the acts of the superior court done in the exercise of its probate jurisdiction, as exists in favor of its acts in ordinary litigation between parties. It is provided by our statute that it is to be presumed "that a court or judge acting as such * * * was acting in the lawful exercise of his jurisdiction." Code Civ. Proc. § 1963, subd. 16. It is to be borne in mind that we have no statute prescribing, as in the ordinary action, what papers shall constitute "the judgment roll" or "record" of a judgment or order in probate proceedings in the courts of this state. We can see no good reason why a decree like the one received in evidence in this matter should not be held to afford presumptive evidence of the jurisdiction of the court to render it. In Estate of Schandoney, 133 Cal. 387, 65 Pac. 877, this court applied the presumption above stated in a guardianship proceeding, quoting Freeman on Judgments, § 124, as follows: "Nothing shall be intended to be out of the jurisdiction of the superior court but that which expressly appears to be so. Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon a collateral attack that the court, if of general jurisdiction, acted correctly and with due authority, and its judgment will be as valid as though every fact necessary to jurisidiction affirmatively appeared." See, also, Estate of Eikerenkotter, 126 Cal. 54, 58 Pac. 370. It is expressly provided by our statute that a certified copy of a decree of distribution must be recorded in the county recorder's office (Code Civ. Proc. § 1719), and that from the time of such filing notice is imparted to all persons of the contents thereof (Code Civ. Proc. § 1706). It thus appears to have been contemplated that the decree itself should afford evidence of the transmission of the title of deceased. It is expressly provided by section 1704, Code of Civil Procedure: "Orders and decrees made by the court, or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute book of the court." It is not questioned, of course, that a judicial record of this state may be proved by the production of a copy thereof, "certified by the clerk or other person having the legal custody thereof." Code Civ. Proc. § 1905.

There is no other matter requiring notice, save such questions as are presented regarding the reimbursement of defendant for moneys expended by him. The question what rule should be applied in such matters has been fully and exhaustively discussed in the opinion of this court in Holland v. Hotchkiss (S. F. No. 5,710) 123 Pac. 258 (this day filed), and it will only be necessary to apply the rules there laid down to the facts of this case.

[6, 7] The evidence sufficiently supports the finding that defendant has paid out only $168.75 on account of matters for which he could equitably claim reimbursement as a condition precedent to plaintiff's having a decree quieting his title. This excludes $75 testified by defendant to have been paid for a survey of the land, for which, of course, he was not entitled to be reimbursed. It includes, according to defendant's own testimony, interest on the money paid by him to the state for the property to the date of the tender, May 7, 1909. There were no data upon which to found a conclusion as to the time of the other expenditures, $30.53 and $32.59, and consequently no foundation for the allowance of interest on such payments. The evidence was also sufficient to support the conclusion that defendant had received $52.35 net profits from the land, which should be deducted from the $168.75. The conclusion that plaintiff should reimburse defendant to the extent of $116.40 was therefore correct.

[8] In view of what we have said, the judgment was correct, except in so far as it provided for the return to the plaintiff of the $116.40 deposited with the clerk of the court for the defendant, if not accepted by the defendant within 30 days. The money should have been awarded absolutely to defendant. without condition of any kind. We cannot determine from the record whether this money has been returned to the plaintiff as required by the judgment, because of nonacceptance by the defendant. The judgment should have concluded with the words: "It is further ordered, adjudged, and decreed that the said sum of $116.40, which has been deposited and is now in the possession of the clerk of this court, be paid over to the defendant."

It is ordered that the judgment be reversed, with directions to the trial court (1) in the event that the $116.40 deposited with the clerk of the court for defendant is still under the control of the clerk to give a new judgment in the precise terms of the original judgment, with the exception of all that part thereof that follows the paragraph thereof last above quoted; (2) in the event that said $116.40 has been returned to plaintiff, to require plaintiff as a condition precedent to the entry of judgment in his favor to again pay said sum to the clerk of the court for defendant, and, if plaintiff fails to make such payment within 30 days after order requiring him to do so is made, to dismiss this action, but, if he makes such payment within said time, to thereupon enter the judgment, in the form already above prescribed.

The order denying a new trial is affirmed. Appellant shall not recover his costs of appeal.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

(162 Cal. 382)

CAMPBELL v. CANTY. (S. F. 5,341.)

(Supreme Court of California. March 25, 1912.)

1. Taxation (§ 679*)—Tax Deeds—Resale by State—Notice—Sufficiency.

A deed from the state made May 5, 1905, covering lands deeded to the state for delinquent taxes, July 3, 1902, is invalid, where notice of such sale and deed was not given as required by Pol. Code, § 3897, as amended by Act March 1, 1905 (St. 1905, p. 31), effective May 1, 1905.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. Trial (§ 395*)—Findings—Sufficiency.

A finding that all the allegations of the complaint are true, and that all the allegations of the answer are untrue, is equivalent to a specific finding as to each allegation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934, 939; Dec. Dig. § 395.*]

3. Appeal and Error (§ 1071*)—Harmless Error—Findings.

A judgment for plaintiff in a suit to quiet title is not subject to reversal for error in findings, where the tax deed relied upon by defendant is void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

4. Taxation (§ 814*)—Tax Deeds—Cancellation—Reimbursement of Purchaser.

The rule that one who seeks equity must do equity applies to suits in equity to set aside a tax sale or tax deed, and to suits under Code Civ. Proc. § 738, in which judgment for plaintiff will in effect annul or cancel such sale or deed, and hence a judgment of cancellation without first requiring plaintiff to repay or pay into court for defendant the sum paid by him upon a tax sale with interest from the date of payment, was erroneous.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1612, 1613; Dec. Dig. § 814.*]

5. Appeal and Error (§ 1151*)—Disposition of Cause—Modification.

A judgment canceling a tax deed will not be reversed for error in failing to require plaintiff to repay to defendant $6.15, being the amount paid by him for the land with interest, where plaintiff consents to a modification of the judgment on the Supreme Court deciding that repayment should have been awarded, and where the question of reimbursement was an unimportant incident of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498–4506; Dec. Dig. § 1151.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Mary Campbell against D. J. Canty. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Modified and affirmed.

Royle A. Carter, William A. Barnhill, and Carter & Carter, for appellant. Geo. Cosgrave and Frank Kauke, for respondent.

SHAW, J. The complaint states a cause of action in the ordinary form under section 738 of the Code of Civil Procedure to determine adverse claims to 160 acres of land in Fresno county, alleging that plaintiff is the owner, and that defendant asserts a claim thereto without right. The answer denies the allegations of the complaint, and alleges that the defendant is the owner under and by virtue of a sale and deed to the state for delinquent taxes and a subsequent sale and deed by the state to the defendant in pursuance of the tax sale. The court found that the plaintiff was the owner of the land, and gave judgment for her quieting her title, unconditionally, and for costs of suit.

[1] The validity of the sale to the state for the delinquent taxes need not be considered. It was made on July 3, 1897. The deed to the state in pursuance thereof was made on July 3, 1902. Upon the authority of the decision of this court in bank in Buck v. Canty, S. F. No. 5340, decided February 10, 1912 (121 Pac. 924), the sale and deed from the state to the defendant are obviously invalid. This sale and deed were made on May 5, 1905, by the tax collector of the county, in pursuance of notices previously given in accordance with the law in force prior to the enactment of the amendment of March 1, 1905, to section 3897 of the Political Code (St. 1905, p. 31). That amendment took effect five days before the sale, the notices given did not comply with its requirements, and for the reasons given in Buck v. Canty the sale was unauthorized by the law in force at the time it was made and is consequently void. The decision of the court below that the defendant had no title to the land was therefore correct.

[2, 3] In addition to the allegations of ownership in plaintiff, the complaint avers that the defendant claims to have paid taxes on the land and to have a lien thereon for the sum paid, and that the plaintiff, on March 25, 1908, and before suit, had tendered defendant $50 in satisfaction of said claim, which defendant refused. The answer admits the tender and refusal. The findings are in the general form that all the allegations of the complaint are true and all the allegations of the answer untrue. This is the equivalent of a specific finding as to each allegation of the answer as well as those of the complaint. They are contrary to the evidence so far as the averments in the answer regarding the sale for taxes to the state and the sale and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

deed to the defendant by the state, in pursuance of the tax sale, are concerned. But as the deed from the state to the defendant is void, as matter of law, for the reason above stated, the inconsistency does not call for a reversal of the judgment or order.

[4] The defendant makes the objection that the court below should have required the plaintiff first to repay, or pay into court for the defendant, the sum paid by him upon the tax sale, with interest from the date of payment, or should have declared the same a lien on the land in favor of the defendant. The amount paid was $5.11, which, with interest from May 5, 1905, to the time of the aforesaid tender, amounts to $6.15. The question is whether the rule that he who seeks equity must do equity applies to suits by the landowner in equity to set aside a tax sale or tax deed, or to suits under section 738 of the Code of Civil Procedure in which a judgment for plaintiff, will, in effect, annul or cancel such sale or deed. The same question is fully considered and decided in Holland v. Hotchkiss and Canty (S. F. No. 5,710) 123 Pac. 258, this day decided. We there decide that the rule applies to actions of this character by the owner and that repayment of the taxes, penalties, and costs paid and interest thereon to the purchaser or his successor must be offered or required before, or as a condition of, the judgment in favor of the owner. Upon the authority of that case, we hold that the court erred in failing to require this repayment or to make adequate provision for it in the judgment.

[5] It is plain that this relief was not the main object of the appeal, or more than a rather unimportant incident of it. The plaintiff in her brief consents to a modification of the judgment by the Supreme Court, in the event that it should reach the conclusion that repayment should have been awarded to the defendant. Technically, upon the record, a new trial might be necessary, for, although the tender is admitted, the payment is denied, and the court below by its general method of drawing the findings has declared that the payment was not made. This is directly contrary to the evidence and to the admissions of the plaintiff. Doubtless it was an inadvertence. The sum involved is too small to justify a new trial, or the imposition of costs upon the respondent, or any further litigation between the parties concerning it, if it can be avoided. In these circumstances we think the better way to dispose of the case is to accept the offer of plaintiff to a modification of the judgment. As the defendant neither in the court below nor at any time offered to accept the money tendered, he should not have costs of appeal.

It is therefore ordered that the judgment of the court below be modified by adding thereto the following: "This judgment is made upon the express condition, anything hereinbefore said to the contrary notwithstanding, that the plaintiff shall pay to the defendant, or deposit in court to be paid to defendant on demand, the sum of $6.15, the same to be in satisfaction of all claim of the defendant under and by virtue of the sum paid by him at the sale of said land to him by the tax collector of Fresno county for the state of California, and in satisfaction of the taxes for which said land was sold to the state by said tax collector on July 3, 1897, and until such payment is made this judgment shall have no force in favor of said plaintiff." And, as so modified, the judgment is affirmed, without costs against the respondent.

We concur: ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

162 Cal. 471

In re BALDWIN'S ESTATE. (L. A. 2,925.)

(Supreme Court of California. March 30, 1912. Rehearing Denied April 29, 1912.)

1. TRIAL (§ 168*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

A directed verdict is proper when, on the whole evidence, the court would be compelled to set a contrary verdict aside as unsupported by evidence, and to warrant a directed verdict it is not necessary that there should be an absence of conflict in the evidence; but if there is a conflict it may not be a substantial one.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 376–380; Dec. Dig. § 168.*]

2. APPEAL AND ERROR (§ 927*)—JUDGMENT ON DIRECTED VERDICT—REVIEW OF EVIDENCE.

A party appealing from an adverse judgment on a directed verdict is entitled to every reasonable inference which can be drawn from the substantial evidence in his favor; but evidence, to be substantial, must be credible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

3. MARRIAGE (§ 22*) — COMMON-LAW MARRIAGE—EVIDENCE—PRESUMPTIONS.

The common-law rule that, where a man and woman lived together as husband and wife and held themselves out as husband and wife, and by their conduct to each other and to the world established an unquestioned repute that they were married, a presumption that they were married arose, obtained in California before the Codes, and is recognized by Code Civ. Proc. § 1963, subd. 30, declaring that it is a disputable presumption that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. § 22.*]

4. MARRIAGE (§ 40*) — COMMON-LAW MARRIAGE—PRESUMPTIONS—EVIDENCE.

The presumption of marriage arising at common law and recognized by Code Civ. Proc. § 1963, subd. 30, from proof of repute and cohabitation, is disputable; and where it conflicts with a higher presumption, such as the presumption of innocence, where a charge of bigamy is based on a marriage resting on cohabitation and repute, it falls.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 58–69, 79; Dec. Dig. § 40.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. MARRIAGE (§ 22*)—COMMON LAW—REPUTE —COHABITATION.

The repute and cohabitation necessary at common law to create a presumption of marriage must be uniform and general, and cannot be established, except by open and undoubted acts of the parties.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. § 22.*]

6. MARRIAGE (§ 22*)—MUTUAL AGREEMENT—STATUTES.

Civ. Code, § 55, declaring that marriage is a personal relation arising out of a civil contract, but consent alone will not constitute a marriage, and it must be followed by a mutual admission of marital rights, does not modify the requirements of the common-law rule that the repute and cohabitation necessary to create a presumption of marriage must be uniform, general, and open, and there must be evidence that the parties assumed the relation of husband and wife, treating each other as married, and so conducting themselves as to have full repute among their friends and associates to be married.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. § 16; Dec. Dig. § 22.*

For other definitions, see Words and Phrases, vol. 5, pp. 4390–4398; vol. 8, p. 7717.]

7. MARRIAGE (§ 50*)—MUTUAL AGREEMENT—EVIDENCE—SUFFICIENCY.

Evidence *held* not to establish a marriage by mutual agreement.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79–89; Dec. Dig. § 50.*]

In Bank. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

In the matter of the estate of Elias J. Baldwin, deceased. From a decree denying the petition of Beatrice Anita Baldwin, otherwise known as Beatrice Anita Turnbull, for partial distribution, she appeals. Affirmed.

Isadore B. Dockweiler and Hutton & Williams (Walter B. Grant and Walter L. McCorkle, of counsel), for appellant. Bradner W. Lee, Gavin McNab, Henry T. Gage, W. I. Foley, Gibson, Trask, Dunn & Crutcher, Garret W. McEnerney, and Hull McClaughry (James L. Robison and Walter Rothchild, of counsel), for respondents.

HENSHAW, J. Elias J. Baldwin died, leaving a vast estate, which is in process of administration in the probate court of the county of Los Angeles. Beatrice Anita Baldwin, otherwise known as Beatrice Anita Turnbull, appeared by her guardian (she at that time being a minor, though she has since attained her majority) and petitioned for partial distribution of the estate to her as a pretermitted child of deceased. Civ. Code, § 1307. A jury was impaneled to try the issues presented by this petition and the opposition thereto filed by the admitted heirs at law, and, after the taking of voluminous testimony, the trial judge withdrew the cause from the consideration of the jury, and directed the jury to return a verdict for the contestants, stating the reason therefor to be that, "as matter of law, the evidence in this case falls far short of the requirements necessary to constitute a marriage."

[1] The conditions under which the course pursued by the court in this instance is held to be proper are defined by a series of uniform decisions of this court, to which it will be sufficient to make reference. The doctrine of scintilla of evidence is rejected, as it is by the courts of the United States. Com'rs of Marion County v. Clark, 94 U. S. 278, 24 L. Ed. 59. A directed verdict is proper, unless there be substantial evidence tending to prove in favor of plaintiff all the controverted facts necessary to establish his case. In other words, a directed verdict is proper whenever, upon the whole evidence, the judge would be compelled to set a contrary verdict aside as unsupported by the evidence. To warrant a court in directing a verdict, it is not necessary that there should be an absence of conflict in the evidence; but, if there be a conflict, it must not be a substantial one. To the support of these incontrovertible declarations of the law, we need do no more than cite Lacey v. Porter, 103 Cal. 597, 37 Pac. 635; Davis v. Cal. St. R. R. Co., 105 Cal. 131, 38 Pac. 647; O'Connor v. Witherby, 111 Cal. 523, 44 Pac. 227; Los Angeles, etc., Co. v. Thompson, 117 Cal. 594, 49 Pac. 714; White v. Warren, 120 Cal. 322, 49 Pac. 129, 52 Pac. 723; Estate of Morey, 147 Cal. 495, 82 Pac. 57; Estate of Chevallier, 159 Cal. 161, 113 Pac. 130.

Appellant's position and contention are the following: Her mother was married to Elias J. Baldwin. The marriage was null in law, illegal and void, by reason of the fact that at the time it was contracted or entered into Elias J. Baldwin was the husband of a living wife, to whom he had been joined by a solemnized marriage (Civ. Code, § 61). As the issue of this marriage null in law, she is the legitimate offspring of Elias J. Baldwin under the rule of section 1387, Civil Code, which declares that "the issue of all marriages null in law, or dissolved by divorce, are legitimate." She is a pretermitted child of Baldwin, entitled to share in his estate, notwithstanding the disposition of that estate made by his will. Civ. Code, § 1307. Essential to the consideration of the evidence which must be had is section 55 of the Civil Code, which, at the time of the asserted marriage between Elias J. Baldwin and appellant's mother, Lillian A. Ashley, read as follows: "Marriage is a personal relation arising out of a civil contract to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage. It must be followed by a solemnization or by a mutual assumption of marital rights, duties or obligations." Admittedly the asserted marriage between Baldwin and the mother of this appellant was not solemnized. It is said to have been a marriage entered into by mutual consent under a written contract, which consent was followed by a mutual assumption of marital rights, duties, and obligations.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

At the threshhold, respondents deny the applicability of this section to the admitted facts in the case. They insist, and challenge a contrary declaration, that there can be and could have been no marriage of any kind when one of the parties to it was incapable of contracting, by virtue of a legal, existing marriage; that in terms section 55 limits the application of its language to "parties capable of making the civil contract" of marriage, and that, under the conceded facts, no marriage ever known to common or statute law could arise: that, when section 61 of the Civil Code declares that a subsequent marriage, contracted under such circumstances, is "illegal and void from the beginning," the word "marriage," as there used, is but a loose, though convenient, way of expressing the true meaning, which is that of a "subsequent *attempted* marriage." To this appellant makes answer that section 1387, Civil Codé, in declaring that the issue of all marriages null in law are legitimate, is designed to meet precisely such a case as the one at bar, and so to relieve the laws of this state from the workings of the unjust rule which would visit the sins of the parents upon the innocent children. And it is said that this view finds support in Graham v. Bennett, 2 Cal. 503; Sharon v. Sharon, 75 Cal. 25, 26, 16 Pac. 345; Blythe v. Ayres, 96 Cal. 582, 31 Pac. 915, 19 L. R. A. 40; Estate of Gird, 157 Cal. 540, 108 Pac. 499, 137 Am. St. Rep. 131. These considerations, however, may be passed over without determination, and the case considered from the point of view most favorable to appellant; that is to say, the point of view which would hold the provisions of section 1387 of the Civil Code to be applicable to the conditions here admittedly existing. This may be done, we say, without impairment of the rights of any of the litigating parties, because, if there was no marriage in fact between E. J. Baldwin and Lillian A. Ashley, the determination that section 1387 of the Civil Code is applicable to such a marriage as is here asserted would neither injure respondents nor benefit appellant.

We are still further influenced to refrain from this consideration by reason of the fact that, to stop what was becoming a public scandal and a reproach to the state, the Legislature, 17 years ago, amended section 55 to read: "Consent alone will not constitute a marriage; it must be followed by a solemnization authorized by this Code." Wherefore we indulge the not unreasonable hope that this case will prove the last of a most malodorous brood.

[2] And thus we are brought to a consideration of the evidence. This consideration will be had with due regard to the rules of law governing conflicts in evidence, and to the rights of the appellant to receive every reasonable inference which can be drawn from substantial evidence in her favor. But it will also be had with due recognition of the fact that evidence, to be substantial, must be humanly credible.

From the nature of the case, the evidence on behalf of appellant could not be and was not her own. Substantially all of the evidence was that of her mother. That evidence, as the attorneys for appellant view it, establishes the following, which this court is told it is "bound to take as true": Lillian A. Ashley (now by marriage Lillian A. Turnbull) is the mother of appellant. She was born in 1868 in Vermont. Her father owned a small stock farm. He died when she was about 15 years old. She continued to live on the farm with her mother for a few years. She was at all times interested in race horses, and her father received newspapers and magazines devoted to turf matters. She went to Boston to be treated for an injury to her spine, leaving her mother still upon the farm. Her mother died in 1890; the daughter being at that time still in Boston. She was educated, and had taught school in Vermont, and was keenly desirous of further education. She was of puritanical training and temperament. She began an innocent correspondence with the noted millionaire and breeder of race horses, Elias J. Baldwin, in an effort to secure a memento from him of one or another of his famous animals. While in Boston, she was for a time supported, wholly or in part, by a Mr. Balch, a married man and a friend of her deceased father, who paid over to her moneys which he owed for horses which he had purchased from either her father or mother. Mr. Balch's death cut short this source of income, and she became dependent for her living upon her own exertions. She entered the family of a Mr. and Mrs. Thompson, people of refinement, living at Winchester, near Boston, who had lost their only child, a daughter, by death, and who took her in as a companion. As a result of the innocent, though desultory correspondence which she had conducted with Baldwin, whom she had never seen, Baldwin called at the Thompsons' in 1891, was received by Mrs. Thompson and Miss Ashley, and spent a few hours in conversation with them. He invited them both to come to California and visit him, without expense to them, at one or another of his hotels. Miss Ashley was then about 23 years of age, but was ardently desirous of pursuing her studies and acquiring a higher education. Her ambition was to enter Wellesley College. All this was discussed in the conversation at the Thompson home, and Mr. Baldwin spoke of his willingness to aid her in procuring an education, and, indeed, of his willingness to adopt her as his daughter. Baldwin went away, and Miss Ashley continued to write to him often, without receiving letters in response. She spoke in these letters of his "promise to educate her" and of his "promise to adopt her." These letters are the outpourings of an innocent girl's mind. She had been her father's pet, and she desired in the same way, but only in the same way, to become the petted child of Baldwin. No pure-minded person can read these letters which are in evidence and find in them any indicia of immorality or improper motives.

She came to California with a Raymond excursion party and reached Los Angeles. This was on February 20, 1893. She had previously written to Baldwin that she was coming, asking him to meet her at Colton. He did not meet her, but subsequently, while she was in Los Angeles, sent her $25 to make the trip to San Francisco, where he was. She arrived in San Francisco upon the evening of March 2d. She was met by Baldwin, and by him conducted to his hotel, where she was registered by him as "Mrs. Ashton, Boston." She was assigned to rooms above the suite of apartments occupied by Baldwin himself. Baldwin showed her about the hotel and returned with her to her rooms. There they talked about sundry matters, but in particular, about Baldwin's desire that she should permit him to adopt her, and that she should remain in California as his daughter. She knew, or at least believed, that Baldwin was a married man, and knew, or at least believed, that he was the father of grown daughters. Notwithstanding that her letters to Baldwin were filled with expressions of her desire that he should adopt her, she declined his proposal, giving as a reason that she had a beautiful home in the East, and her intention was to return to it to finish her education. (She was at that time over 24 years of age, and had no home in the East, beautiful or otherwise, as she had ceased some time previously to be a member of the Thompson household, and had been living at a hotel.) Baldwin kissed her affectionately that evening upon parting. They spent a part of the next day, March 3d, in driving about the city. Baldwin dined with her that evening in her room, after which they went together to the theater. After the theater, they went to Baldwin's suite of rooms—rooms where Baldwin told her that he lived and made his home. They had champagne at supper, of which they drank moderately. Baldwin was affectionate and kissed her. She having refused to become his adopted daughter, Baldwin asked her finally how she would like to marry an old fellow like him. (He was then 65 years old.) He told her that he was all alone in the world. She had believed up to that moment that he was a married man, and so declared, saying to him, "Why, Mr. Baldwin, I supposed you were married." He informed her that he was legally divorced, and had no one to love him or care for him. He urged an immediate marriage. She demurred. She insisted upon a marriage before a minister or a judicial officer. He "argued" that a marriage paper, made out and signed by the two of them, would be equally binding and just as good. So they "were married there in that way." Baldwin took some hotel stationery, dated it March 3, 1893, and wrote on it: "'I, Elias Jackson Baldwin, do take Lillian Alma Ashley to be my lawful wedded wife,' and he signed it. And he wrote, 'I, Lillian Alma Ashley, do take Elias Jackson Baldwin to be my lawful wedded husband,' and he told me to sign it, and I signed it. * * * Then he folded the paper and gave it to me, and he said that was just as good a marriage certificate as any minister could give me; that I was his wife." Miss Ashley had come to San Francisco with a suit case. This suit case, which had contained her personal effects, was in her room on the floor above. For this reason, the bridal night was spent there; Baldwin going to her rooms, carrying his nightrobe. Here the narrative pauses, while we turn to the consideration of the evidence offered by respondents.

Again we repeat that this presentation is in full recognition of the rule governing conflicts of evidence. It is not its purpose to weigh the conflict, where such conflict exists. It is proper, however, to say, that in some instances the testimony of Mrs. Turnbull must be rejected as incredible. In all instances, it is necessary that the evidence be presented to throw light upon the second chapter to which we will shortly come, the chapter that deals with the asserted married relations of these two people; for we are called upon to consider a marriage claimed by appellant to have been effectuated without solemnization, but by a consent, followed by the mutual assumption of marital rights, duties, and obligations. The existence of this marriage is denied; the assumption of the marital rights, duties, and obligations is likewise denied. Wherefore the characters of the two parties to the asserted marriage become an important consideration in determining the real nature of the relationship which existed between them. For, while as has been said, it is contended upon the part of appellant that the evidence establishes that Lillian A. Ashley was a pure, innocent, confiding girl, who yielded to the embraces of Baldwin solely in the belief that she was legally his wife, the contention of respondents in this regard is that she was a designing and mercenary wanton, who had been the mistress of other men, one of whom, at least, she had blackmailed, and that she voluntarily entered into a fugitive and meretricious relationship with Baldwin, thinking nothing of matrimony, but solely of money.

Taking up the life of Miss Ashley in 1889, respondents introduced evidence to show, and contend that they have overwhelmingly shown, the following facts: Miss Ashley lived in Boston in 1889 as the mistress of Wesley P. Balch, a horseman. He died by suicide in November, 1890. Being thus thrown upon her resources, she renewed her letter writing to Baldwin, which she had allowed to flag or lapse. Thus, in March, 1891, she writes to Baldwin: "But when he [Balch] died, and by his own dear hand too, I shall never forget the deep sorrow it has cast over my life. Left alone in a great city, homeless and friendless, no money, no income now. * * * I have led such a carefree dependent loving life, that to find myself dependent upon my own resources and alone, it nearly kills me. * * * It is impossible for me to exist very long unless I have some one to love and who in turn cares very tenderly for me. * * * But somehow I feel that I wish we might mutually agree and you could love and care for me as he did (but he held my property). You would be obliged to care for me with your own property or means, for I have none now. However, I would always be an obedient girl. I should mind you and love you so truly if you would adopt me in this manner as he did. * * * Will you adopt me in this way and care for me with your own money, pay all my bills and love me very fondly in a nice manner? If so, I know I shall be very fond of such a benefactor."

In 1889 she wrote a letter, hereinafter quoted, to Lewis Leach, of the Fair Grounds Association at Fresno, Cal., a man whom, also, she had never met—a respectable elderly man of about 65 years of age. She admits having written this letter and similar letters to other horsemen throughout the United States, whose acquaintance even she had never made. She wrote a similar letter to Baldwin.

"28 Union Park, Boston, Mass. July 10, 1889. Mr. Lewis Leach, My dear Sir. I was born and raised in Vermont, love horses almost to destraction, am 20 years old, will be 21 the 11th of next Nov. am alone in the World, my own mistress and have got to earn my living as am not rich by any means. Saw your name in the Horseman in connection with the great International Running Race, as I want to have a horse loving friend in Cal. to secure me a nice position, also further my interests in various ways so that I can go there in the near future, I have written to *you*, My Eastern 'Prince,' is Wesley P. Balch, but as I am going to Cal. to live for a while, shall need a 'Count' on the Pacific coast. Now if you are a whole souled Youth with the 'Ducats' good figure, and fair looking face, write me & enclose Photo, and on receipt of same, will tell you more about Yours truly, Miss L. A. Ashley—or 'The Blonde.'"

To Baldwin, after the death of Balch, she wrote numerous letters, from which the following are extracts: "You see I really have not lived in Boston since Mr. Balch died, am 16 miles out with a Widow lady & her dog. We don't agree very well, and I hate to be dependent upon her, & I wish I could go back in Town and take my pretty apartments in 9 Rutland Sq. again, and because I cannot go (for I have not the ducats), I am unhappy. For I had an income from my property when Mr. B. was alive. I want to tell you all my 'woes' and perhaps you might make me very happy. I guess I should hug you if you was here, and did make me happy. But as long as you are not I can say so, eh. Please write on receipt of this. * * * You said in one of your letters that would try to be my friend and see that I do not want for anything. Please then let me go back to my pretty rooms and girlish carefree life again, for I am so weary of this place. Will you? I will send you a nice letter every week and then when you do come east next summer, you will find a happy Girl to greet you in Boston, Mass. Will you adopt me this way, and care for me with your own money, pay all my bills and Love me very fondly in a nice manner, if so I know I shall be very fond of such a Benefactor. * * * However, by your letters I really believe you to be a Gentleman of Honor, and so nice that I can't help caring for you. The most stubborn wills can be won by love. * * * I have thought that if I were to go back to Town to my Rooms it might not be wise unless I could find some way of accounting for my means of Support for People know I lost my Property by Mr. Balch's death, at least they know it in Rutland Sq. I might find rooms in some other nice Christian family or Perhaps board to some Hotel, or else say I had unearthed a rich Uncle in California, who was going to adopt me when He came East this commin Summer. I will leave you to suggest, and I will always obey you. * * * I have not been myself at all, because am cared for as a little child, not capable of taking care of myself, and no wonder I drank Chloral last April and tried to drown myself. You would do the same or more, if you were only a girl surrounded by a lot of old 'gone by' Society Ladies, who were lecturing you to death by their tongues if they ever saw a Gentleman speak to you, now a spirited girl like I, objects to being always kept down in this way and never have a Gentleman friend, so this time I just run away, and my sole object was to run right to your arms and ask peace and Protection. But my money gave out, and I could not go on without the Ducats, so have waited for you so patiently as my only Hope from being taken back to Boston. * * * Oh if only you could telegraph me the money to come to you. I would be in San Francisco as fast as steam could fetch me. * * * I ran away from Boston Aug. 5th to Hornellsville, N. Y., left there two days later for Richmond, Va., stopped over Sunday in Harrisburg, Pa., staid at the Commonwealth Hotel, told Mr. Russ, the Prop'r that had run away from home, and was going to Richmond, Va., that my funds had given out, etc., but would like to stop over Sunday as I do not believe in travelling on the Sabbath if one can possibly avoid it. I suppose my laughing girlish way won him over, and he asked me if I was running away to meet my Lover to get married. I only laughed, and thought my, if he only knew how the old ladies that support me keep me from having one single lover, he would not be guilty of asking such a question as that. When I came away I done a very naughty thing I realize now, for I told him if I did not send him the money, $4.50 in three weeks, to charge my Expenses to you. Now am I not a fraud? But my dear old Pet, you see I thought I should have a chance to get to 'Frisco' before then, and with a 'Hug and Kiss' fix it all right with you. But such is life so do not blame me too hard, will you? I enclose the bill to you now. Please write me soon and direct to my own name, No. 9 Rutland Sq. Boston. Send me the ticket or money and I will surely come to you. Lovingly Yours, Lillian A. Ashley."

All this and much more was before she had ever seen Baldwin. Subsequent to his visit at the home of the Thompsons, she wrote as follows: "Hope all your business will go to suit you, and you wont forget me and my Wants again. I shall think of you all the time now and dream of you too I am afraid. I am going in Town to meet a young lady and go shopping in the morning, and Mr. and Mrs. T. will go up to the mountains for three days. Now don't you wish you had stayed. Write soon. With a Hug and Kiss, Lillie. Please write something of your former intentions of adopting me if I pleased you and your wife, etc., make it read nice and write me all the impressions you had of 'Yours truly.' Lovingly Yours, L. A. A."

There are many more similar outpourings of this puritanically innocent mind; but these will suffice as exemplars, and we turn to another of her life phases. In May, 1892, she met Colonel Pope, and as a result of this meeting, or of this and subsequent meetings, she received from him through his attorney, who was a witness in the case, large sums of money. Her explanation is that Pope lured her to a bedroom, under pretense of taking her to a respectable private lunchroom, and attempted a rape upon her; that he failed utterly in his wicked design and deeply repented of it; that he was a very philanthropic man, and, actuated by the combined motives of philanthropy and remorse, he forced money from time to time upon her—money which she was reluctant to receive, and which at times she refused to receive. Upon the other hand, her own letters, over the authenticity of which there cannot be the slightest doubt, disclose and declare with nauseating circumstantiality of detail that she was the mistress of Pope, had willingly submitted to his embraces, and thereafter had instituted a system of blackmail, so that Pope called to his aid his attorney, who, with a detective, effected an arrangement with Miss Ashley, whereby she was to be paid $200 per month, if she would not annoy Pope by writing to him (Pope being a married man with a family of children), and would keep away from Boston. In receipt of an income from this source, she left the Thompson home and established herself in a hotel in Boston, explaining to the Thompsons that a millionaire "up the Hudson" had become enamored of her and engaged to her, and was giving her money on condition that she travel. It is to W. A. Redding, the attorney for Pope, that she expressed her desire to go to California; and it was he that gladly gave her the money. She is thus living upon the fruits of Pope's unsolicited bounty, or upon the blackmail which she wrung from him, when she entered into her marriage contract with Baldwin. And here we may anticipate the future narrative to make a statement which will, of course, occasion not the slightest surprise. The written contract was never produced. The explanation of its nonproduction, however, *is* surprising. Baldwin, as we have seen, gave it to her, but a day or two after asked her to give it to him, which she did, he saying that "girls were so careless about such things," and, of course, she never saw it thereafter. And to finish this outline, it should be said that Baldwin was 65 years of age, with daughters grown up and married, and one of them a grandmother, with his home in San Francisco, where lived his wife, married by a church ceremony, and known to the world to be his wife. Baldwin's own reputation as a libertine, if not national, was certainly more than local; and there is evidence that Miss Ashley knew this, though as Mrs. Turnbull she unhesitatingly denies this fact, as, it may be said, she denies nearly every other fact or circumstance which may be thought to weigh against her.

The story of the assumption of marital rights, duties, and obligations following the marriage contract, entered into at midnight of March 3d, next follows. The two slept in the rooms assigned to Miss Ashley as "Mrs. Ashton," not even in the apartments of Baldwin, which he had declared to be his "home," had breakfast in the woman's room next morning, and later in the day went to a gallery, where she was photographed. That night he again slept with her in her room, and on the 5th, 6th, or 7th of March, the bride being unable to name the date with more particularity, he left her and went to Bakersfield alone. During this period, but one person is declared to have seen them together in her room, and that person an unknown negro waiter, who served their breakfast. She was still registered as "Mrs. Ashton." Her explanation of this is that the secrecy was maintained at Baldwin's request. On March 8th she went alone to Los Angeles, and herself registered at the Westminster Hotel as "Miss L. A. Ashley, Boston, Mass." Two days later Baldwin joined her at the hotel. They lunched together in the public dining room, and took a train for San Diego. They arrived at San Diego on March 10th, and Baldwin there did the registering. The registration was "E. J. Baldwin and Daut." They were assigned adjoining rooms, whether connecting or not she did not remember; but they slept together at night. Three days were spent in driving about the city. The only person whom she recalls having met at the hotel was Mr. Babcock, the proprietor. She says that Mr. Baldwin introduced Mr. Babcock to her as Mrs. Baldwin, notwithstanding the fact that the register showed them as father and daughter. And once more, anticipating for a moment, it may be said that Mr. Babcock testifies that he was introduced to her by Baldwin as his daughter; and that in a seduction suit which Miss Ashley subsequently brought against Baldwin she caused the deposition of Mr. Babcock to be taken, and it was taken for the express purpose of showing that Baldwin had so introduced her as his daughter, and that the register showed this precise fact. Leaving San Diego upon March 12th, and traveling together to Los Angeles, Baldwin left her at the depot and told her to proceed to the Oakwood Hotel at Santa Anita and there register as Miss Ashley. The Oakwood Hotel was owned by Baldwin, was near one of his home places, the great Santa Anita ranch, where lived one of his married daughters, Clara Stocker, with her husband. Miss Ashley went to the hotel and so registered. The next day she was one of a "bus party" which was driven from the hotel to the grounds and private residence of Mr. Baldwin, a mile away. She there saw Mr. Baldwin and went driving with him. During all of the time that she remained at the Oakwood Hotel, which was from March 13th until April 19th, Baldwin admittedly in the daytime was domiciled at his home upon the ranch. He was never registered at the Oakwood Hotel, where, in a single room and registered as "Miss L. A. Ashley," was his trusting, confiding, and puritanical wife. She asserts, in contrariety to the testimony of every other witness, that Baldwin came to the Oakwood Hotel at night and slept with her. She does not assert that any human being knew this, even her brother, who occupied an adjoining room. Every other witness at the trial with any knowledge of the facts, including the then lessee and manager of the hotel, swore that Baldwin never in his life spent a night in a room at the hotel. Be this as it may, and accepting Mrs. Turnbull's statement that he did so spend the nights with her there, indisputably the visits were furtive and clandestine. Upon April 19th, Baldwin having departed some days prior thereto, Miss Ashley left the Oakwood Hotel, and with her brother went to San Francisco and to the Baldwin Hotel. Here, again, she registered as Miss L. A. Ashley, or Lillian A. Ashley. She testifies that she occupied Baldwin's suite at the hotel. The evidence of the manager is that the hotel books showed an assignment to her of a room upon another floor. However this may be, she names but two persons who ever saw her in those rooms, an unnamed and undiscoverable negro servant, and George Baldwin, son-in-law of E. J. Baldwin and husband of his daughter Anita. She and Baldwin breakfasted and dined, she says, in his rooms, while she took her luncheon in the main dining room at a table where sat her brother, Anita, Baldwin's daughter, George Baldwin, her husband, Henry E. Highton, Baldwin's attorney, and Mrs. Highton, his wife. With the single exception of George Baldwin, who admittedly was fully aware that Baldwin had a wife living in a home upon California street in San Francisco, Mrs. Turnbull does not assert that during her entire stay at the hotel any one of these persons with whom she sat at the table ever knew her as other than Lillian Ashley. She thus, and under these conditions of life, remained in the hotel from April 20th until about May 17th. A few days before the last-named date, she says she overheard the name of "Mrs. Baldwin" mentioned by Anita and later by another woman. She asked Baldwin about it, and he told her he was married, and not divorced. She at once broke off all relations with him, and became ill.

Upon May 17th Baldwin left for the East. Immediately thereafter, she was told to vacate her rooms. She did so upon the 26th of May, 1893, and went East in pursuit of Baldwin. She found him upon the St. Louis race track and obtained from him $40. With this she went to Boston to see Colonel Pope. She was turned over to James R. Wood, a detective in his employ. He arranged with her that if she would go back to California and live there for a year, without annoying Pope, he would within a year buy her a home in Los Angeles for $2,000 in return for a full release to Pope from all her claims and demands. She gave the release and received the home. She was with child, which was born December 27, 1893, and the paternity of this child was charged upon Baldwin. Subsequently she brought a suit for seduction against him, in which a vast amount of documentary evidence, consisting of her letters to Baldwin and Wood and W. A. Redding, Pope's attorney, and to others, were introduced. She failed in this action. The judge who tried that case, and the courtroom clerk, testified to the genuineness of these letters, and to their having been introduced in evidence without demur or question of their genuineness upon her part, though at the present trial, whenever such a document appears to be damaging, she unhesitatingly pronounces it a forgery. Many of these letters, of course, bear the file marks of the court upon the former trial.

To fill in this outline which has been given of her testimony as to the assumption of marital rights, duties, and obligations, nothing need be added to the period from the 3d of March to the 12th of March, when she reached the Oakwood Hotel. The general course of life of herself and Baldwin there has been described according to her own testimony. The only persons whom she named as having any knowledge of the asserted marital relations while she was at the Oakwood Hotel were her brother, whose deposition taken in the seduction case, which deposition in this case he declares to be the truth, entirely negatives her assertion, a Mr. Risner, who is dead, and a Mr. Stevens, who is dead, and Mr. and Mrs. Fox, tourists from "somewhere in Wisconsin," who could not be located, a Mr. Lopez, who denied that he had ever been introduced to her at all, or that he had even known her as Mrs. Baldwin, two women, neither friends nor associates of Baldwin, and finally Mrs. Stocker, Baldwin's married daughter, herself a grandmother. Upon the trial of this action, Mrs. Turnbull's testimony was given at intervals and consumed much time in the taking. Asked concerning her meeting with Mrs. Stocker at the Oakwood Hotel, and whether Mrs. Stocker spoke to her "as she would to a mother," Mrs. Turnbull replied that she did not, adding, "I think she very likely thought I was Miss Ashley." Mrs. Stocker, of course, knew of the existence of the legally and ceremoniously wedded Mrs. Baldwin; but a few days later Mrs. Turnbull testified that Baldwin had, in fact, introduced her to Mrs. Stocker as his wife, and that at a dinner party given in her honor Mrs. Stocker leaned over and whispered to her, "Mother." Mrs. Stocker denies all this absolutely. This covers the matrimonial relationship at the Oakwood Hotel. At the Baldwin Hotel, during the time of her last residence there, George Baldwin, a cousin of E. J. Baldwin, and husband of his daughter, who knew the true Mrs. Baldwin intimately and had lived at her home for months, testified that Baldwin introduced Miss Ashley to him as his wife. He says: "He [E. J. Baldwin] asked me to say nothing in regard to the introduction he gave me. I says: 'How is that; haven't you got a wife?' And he says: 'Yes; but you can have as many as you want, if you know how to manage it.' I says: 'That is a new one on me; you can do that in Utah, but not in California.' He says, 'Don't say anything about it, George,' and walked away." Another witness, Stewart by name, said that he had met her with Baldwin in the corridor of the hotel, and Baldwin had introduced her as his wife. He was not sufficiently well acquainted with Baldwin to know at that time that Baldwin had a legal wife. Some other witnesses of similar character offered like testimony. The explanation lies, perhaps, in the evidence given by one of them, Wheatfield, who said he thought that Mrs. Turnbull was one of the women Baldwin had introduced to him as his wife. Wheatfield declared that Baldwin had introduced so many women to him as his wife that he had "got himself mixed up so on Mr. Baldwin's ladies that I would not stand here on oath and swear to any of them * * * as to being his wife, or not his wife. * * * He had a manner of introducing them that way."

During the period of time of this asserted matrimonial relationship, she was in receipt of and receipted for moneys from Colonel Pope in the name of Lillian Ashley. During this time, she wrote for and received $400 from Pope to make a trip to Australia; for it appears that Pope was quite willing to pay the larger price for the greater distance. It is uncontroverted that wherever and whenever she was called upon to write her name she wrote it as Lillian Ashley. In the seduction suit which she subsequently brought against Baldwin, and wherein she charged him with "soliciting and importuning her to have sexual intercourse with him, and, by means of artifice and promises, inducing her so to do," from the beginning to the end, in all of the explanations, examinations, and cross-examinations touching the false promises which led to the seduction, there is not one word of this asserted marriage. Moreover, in the letters which she wrote to Wood, Pope's detective, at a time when she thought that Wood would aid her in her prospective seduction suit against Baldwin, letters of a most extraordinarily intimate character, letters urging that Pope deny his intimacy with her, and that she would do the same for fear of the injurious effect which the truth would have upon her case against Baldwin, nowhere is there the slightest intimation, much less claim, of a marriage contract or of a marriage relationship.

[3, 4] The law governing the consideration of evidence offered to support a marriage, such as is here contended for, merits presentation. But, from the very simplicity and uniformity of that law, the presentation may be brief. At common law, the ceremony of marriage was religious, and to a valid marriage such ceremony was a prerequisite. But where a man and a woman lived together as husband and wife, under the name of husband and wife, held themselves out to the world as husband and wife, and by their conduct to each other and to the world thus established a common, uniform, and undivided repute that they were married, evidence of all this was accepted, not as establishing a marriage, but as raising a presumption that a marriage had taken place. The law was influenced to this end, because it always inclines to believe in fair dealing, rather

than foul; it presumes innocence and not guilt; it prefers to recognize a relationship held out to the world as honest to be honest, rather than dishonest; and it leans to the legitimacy of children. In this state before the Codes, the common-law rule obtained; and this principle of the common law was placed in the Code, and still remains there, in the declaration that it is a disputable presumption "that a man and woman deporting themselves as husband and wife have entered into a lawful contract of marriage." Code Civ. Proc. § 1963, subd. 30. This presumption at common law, as under the Code, was disputable; and whenever it conflicted with a higher presumption, as the presumption of innocence, where a charge of bigamy was based upon a marriage resting in cohabitation and repute, it fell. Case v. Case, 17 Cal. 598; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; People v. Beevers, 99 Cal. 286, 33 Pac. 844.

[5] We need not be at length to point out the requisites of conduct, deportment, demeanor, and repute necessary at the common law to supply evidence from which the presumption of marriage could arise. The subject is elaborately discussed in White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799, and the common-law authorities cited. The opinion of Lord Westbury, in Campbell v. Campbell, L. R. I. Sc. & Div. App. 200, 211, is quoted to the following effect: "Cohabitation as husband and wife is a manifestation of the parties having consented to contract such relation inter se. It is holding forth to the world by the manner of daily life, by conduct, demeanor, and habit that the man and woman who live together have agreed to take each other in marriage, and to stand in the mutual relation of husband and wife; and when credit is given by those among whom they live, by their relatives, neighbors, and acquaintances, to these representations, and their continued conduct, then habit and repute arise and attend upon the cohabitation. The parties are holden and reputed to be husband and wife; and the law of Scotland accepts this combination of circumstances as evidence that consent to marry has been lawfully interchanged. Probably, therefore, in the correct expression of the law, it would be more proper to say that cohabitation with habit and repute is a mode of proving the fact of marriage, rather than a mode of contracting marriage." And this court declares it to be "well settled that the repute which, with cohabitation, will be proof of marriage must be uniform and general, not divided and singular. If repute lacks uniformity and is divided, then such repute cannot prove a marriage." In the later case of Quackenbush v. Swortfiguer, 136 Cal. 149, 68 Pac. 590, it is repeated: "It may be said that the law is elementary that the repute which, with cohabitation, will be proof of marriage must be uniform and general, and not divided and singular, and cannot be established, except by the open, undisguised, and undoubted acts of the parties which are visible to outsiders." So much for the governing principles of the common law.

[6] The Code section did not modify the requirements of the common law. When it declared that, to constitute a marriage, consent first had must be followed by "the mutual assumption of marital rights, duties, or obligations" it did not mean that less in the deportment, conduct, and repute of the parties was necessary than had been necessary at common law. All that the common law required was still necessary. The subject is reviewed in Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; and, while holding to the requirements of the common law as here set forth, it is added: "But certainly, if consent and consummation by sexual intercourse were sufficient to constitute marriage at common law, it clearly appears to have been the intention of our Legislature to change that rule and require something more. At common law, and under statutes authorizing marriage by consent, without formal ceremony, if the parties agree presently to take each other for husband and wife, and from that time live together *professedly in that relation*, proof of these facts is held to be sufficient to constitute marriage. Certainly nothing less than this can be held to be sufficient under the latter clause of section 55. There must be evidence sufficient to show that they *assumed* the relations of husband and wife, which calls for the same degree of proof, if cohabitation be depended upon, as was required at common law to establish the marriage." In Hinckley v. Ayres, 105 Cal. 357, 38 Pac. 735, the matter is thus succinctly summed up: "There is no need here of discussing the law of marriage without solemnization, or the question: What constitutes a 'mutual assumption of marital rights, duties, or obligations,' within the meaning of section 55 of the Civil Code? The law on that subject is sufficiently settled for the purposes of the case at bar in Sharon v. Sharon, 79 Cal. 633, 22 Pac. 26, 131; White v. White, 82 Cal. 427, 23 Pac. 276, 7 L. R. A. 799; Kilburn v. Kilburn, 89 Cal. 46, 26 Pac. 636, 23 Am. St. Rep. 447; People v. Beevers, 99 Cal. 286, 33 Pac. 844, and other cases. There is no such assumption, unless the parties live together as husband and wife, treat each other 'in the usual way with married people,' and so conduct themselves as to have full repute among their intimate friends and associates to be husband and wife." And to the like effect may be cited In re Briswalter, 72 Cal. 107, 13 Pac. 164; Harron v. Harron, 128 Cal. 308, 60 Pac. 932; In re Jessup, 81 Cal. 408, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

[7] When to what has been disclosed as the conduct and life of these parties in the brief months during which the marriage re-

lationship must, if it existed, be established by this open and undivided repute, it is remembered that Baldwin's lawful wife was living in San Francisco, that in his wide circle of intimate friends and associates no one was presented to this supposititious wife, that she herself never represented or claimed herself to be his wife, that for him to have done so would have been to declare himself guilty of the crime of bigamy, and that in the communities where their fugacious and furtive intrigue was carried on it could not have been possible for the repute of their marriage to have even existed, much less to have become uniform, general, and undivided, because the very persons who alone could have established such repute knew of the existence of Baldwin's legal wife, and would have known that the pretensions of another were ill-founded (and repute to be repute must be believed), can it be said that any review of this evidence is either needful or desired? To declare that the holy state of matrimony is shown by this low, lecherous liaison, this clandestine commerce, compounded of concupiscence and cupidity, would be to the mind of woman as abhorrent as to the mind of man it is preposterous; and we express our accord with the declaration in the brief of attorneys for respondents that "to deny the trial court the right to direct a verdict in such a case and upon the facts here proved would be to deny it the right to retain its self-respect."

Lest it may be thought to have been overlooked through inadvertence, one other contention of appellant deserves brief consideration. It is, in effect, that the law requires only a *commencement* of matrimonial cohabitation of the mutual assumption of marital rights, duties, or obligations, and that once the commencement has been made the marriage is complete; that this commencement need not be public, nor need the matrimonial cohabitation continue. This is but a euphemistic way of declaring that, if a man and woman, however secretly, consent to take each other as husband and wife, and follow that consent by a single secret act of sexual intercourse, the marriage is complete. The same argument was advanced in Sharon v. Sharon, and was met and answered in the following language: "The contention of the respondent is thus expressed in her brief: 'We repeat, the first mutual act, be it of sexual commerce or the assumption of any other right, duty, or obligation of the marital relation, after the execution of the written contract of marriage, instantly establishes the relation of husband and wife.' The exigencies of her case drive her to this position. If it cannot be upheld, the conclusion reached by the court below must inevitably be wrong. Let us see to what this would lead us. It means, supposing a case, that, where a couple are associated together in the meretricious relation of man and mistress, and in the habit of meeting occasionally, solely for the purpose of gratifying their passions, while so connected they consent, no matter how informally, to marry, and thereafter continue to live precisely as before, the mere fact that sexual intercourse, under such circumstances, follows after the consent amounts to a mutual assumption of marital rights, duties, and obligations, and from that time they are husband and wife. It means, therefore, that, in some cases at least, this requirement of the statute amounts to nothing. It means that a couple may consent to marry, may live precisely as if they are unmarried and their relations meretricious; to the world they may appear to be unmarried, and their children, if they have any, appear to be bastards. If they conclude to violate their 'consent' to marriage, they may go their ways; that they were husband and wife cannot be proved, and their children are bastards indeed. *We cannot so far reflect upon the lawmaking power as to hold that such was their intention.*"

The decree appealed from is affirmed.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.

(162 Cal. 455)

WILLCOX v. EDWARDS. SAME v. PAXTON. SAME v. LEWIS. (S. F. 5,313, 5,314, and 5,315.)

(Supreme Court of California. March 30, 1912.)

1. Constitutional Law (§ 5*)—Amendment of Constitution—Effect.

The Nov. 3, 1908, amendment of Const. art. 4, § 26, forbidding sale of corporate stock on margin or to be delivered at a future day in certain cases, repealed or extinguished all provisions of the former section not re-enacted in the amended section.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 2, 8; Dec. Dig. § 5.*]

2. Constitutional Law (§ 23*)—Constitutional Provisions—Operation.

Generally a constitutional provision is not retrospective in its operation, unless clearly so intended.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.*]

3. Constitutional Law (§ 23*) — Retroactive Operation.

The amendment Nov. 3, 1908, of Const. art. 4, § 26, whereby sales of corporate stock on margin or to be delivered at a future date are unlawful only when made without intention to make actual delivery, is not retrospective in its operation, and does not validate previous contracts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.*]

4. Contracts (§ 103*)—Illegality — Repeal of Statute—Effect.

A contract void when made is not validated by subsequent repeal of the law which made it invalid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 468-476; Dec. Dig. § 103.*]

5. Constitutional Law (§ 23*)—Stock—Unlawful Sales of Stock—Right to Recover Payment.

Const. art. 4, § 26, originally provided that all contracts to sell corporate stock on margin, or for future delivery, should be void, and that money paid thereunder might be recovered. As amended November 3, 1908, the section forbids such sales only when made without intention to deliver, and prohibits the recovery of any money paid under a void contract. *Held*, that the amendment repealed the right of action to recover money paid under a contract which was void under the original section, but which would have been valid if made after the amendment; the right to sue not having become vested.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 20; Dec. Dig. § 23.*]

6. Corporations (§ 123*) — Pledges Under Void Contract—Right to Recover.

But shares pledged under a void contract, but not purchased on margin, are recoverable as not being held by the pledgee to cover a valid obligation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 481, 491, 507–512, 537, 539–546, 612, 618; Dec. Dig. § 123.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Actions by George M. Willcox, administrator of F. W. Sisson, deceased, against W. Edwards, doing business as Edwards & Co., against Charles E. Paxton, and against Frank R. Lewis. Judgment for defendants, and plaintiff appeals. Reversed, with instructions.

Charles S. Wheeler and J. F. Bowie (Nathan Moran, of counsel), for appellant. Aitken & Aitken and Bishop, Hoefler, Cook & Harwood (Alfred J. Harwood, of counsel), for respondents.

PER CURIAM. After the decision of these cases in department a rehearing was granted for the purpose of considering further the effect of the omission from the constitutional enactment of November 3, 1908 (section 26, art. 4), of the provision whereby money paid on certain prohibited contracts might be recovered. As there is no difference of opinion regarding some of the matters discussed in the opinion of the department, written by Mr. Justice Shaw, a portion thereof is hereby adopted as follows:

"In each of the above-entitled causes a general demurrer to the amended complaint was sustained, the plaintiff refused to amend, and judgment was thereupon given for the defendant. The plaintiff in each case has appealed from such judgment. The questions of law presented are the same in each case, and the facts are so far identical that it will be necessary to give those only which are stated in the complaint against Edwards. Edwards was a broker in San Francisco. Sisson and Edwards agreed that Sisson should furnish Edwards with sums of money wherewith to buy corporate stocks, not enough, however, to pay the full price thereof, and that Edwards should buy such stocks for Sisson. Edwards agreed to advance whatever additional money was required for that purpose and to hold the stocks so bought as security for the moneys so advanced by him, with interest thereon, and for his commissions for making the purchases, all of which Sisson agreed to pay. If the stocks bought depreciated so that they were not worth the amount of such advances, interests, and commissions, Edwards was empowered to sell them to reimburse himself. Under this arrangement, Edwards had bought stocks from time to time for Sisson, had received divers sums of money for Sisson for that purpose, and had advanced sums of money for him in payment thereon, the particular amounts whereof were unknown to the plaintiff administrator, but were well known to the defendant. In November, 1907, and January, 1908, the stocks bought by Edwards had depreciated, and he threatened to sell the same to repay the advances, interest, and commissions owing to him, whereupon, to prevent the making of such sales, Sisson delivered to Edwards, in pledge as additional security for the moneys so owing to Edwards, two stock certificates, representing 200 shares of the Arizona Lumber & Timber Company. These shares were owned by Sisson, and were not a part of the stocks purchased by Edwards in pursuance of the aforesaid agreement. A few days after the pledge of this stock was made Sisson died. The plaintiff is the duly appointed administrator of his estate. Edwards threatened to sell the two certificates last mentioned to obtain repayment of the moneys so due him from Sisson, whereupon this action was begun. The complaint prays for judgment directing the delivery to plaintiff of the two last-mentioned certificates of stock and enjoining the threatened sale thereof, and that Edwards be compelled to account for the moneys furnished by Sisson to him, and that judgment be given in favor of plaintiff for the balance found due upon such accounting.

"The action was begun on June 12, 1908. It was predicated on the provisions of section 26, art. 4, of the Constitution, as it then existed, authorizing a recovery of money paid on a contract for the sale of corporate stock on margin. A demurrer to the complaint was filed, and before it was disposed of the people, on November 3, 1908, adopted an amendment of section 26, art. 4, aforesaid. Thereupon an amended complaint and a general demurrer thereto were filed, and this demurrer, as above stated, was sustained by the court below. On behalf of the respective defendants, it is claimed that the amendment of the Constitution takes away all prior rights of action to recover moneys paid on contracts for margin sales of stock, and all rights growing out of such contracts.

"Prior to the amendment of November 3,

1908, section 26 was as follows: 'The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose, and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery. The Legislature shall pass laws to regulate or prohibit the buying or selling of the shares of the capital stock of corporations in any stock board, stock exchange, or stock market under the control of any association. All contracts for the sale of shares of the capital stock of any corporation or association, on margin or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction.' The section as amended on November 3, 1908, is as follows: 'The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this state of lottery or gift enterprise tickets or tickets in any scheme in the nature of a lottery. The Legislature shall pass laws to prohibit the fictitious buying and selling of the shares of the capital stock of corporations in any stock board, stock exchange, or stock market under the control of any corporation or association. All contracts for the purchase or sale of shares of the capital stock of any corporation or association without any intention on the part of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market prices on divers days, shall be void, and neither party to any such contract shall be entitled to recover any damages for failure to perform the same, or any money paid thereon, in any court of this state.' The concluding sentences of the respective sections show the changes made by the amendment which are involved in this action. The original section gives the broader description of the thing prohibited. It forbids all contracts for the sale of stock 'on margin, or to be delivered at a future day.' The new section forbids such sales only when they are made 'without any intention on the part of one party to deliver and of the other party to receive the shares, and contemplating merely the payment of differences between the contract and market price on divers days.' The contract between Sisson and Edwards, as it is alleged, was clearly a contract for the purchase and sale of stocks on margin (see Parker v. Otis, 130 Cal. 330, 62 Pac. 571, 927, 92 Am. St. Rep. 56), and as such was forbidden by the constitutional provision in force at the time it was made. But the allegations of the complaint do not show a contract which comes within the description of the thing forbidden by the amended section. The complaint does not aver that the sales were made without any intention to deliver or receive the stock, or that the parties contemplated merely the payment of differences between the buying price and the market price on a future day. Both the old and the new section declare that the forbidden contracts 'shall be void.' The contract as alleged was void under the old section, the one then in force, but it would not have been void under the new section, if it had been made after its adoption.

[1-3] "The effect of the adoption of the amendment of 1908 was to repeal or extinguish all provisions of the former section that are not re-enacted in the amended section. If it has a retroactive effect, it would validate the contract for the purchase of stocks as it is alleged in the complaint, and render it binding upon both parties. This would necessarily defeat the action to recover from Edwards the money paid thereon by Sisson, for it does not appear that Edwards is in any respect in default thereon; hence he could not be called upon to return the money paid to him thereunder and used by him in pursuance thereof, if the validity of the contract is established. The first question for determination is therefore whether or not the repeal or extinguishment of the former section had the effect of validating the contract which by it was expressly declared to be void. The general rule, applicable alike to constitutions and statutes, is that they are not to be considered retrospective in their operation, unless the intention to make them so clearly appears from their terms. Gurnee v. Superior Court, 58 Cal. 90; Watt v. Wright, 66 Cal. 204, 5 Pac. 91; Oakland v. Whipple, 44 Cal. 303; Cooley on Const. Lim. 97. The amendment is therefore not retrospective in operation, for it contains nothing to that effect.

[4] "The established rule is that, if a contract is void by the law in force at the time it is made, the subsequent repeal of the law will not validate such contract. The following cases declare this rule: Hannay v. Eve, 2 Cranch, 242, 2 L. Ed. 427; Milne v. Huber, 3 McLean, 216, Fed. Cas. No. 9,617; Mays v. Williams, 27 Ala. 267; Woods v. Armstrong, 54 Ala. 150, 25 Am. Rep. 671; Pacific G. Co. v. Dawkins, 57 Ala. 115; Mitchell v. Doggett, 1 Fla. 371; Denning v. Yount, 62 Kan. 220, 61 Pac. 803, 50 L. R. A. 103; Quarles v. Evans, 7 La. Ann. 543; Springfield Bank v. Merrick, 14 Mass. 324; Hathaway v. Moran, 44 Me. 67; Robinson v. Barrows, 48 Me. 186; Banchor v. Mansel, 47 Me. 58; Webber v. Howe, 36 Mich. 155, 24 Am. Rep. 590; Ludlow v. Hardy, 38 Mich. 690; Handy v. St. Paul, etc., Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; Andling v. Levy, 57 Miss. 58; Decell v. Loewenthal, 57 Miss. 334, 34 Am. Rep. 449; Bailey v. Mogg, 4 Denio (N. Y.) 62; New York, etc., Co. v. Van Horn, 57 N. Y. 477; Roby v. West, 4 N. H. 285, 17 Am. Dec. 423; Puckett v. Alexander, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43; Hughes v. Boone, 102 N. C. 164, 9 S. E. 286; Nichols

v. Poulson, 6 Ohio, 309; Denny v. McCown, 34 Or. 47, 54 Pac. 952; Gilliland v. Phillips, 1 S. C. 155; Hunt v. Robinson, 1 Tex. 748; Sayer v. Brown, 7 Ind. T. 675, 104 S. W. 878.

"The text-writers declare the same doctrine. 9 Cyc. 576; 15 Am. & Eng. Ency. of Law, 242; 1 Page on Cont. § 333, p. 517; Bishop on Cont. § 479; 2 Sutherland on Stats. (2d Ed.) p. 1219. Statutes changing the law relating to usury seem to constitute an exception to this rule. In Curtis v. Leavitt, 15 N. Y. 85, 152, 173, 229, 254; Woodruff v. Scruggs, 27 Ark. 26, 11 Am. Rep. 777, Iowa Ass'n v. Heidt, 107 Iowa, 297, 77 N. W. 1050, 43 L. R. A. 689, 70 Am. St. Rep. 197, Savings Bank v. Allen, 28 Conn. 97, Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 239, and Andrews v. Russell, 7 Blackf. (Ind.) 474, there were retrospective statutes expressly forbidding the party to set up the defense of usury in actions upon pre-existing contracts, or, in effect, taking away the right to make such defense. In Ewell v. Daggs, 108 U. S. 148, 2 Sup. Ct. 408, 27 L. Ed. 682, Wood v. Kennedy, 19 Ind. 68, and Parmelee v. Lawrence, 48 Ill. 339, the amended statutes merely omitted and consequently repealed by implication the penal provisions of the previous usury law. The defense of usury must be made affirmatively in some recognized mode, or it is waived. 22 Ency. of Pl. & Prac. 421, 422. The usurious contract, although said by the statute to be 'void,' is held to be only voidable at the election of the payor, and money paid thereon cannot be recovered. Matthews v. Ormerd, 140 Cal. 582, 74 Pac. 136. The general rule that the repeal of a law does not validate contracts declared void thereby is recognized and admitted in all the above mentioned cases, and the usury law is said to be an exception. The decisions are based on the ground that the right to set up usury as a defense and avoid the contract to pay principal or interest is in the nature of a statutory penalty upon the lender and comes within the rule that the repeal of a penal law instantly releases the penalty imposed, and that it is not a property right, but a mere privilege pertaining only to the remedy, which the Legislature may take away. The situation of one who has agreed to pay usury is not similar to that of the decedent here. One who sets up the defense of usury to avoid his note in not seeking to recover money which he has paid, or of which he has been deprived. He is endeavoring to avoid the payment of money which he justly owes. He is given the right to do this solely for the sake of accomplishing the public purpose of preventing the making of usurious contracts, and not to reimburse him for any outlay he has made. The decedent, on the other hand, has paid money to the broker. He had, in contemplation of the law as it then stood, suffered a pecuniary loss. He was allowed to recover the loss, whereas the one who pleaded usury to avoid payment of his debt was allowed to inflict a positive injury upon the payee.

* * *

"There are a few decisions not involving usury laws which declare that the particular contracts under consideration therein, although void by the law in force when made, were rendered valid by the subsequent repeal of the law. Washburn v. Franklin, 35 Barb. (N. Y.) 599; Central Bank v. Empire, etc., Co., 26 Barb. (N. Y.) 23; Hess v. Werts, 4 Serg. & R. (Pa.) 356; Lewis v. McElvaine, 16 Ohio, 347. The overwhelming weight of authority, as we have seen, is against these decisions. * * * The amendment to the Constitution is not made retroactive, the original section declares such contracts wholly void and not merely voidable, the vice inhered in the contract itself, and the new provision does not purport to declare such prior contracts or any contracts valid or enforceable. We are satisfied that the amendment does not validate previous contracts for the sale of stocks on margin."

[5] No doubt can be entertained on the foregoing proposition that the contract for the purchase of stocks on margin was void under the provision of the Constitution existing at the time it was made, and that it would not have been void if it had been made after the amendment in 1908 of section 26, art. 4, of the Constitution. The court, however, is convinced that the right to sue under the section as it existed when the contract was made did not survive the repeal of that part of the Constitution. To uphold that doctrine, we would be compelled to conclude that the right to sue for the recovery of money paid under a void contract for the purchase of stock was a vested right depending upon a quasi contract for the repayment of the money by the broker which arose by operation of law from the very terms of the constitutional provision as it existed when the void contract was made. Such a rule is not, we think, supported by the best reasoning nor by the weight of authority. We are here concerned with the right of action given by the section as it stood originally, but omitted from it upon its later readoption. Unless a vested right had arisen in favor of plaintiff's decedent prior to the amendment of the constitution without a saving clause, the privilege of bringing suit for the money paid on the margin contract was withdrawn by the repeal of the law granting it, and all pending litigation not prosecuted to final judgment fell for want of authority to maintain it. We have concluded that the privilege of bringing an action like this was taken away by the later enactment, and that makes it unnecessary to discuss the effect of this subsequent constitutional provision upon the status of the contract for the purchase of stock on margins. We are aware that this court has held the consti-

tutional provision giving the right to sue under the former section 26 of article 4 to be not penal but remedial in its nature (Parker v. Otis, 130 Cal. 322, 62 Pac. 571, 927, 92 Am. St. Rep. 56), and therefore that an action brought under it is not barred by the statute of limitations applicable to actions "upon a statute for a penalty or a forfeiture"; but it does not follow that being remedial the section in question confers a right that is vested before action and final judgment thereon. Nor does the expression contained in the case just cited mean that the drastic remedy formerly given to one who deals in stocks on margin contracts is not conferred for highly punitive purposes. In that case and in others to which we shall refer the court merely held that the privilege of bringing suit was not technically a "penalty" in contemplation of the statutes of limitation. Indeed, Parker v. Otis is itself authority supporting respondents' contention that the right to sue is in the nature of a privilege extended to the investor on a margin contract not merely to protect him, but to discourage that kind of gambling. The opinion contains this language: "The Constitution treats the transactions in question as harmful in their tendency, and because harmful has sought to eradicate the evil not only by declaring the contract void, but also by giving a right of action to recover the money paid under it." In Baldwin v. Zadig, 104 Cal. 594, 38 Pac. 363, 722, this court said: "Except for the provision of the Constitution, there would be no right of recovery in the plaintiff, and we think that this right of recovery must be measured by the terms of the Constitution in which it is given." In Wilson v. Head, 184 Mass. 516, 69 N. E. 317, the problems before the court were essentially the same as those presented here. That also was a suit to recover money paid under a contract for the purchase of stocks on margin which was void in law at the time it was made. By a subsequent amendment to the law, the right of recovery was limited in such manner as to make it applicable to the facts of that case. There, as here, the contention was made that the right to recovery of money paid under the void contract had vested by virtue of the law in force when the transaction took place, and could not be defeated by the subsequent enactment, but the Supreme Court of Massachusetts held that, although the statute creating the privilege to sue was remedial and not penal, it gave no vested rights which the Legislature could not take away. The opinion contains this language: "It is necessary to consider the effect of the amendments upon cases which arose prior to the enactment of the statute of 1901 and which are included in the original statute, but not included in the amended statute. Did the statute create rights which vested before the amendments were in force so that the Legislature could not constitutionally take them away? These rights were purely statutory, to recover money paid under a kind of gambling contract under which there can be no recovery at common law. Wall v. Metropolitan Stock Exchange, 168 Mass. 282, 284, 46 N. E. 1062. As was said in Corey v. Griffin, 181 Mass. 229, 232, 63 N. E. 420, 421, the statute was 'intended to suppress a well-known species of gambling. * * * The object is not to punish the winner nor to protect the loser as such, but simply to prevent this kind of gambling by subjecting the participants to a liability which, except for some great purpose of preventing injury to the public morals, would seem to be unfair and unjustifiable.' See Crandell v. White, 164 Mass. 54 [41 N. E. 101]. Such a statute does not give vested rights which the Legislature may not take away. When the remedy provided by the statute is lost by an amendment taking it away in certain classes of cases, nothing further of benefit remains in those cases. Bartlet v. King, 12 Mass. 537 [7 Am. Dec. 99]; Nichols v. Squire, 5 Pick. 168; New London Northern Railroad v. Boston & Albany Railroad, 102 Mass. 386, 389; Louisiana v. Mayor of New Orleans, 109 U. S. 285, 287 [3 Sup. Ct. 211, 27 L. Ed. 936]; People v. Livingston, 6 Wend. [N. Y.] 526, 530; Van Inwagen v. Chicago, 61 Ill. 31; Bailey v. Mason, 4 Minn. [546 (Gil. 430)]." One of the cases cited in the opinion just quoted is State of Louisiana ex rel. Folsom v. Mayor and Administrators of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. The relator, Folsom, owned certain judgments against the city of New Orleans, given as compensation for injury to property by a mob. After these judgments became final, the power of taxation by New Orleans was so changed that no money could be raised for their payment. The relator sought to compel a levy under the former law of a tax sufficient to meet his claims. It was urged that the judgments were contracts which might not be impaired by subsequent legislation. Mr. Justice Field, delivering the opinion of the court, said, among other things: "A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and, by a fiction of law, a promise to pay is implied where such legal obligation exists. It is on this principle that an action ex contractu will lie on a judgment. Chitty on Contracts (Perkins' Ed.) 87. But this fiction cannot convert a transaction wanting the consent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest. The prohibition of the federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any state action. Where a transaction is not based upon any assent of parties, it cannot be said that any state is pledged with respect to it; and no case arises for the operation of the prohibition. Garrison v. City of New York, 21 Wall. 203, 22 L. Ed. 612. There is therefore nothing in the liabilities of the city by reason of which the relators recovered their judgments that precluded the state from changing the taxing power of the city, even though the taxation be so limited as to postpone the payment of the judgments." If a judgment for tort does not vest a right arising ex contractu against a municipal corporation, a fortiori, the privilege of an individual to sue, given him more to prevent gambling than to reimburse him for money paid by him on a valid contract, is not a contractual prerogative which the Legislature may not take away before it has ripened into a final judgment. In Bartlet v. King, 12 Mass. 537, 7 Am. Dec. 99, it was held that a statute of mortmain was repealed by a later law changing the whole attitude of the state to the subject-matter of the legislation. In New London Northern R. R. Co. v. Boston & Albany R. R. Co., 102 Mass. 386, it was held that a statute vesting in railroad commissioners the powers and duties of commissioners appointed by the court in accordance with an earlier statute took away the jurisdiction of the court and its commissioners over pending proceedings. The court used the following significant language in the course of the opinion: "A statute which wholly repeals an earlier one, either expressly or by implication, without any saving clause, makes it ineffectual to support any proceedings, whether not yet begun, or pending at the time of its passage, and not already prosecuted to final judgment vesting absolute rights. The books are so full of cases illustrating this principle that the only difficulty is in making a selection." In Van Inwagen v. City of Chicago the Supreme Court of Illinois was considering an action to collect a tax for an insurance business transacted in the city of Chicago. It was held that the enabling act was repealed by a later statute, and that the cause of action for the tax was not a vested one. Mr. Justice Breese, who delivered the opinion of the court, said, among other things: "We believe the rule is well settled that, as to inchoate rights, rights not carried into judgment, and so not executed, cannot be, and are not, saved, in the absence of a saving clause in the repealing statute. The doctrine is that inchoate rights, derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute, and unless those rights have become so far perfected as to stand independent of the statute. * * * The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed, except for the purpose of those actions or suits, which were commenced, prosecuted and concluded while it was an existing law. Ray v. Goodwin, 4 Moore & Payne, 341; Dwarris on Statutes, 676."

The very language of section 26, art. 4, of the Constitution as it existed when plaintiff's decedent entered into the contracts in question, indicates, we think, an intention not to vest a right to the return of his money in one who entered into a forbidden arrangement with a broker for the purchase of stocks on margin. He was given the power to sue for the money, but there is no declaration or implication that he was entitled to it before it was recovered by such suit. The very terms of the section gave to him an inchoate right, and, as we have seen, such rights became vested only when reduced to final judgment. In Bailey v. Mason, 4 Minn. 546 (Gil. 430), it was held that a mechanic's lien, depending not on contract, but upon a statute alone for its existence, was an inchoate right which was destroyed by the unconditional repeal of the statute which created it. We might discuss many other cases to which our attention has been called, but will only mention a few typical ones. Kimbro v. Colgate, 5 Blatchf. 230, Fed. Cas. No. 7,778, was a case involving the validity of a contract made in violation of a federal statute requiring agreements of a certain kind to be stamped. It was conceded that the contract, when made, was wholly void, and that any party to it was authorized to bring suit to recover back the money paid under such purported agreement for his own benefit. The right to sue was declared to be not a penalty. Nevertheless the court said that: "As the money was paid under a contract made in violation of law, there is no ground for the recovery of it back, upon principles of the common law, and, as the statute which gave the remedy has been repealed, the cause of action and the suit must, upon established principles, fall with the repeal." The rule that if the remedy for a right created solely by statute is repealed while the right is still inchoate, and not reduced to possession, the right is lost, in the absence of a saving clause in the repealing statute has been adopted in this state. In People v. Bank of San Luis Obispo, 159 Cal. 65, 112 Pac. 866, Mr. Justice Henshaw, delivering the opinion of the court, after a review of the leading state, federal and English authorities, said: "In the case of penalties and crimes, the repeal operates to defeat all actions pending. In case of a statute conferring civil rights or powers, the repeal operates to deprive the citizen of all such rights or powers which are at the time of the repeal inchoate, incomplete, and unperfected. In the case of statutes conferring jurisdiction, the repeal operates by causing all pending proceedings to cease and terminate at the time and in the condition which existed when the repeal became operative. In cases of judgment pending upon appeal, the rule of decision is that the proceedings abate and the judgment falls."

Our attention has been called to no authority holding that a quasi contract for the repayment of money arises out of a transaction like the one which we are considering. In Palmer v. Conly, 4 Denio (N. Y.) 376, it was said that a penalty given to a landlord against one who knowingly assisted a defaulting lessee to remove his furniture from the leased premises vested in favor of the lessor, notwithstanding the repeal of the statute providing the remedy of distress for rent. That case, however, is not at all similar to the one at bar. The reason for imposing the penalty was that the wrongdoer knowingly assisted another in violating his contract with an innocent party. The College of Physicians v. Harrison, 9 Barnard & Creswell, 524, and the Company of Cutlers in Yorkshire v. Ruslin, Skinner, 364, cited in Palmer v. Conly, supra, were both cases in which the penalties were given in favor of innocent parties against the violator of the law as satisfaction to the former for actual loss Thompson v. Howe, 46 Barb. (N. Y.) 287, to which our attention has been called, was dependent upon a statute giving to a party defrauded a right of action for a penalty against the one who had practiced the fraud upon him. We have been cited also to authorities holding that where a penalty is imposed by statute on a common carrier for omitting precautionary measures, and such omission constitutes negligence, the repeal of the law commanding the precautions, after a breach thereof, does not take away a right of action in favor of a party injured by reason of the common carrier's negligence (Grey's Executor v. Mobile T. Co., 55 Ala. 407, 28 Am. Rep. 729; Graham v. Chicago, etc., Co., 53 Wis. 473, 10 N. W. 609; Bay City, etc., Co. v. Austin, 21 Mich. 410), but such authorities are not apposite to the circumstances of this case, because the relation of common carrier and shipper or passenger is contractual and applicable existing statutes are, of course, made part of every contract between such parties.

We conclude, therefore, that the special remedy conferred by the old section 26 of article 4 of the Constitution was not one arising from contract, and was not a vested right. It arose alone upon the provision of the statute imposing it. (Baldwin v. Zadig, supra.) No quasi contract for repayment of the money arose by operation of law, because such contracts are not favored, and are only declared when "principles of natural equity" or the law itself produces the obligation. Pothier on Obligations, p. 113. Therefore, the administrator had no cause of action for the money paid to the brokers under void contracts. The demurrers were properly sustained as to these causes of action.

[6] The plaintiff also sued for the delivery of certain shares of stock which were owned by his decedent, and were pledged to the brokers to secure the payment of certain sums claimed under the margin contracts. These shares were not purchased on margin. It is contended that the right to sue for the return of the money paid and the cause of action for the pledged stock are not dependent one upon the other—that the original contract being void, stock pledged in support of it could be recovered as not being held by the pledgee to cover a valid obligation, and with this contention we agree. Respondents argue that in theory these actions were exactly like Cashman v. Root, 89 Cal. 377, 26 Pac. 883, 12 L. R. A. 511, 23 Am. St. Rep. 482, in which the property pledged as security for payments on contract for purchase of stock on margin are held recoverable under the very section we have been discussing: that, as these suits depended upon the privilege of bringing an action for payments on a certain sort of contract, the withdrawal of that privilege left the plaintiff without power of recovery in these actions whatever his right to the return of the pledged stock may be if pursued in a proper suit. But the complaint in each case sets forth all of the circumstances of the transactions between Sisson and the defendants, and prays judgment for the money and the pledged stock. The contracts were void when they were made, and, as we have held, the repeal of the constitutional right to sue for the money paid under their terms did not operate to give validity to the agreements themselves. The stock, therefore, was pledged to secure advances to be made on void contracts. None of it had been actually applied to payments on such contracts before the return of the shares was demanded by plaintiff, and such demands antedated the constitutional amendment. The stock was, therefore, held without authority of law as supposed security for void contracts and according to the complaints in these cases clearly plaintiff was entitled to its return. The demurrers to the causes of action for recovery of the pledged stock were erroneously sustained.

The judgment is reversed with instructions to the superior court to permit amendments to the complaints in accordance with the views expressed in the foregoing opinion.

SHAW, J. (concurring). I concur in the judgment of reversal. I agree with the conclusion that the contracts for the purchase of stocks on margin, being void under the constitutional provision existing at the time said contracts were made, were not made valid by the subsequent amendment in effect repealing the vitiating provision. And I agree that the stocks pledged to secure these void contracts belonged of right to the pledgor, and the plaintiff is entitled to recover them. I express no opinion upon the proposition that the money paid upon the marginal contracts cannot now be recovered back by the plaintiff.

ANGELLOTTI, J. I concur with SHAW, J.

162 Cal. 493

In re FORRESTER. (Sac. 1,920.)

(Supreme Court of California. April 1, 1912.)

1. GUARDIAN AND WARD (§ 10*)—APPOINTMENT OF GUARDIAN—COMPETENCY—BURDEN.

Under Code Civ. Proc. § 1751, providing that the father or mother of a minor child under the age of 14 years is entitled to appointment as guardian in preference to any other person if found competent, a father is entitled to appointment in preference to the grandmother, unless found to be incompetent; the presumption being that he is competent.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

2. GUARDIAN AND WARD (§ 10*) — APPOINTMENT OF GUARDIAN—WHO ENTITLED.

Under Code Civ. Proc. § 1751, providing that the father or mother of a minor child under the age of 14 years is entitled to appointment as guardian in preference to any other person if competent, the father, if competent, is to be preferred to the grandmother, although the child's health and welfare would be promoted by granting guardianship to the grandmother.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

3. GUARDIAN AND WARD (§ 13*)—APPOINTMENT OF GUARDIAN—PROCEDURE.

In a contest over the appointment of a guardian for a minor child, where the court finds as a fact that the father has not maintained the child and as a conclusion of law that he is incompetent to act as guardian, a judgment granting letters to the grandmother is improper, there being no finding that the father is incompetent, and the conclusion of law being insufficient as a finding because based on the finding of his failure to maintain, which is insufficient to show incompetency.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

4. GUARDIAN AND WARD (§ 10*)—APPOINTMENT OF GUARDIAN—WHO ENTITLED.

Although Civ. Code, § 246, subd. 4, provides that a parent forfeits his right to guardianship of a minor child if he knowingly or willfully abandons or fails to maintain it, a mere acquiescence in the voluntary act of the grandparents in supporting the child does not forfeit such right, especially in view of Civ. Code, § 208, providing that a parent is not bound to compensate the other parent or a relative for the voluntary support of a child without an agreement for compensation.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

In Bank. Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Petition by Annie I. Wollam for letters of guardianship of Elsie Anna Forrester, a minor. From a judgment granting letters to the petitioner, Coover W. Forrester, father of the minor, appeals. Reversed and remanded for new trial.

R. W. Dodge, for appellant. H. R. McNoble and A. V. Scanlan, for respondent.

SLOSS, J. The respondent, Annie I. Wollam, applied for appointment as guardian of the person of the minor above named. The petitioner was the maternal grandmother of the minor; the mother being dead. The amended petition of respondent alleged that appellant, the father of the minor, was not a fit and proper person to be appointed guardian, and was incompetent to act as such. Appellant answered, denying his incompetency, and asking that he be appointed guardian.

The court below found as facts that the minor was, and had been for 15 months prior to the commencement of the proceeding, under the care of and solely supported by respondent and her husband; and that appellant, having the ability so to do, had willfully failed and neglected to maintain said minor and to provide her with the common necessaries of life. From these facts it drew the conclusion of law that the appellant is not a fit and proper person to be appointed guardian of said minor child, and is incompetent to act as such. Judgment was accordingly entered directing that letters be issued to respondent. The contestant, Coover W. Forrester, appeals from this judgment.

[1, 2] The minor was of the age of 19 months when this proceeding was instituted. Under the provisions of section 1751 of the Code of Civil Procedure, it is made the duty of the court to appoint the father or mother of a minor child under the age of 14 years, if such parent is "found by the court competent to discharge the duties of guardianship." Inasmuch as the presumption of law is in favor of competency, "the section is to be construed as if it read that the father or mother is to be appointed if not found by the court incompetent." In re Campbell, 130 Cal. 380, 62 Pac. 613. Accordingly, where the father is competent, he is entitled to letters of guardianship in preference to the grandmother, even though the court may find that the child's health and welfare would be promoted by granting guardianship to the grandmother. Guardianship of Salter, 142 Cal. 412, 76 Pac. 51. In a case like this the primary subject of inquiry is, then, the competency of the parent applying to act as guardian. If found competent, he or she must be appointed as against a more distant relative or a stranger. To this rule there appears to be no exception, except that declared by subdivision 4 of section 246 of the Civil Code. Under that section, a parent forfeits the right of guardianship if he "knowingly or willfully abandons, or having the ability so to do, fails to maintain his minor child under the age of fourteen years. * * *"

[3] In the case at bar, the court found that the appellant had willfully failed to maintain

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the child, though able to do so. It did not find as a fact that he was not competent to act as guardian. His incompetency was declared to follow as a conclusion of law from the facts found. A finding may, to be sure, be regarded as one of fact, even though mistakenly placed among the conclusions of law. But this cannot be done where it appears that the alleged finding was a conclusion drawn by the court from the facts previously found, and such facts do not, as matter of law, support it. People v. Reed, 81 Cal. 77, 22 Pac. 474, 15 Am. St. Rep. 22; Geer v. Sibley, 83 Cal. 4, 23 Pac. 220; Sav. & L. Soc. v. Burnett, 106 Cal. 540, 39 Pac. 922; Niles v. City of L. A., 125 Cal. 572, 58 Pac. 190; People v. McCue, 150 Cal. 195, 88 Pac. 899. Such is the situation here. The only finding of fact affecting the father's right to letters is that he has willfully failed to maintain his child. The failure to provide may, no doubt, be shown as one of the items of evidence bearing upon the question of competency. But it is not the same thing as incompetency, nor does it in and of itself require a conclusion that the parent is incompetent. The past failure of a parent to provide for his child may well coexist with a present ability to fully discharge all the duties of guardianship. The judgment appealed from cannot, therefore, be sustained on the ground of the appellant's incompetency.

[4] This would, however, be immaterial if the finding that the appellant had willfully failed to support his child were supported by the evidence. As has been said, such failure forfeits the parent's claim of guardianship. But we think the testimony introduced was not sufficient to justify a finding of such forfeiture. The parent's right to the custody and control of his child should not be taken from him except upon a clear showing of delinquency on his part.

The child was born in January, 1909, at Hanford. In May, 1909, the child's mother returned with it to the home of her parents (one of whom is the respondent) at Stockton. The appellant at this time went to Texas. In October, 1909, he came to Stockton, and lived with his wife and child in apartments. In the interval, the grandparents had supported the child, the appellant furnishing only a small amount of money. After three or four weeks, the wife again went to the home of her parents, taking her child with her. In April, 1910, she died. During all of this period, from October to November, 1909, to April, 1910, and until the commencement of the proceedings, in June, 1910, the child was entirely supported by its grandparents; the appellant furnishing nothing for its support. The appellant himself was in poor health, but the testimony was such as to justify the conclusion that he had the ability to earn enough to provide for the child. But the testimony of all parties agreed to the point that the grandparents had voluntarily supported the child, and that neither of them had ever asked the father to contribute. It was also shown (though this would perhaps be important only if there were a claim that the appellant had abandoned the child) that he had from time to time visited the child at the home of its grandparents, and had been deterred from further visits by warnings not to enter the house.

Section 208 of the Civil Code provides that "a parent is not bound to compensate the other parent, or a relative, for the voluntary support of his child, without an agreement for compensation. * * *" In view of this provision, we think the severe penalty of forfeiture of parental rights should not be visited upon a father who has merely permitted other relatives to voluntarily support his child, where the child is properly cared for, and no request for contribution has been made. In such case the interests of the child have suffered no injury, and the father has violated no legal duty to the relatives who have assumed the maintenance of the child. His acquiescence in their voluntary acceptance of this burden does not constitute a willful failure to support, within the meaning of subdivision 4 of section 246 of the Civil Code. The case is certainly no stronger than it would have been if the appellant had agreed with the grandparents that they should have and rear the child. In that event, the father might have reclaimed his child at any time, even though the grandparents had expended money in its support Matter of Galleher, 2 Cal. App. 364, 84 Pac. 352, and cases cited. For these reasons, the judgment must be reversed, and the proceeding remanded for a new trial. The appellant asks that the court below be directed to grant letters to him. This cannot be done, because the issue as to his competency has not been disposed of, and this issue must be determined by the trial court.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; HENSHAW, J.

162 Cal. 524

In re FLEMING'S ESTATE. (S. F. 5,869.)

(Supreme Court of California. April 3, 1912. Rehearing Denied May 1, 1912.)

1. Descent and Distribution (§ 71*)—Relationship—Burden of Proof.

In a proceeding for the distribution of the estate of an intestate, a person claiming that the intestate's real name was different from that under which he went, and that he was in fact her brother, has the burden of establishing such fact.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. DESCENT AND DISTRIBUTION (§ 71*)—RELATIONSHIP—EVIDENCE.

In a proceeding for the distribution of the estate of an intestate, evidence *held* sufficient to support a finding that a claimant was in no way related to intestate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 229–236; Dec. Dig. § 71.*]

3. APPEAL AND ERROR (§ 151*)—PARTY AGGRIEVED.

In a proceeding for the distribution of an intestate's estate, where the court on appeal has determined that a claimant is in no way related to deceased, she is not a party aggrieved, and has no standing to attack the decree on the ground that the person to whom it awarded the property was not entitled thereto.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 947–952; Dec. Dig. § 151.*]

4. APPEAL AND ERROR (§ 1169*)—VALIDITY—NECESSITY OF FINDINGS.

A judgment which is not supported by the findings is not void, but merely erroneous, rendering it reversible on an appeal by a party entitled to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4531–4539; Dec. Dig. § 1169.*]

Department 1. Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Proceedings for the final distribution of the estate of John J. Fleming, deceased. From an order denying a new trial, Ella Fleming Carter appeals. Affirmed.

R. B. Tappan and F. A. Berlin, for appellant. A. L. Frick, A. F. St. Sure, George W. Reed, and Darwin C. De Golia, for respondents.

ANGELLOTTI, J. This is an appeal by Ella Fleming Carter from an order denying her motion for a new trial of a proceeding for the final distribution of the estate of deceased, who died intestate. In her petition for distribution appellant alleged that the only heirs at law of deceased were herself, an adult half-sister of deceased, and Justine Fleming, Annie Fleming, and Ella Fleming, children of a deceased half-brother of deceased, and she asked that the whole estate of deceased be distributed to her and said Justine, Annie, and Ella Fleming. There was another petition by Ella Woodbury and three others, alleging themselves to be nephews and nieces of deceased and his sole heirs at law. Still another petition was presented by respondent A. F. St. Sure, as assignee of George A. Myles and Ann Myles, who were the brother and sister of the wife of deceased, who had predeceased him, and who were alleged to have been of the nearest degree of relationship, and entitled to take all his estate. The basis of their claim was that the property was common property of deceased and his deceased spouse while such spouse was living, and that, in the absence of blood relatives, they were entitled to take the same under subdivision 8 of section 1386 of the Civil Code. The three petitions were heard together. The trial court in its decree specifically found as to Ella Woodbury and her three copetitioners and as to Ella Fleming Carter, Justine Fleming, Annie Fleming, and Ella Fleming, that they "are not the heirs at law, next of kin, or in any way related to the said deceased, John J. Fleming, nor is any one of them an heir at law, or next of kin, or in any way related to the said deceased, John J. Fleming," and denied the petitions on their behalf. Finding further that deceased left surviving him no blood relation, or person related to him by consanguinity, it distributed the whole estate to petitioner St. Sure, the assignee of George A. and Ann Myles. Ella Woodbury and her three copetitioners acquiesced in this result, neither appealing from the same, nor inaugurating any proceeding for new trial. Ella Fleming Carter alone moved for a new trial, and has taken an appeal from the order denying such motion.

The principal question for consideration on this appeal is whether such portions of the findings of the trial court as declare that she and her three nieces, Justine, Annie, and Ella Fleming, are not in any way related to deceased, and that none of them is an heir at law of deceased, are sufficiently sustained by the evidence.

Appellant's claim of such relationship is based entirely upon the claim that the deceased was, in fact, one Richard Fleming, Jr., a son of Richard Fleming, Sr., who came from England to New Orleans, La., in 1854 or 1855 and who lived in such city until he died in the year 1869. It is not disputed that appellant is a daughter of said Richard Fleming, Sr., by his second wife, or that Justine Fleming, Annie Fleming, and Ella Fleming are the children of a deceased son of Richard Fleming, Sr., by said second wife. Richard Fleming, Sr., had a son, named Richard Fleming, Jr., by his first wife, and appellant's claim of relationship to deceased on the part of herself and her three nieces is based entirely on her claim that deceased was, in fact, said Richard Fleming, Jr.

[1] The burden of proof was upon appellant to establish the validity of this claim. The findings of the trial court were substantially that such claim was not established to its satisfaction by the evidence. Is there sufficient support in the evidence for such a conclusion? If there is, it is not to be doubted that we cannot disturb the findings, even though the evidence is such that sufficient support for a contrary conclusion might also be found therein.

[2] An examination of the evidence on this question contained in the transcript, and a consideration of the arguments contained in the brief of counsel, have satisfied us that there is no warrant for holding that the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

findings in this matter are without sufficient support in the evidence.

It is established by the evidence given on behalf of appellant that Richard Fleming, Jr., was born in England. His mother's maiden name was Bessie Kalaber. She died in England, and subsequently, in 1854 or 1855, the father, Richard Fleming, Sr., came from England to New Orleans with the boy, then a lad of four or five years of age, and there established his residence. Richard Fleming, Jr., ran away from his home when he was a small boy in company with a man named Sawyer. Evidence as to his subsequent whereabouts was very meager. John J. Fleming of Burlington, Iowa, a son of a brother of Richard Fleming, Sr., who resided in Burlington, deposed that he saw him at that place in 1863 or 1864, wearing the uniform of a Union soldier and going under the name of James Sawyer, and representing himself as having been in the Union army. This witness further said that he saw Richard Fleming, Jr., once thereafter, between the years 1880 and 1884, in Burlington, when he looked very badly, and his clothes were in a dilapidated condition, and he asked for some money, saying he was very much in need thereof. He remained there one or two days only. There was testimony that in 1884 or in 1885 he was in New Orleans for about a week, when he made himself known to his relatives, and said he was from California and said he was going back there. John J. Fleming of Burlington was of the opinion that a photograph of deceased shown him was the photograph of Richard Fleming, Jr. Certain of the witnesses who saw Richard Fleming, Jr., in New Orleans in 1884 or 1885 testified that they were of the same opinion. There was testimony on the part of these witnesses and John Fleming of Burlington, none of whom ever saw Richard, Jr., except upon the occasions already designated, as to his height, apparent age, and general appearance, the tendency of which was to show that he resembled deceased in those regards. There was also testimony of a Mrs. Sears who knew deceased in Oakland, Cal., from the year 1883, to the effect that deceased told her that he ran away from home while young and had lost sight of his folks, but knew that he had an uncle, a brother of his father, living in Burlington, and also that when deceased returned from a trip to New York, which she said he took in 1887 by steamer by way of Panama, he told her that he came back from New York by rail by way of New Orleans. There was also the testimony of two men named Valentine to the effect that deceased had told them in the late 80's that Judge Fleming of Burlington was his uncle, and they further testified that he resembled the Burlington Flemings in appearance. There was also the testimony of another witness to the effect that appellant resembled deceased in appearance. Another witness testified that deceased once told him, when he was drunk, that he was born in England, and that he had "more relatives what you think of." There was also the evidence of some witnesses to the effect that in their opinion there were certain points of resemblance between deceased and the photograph of some member of the New Orleans Flemings, which photograph was in evidence before the trial court. Such, in a general way, is the testimony relied on by appellant as showing that deceased was Richard Fleming, Jr.

The deceased resided in Alameda county, Cal., from at least as early as 1872, for he was registered as a voter of that county on September 30, 1872, to the time of his death, January 17, 1907. He always went by the name of John or John J. Fleming, never having been known in that county by any other name. His first registration showed the name to be John Fleming, and his place of nativity to be New York. His last affidavit for registration, made September 28, 1904, gave his name as John James Fleming, and New York as his place of birth. His affidavit for a marriage license made April 10, 1875, gave his name as J. J. Fleming, his age as 25 years, and his place of nativity as New York. The certificate of his marriage states him to be John James Fleming, age 25 years, of New York City, a son of James Fleming and Mary, née Smith, his wife. His record as a depositor at the Oakland Bank of Savings, furnished by himself, gave his father's name as P. Fleming, his mother's maiden name as Mary Kyley, his birthplace as New York City, and his date of birth September 15, 1850. His depositor's record at the Union Savings Bank, signed by himself, showed his mother's maiden name to have been Mary Kyley and his birthplace New York City. His depositor's record at the Central Bank, made in December, 1896, entirely in his own handwriting, was signed John J. Fleming, and stated his father's name to have been P. Fleming, his mother's maiden name to have been Mary Kyley, and his date of birth September 15, 1850. He had told several apparently disinterested witnesses that he was born and raised in New York, and was apparently quite familiar with that city, and had apparently never told anyone that he had lived in New Orleans, or had any relatives there. During his residence in Alameda county, he apparently left the state only once, and the evidence is ample to support a conclusion that this was after he sold a saloon owned by him, known as the Gem Saloon, which was shown to have been August 28, 1885. There is ample evidence to support a conclusion that he left San Francisco by a steamer for Panama, avowedly bound for New York, that he went directly to New York by this route, and returned to California within a few weeks, variously stated by witnesses from four to eight or nine. There was nothing to indicate that he passed through or visited New Orleans on his trip, other than the testimony of the New Orleans witnesses already referred to, except the testimony of Mrs. Sears that he told her he "came back from New York by rail by way of New Orleans and visited that state." There was absolutely nothing other than the testimony of John J. Fleming of Burlington, already referred to, to indicate that he visited Burlington on this trip, or at any other time. So far as appears, the only claim of any mention by him of New Orleans in the whole course of his residence in Alameda county was that contained in the testimony of Mrs. Sears above noted. There was nothing to indicate that he had ever served in the United States army or that he had ever said anything about any such service. No reason appears why deceased should have assumed a name not his own and especially no reason why he should have assumed the name of John J. Fleming, if it were not his true name.

We have set forth in a general way the testimony before the lower court on the question at issue. It seems very clear to us that it is of such a nature as to support the conclusion of the lower court that appellant had not satisfactorily established that deceased was Richard Fleming, Jr., or in any way related to the family of which he was a member. At the very least, the circumstances relied on by respondent were sufficient to present a case of conflicting evidence. In view of the many other circumstances appearing, the trial court was not bound to accept the testimony of Mrs. Sears and the Valentines as correctly stating the exact purport of statements made by deceased to them in the course of casual conversation many years before. Even if such statements had been made by him, they would by no means be conclusive, in view of the other circumstances. The same is true as to the testimony relating to the claimed resemblance between deceased and the man who visited New Orleans and Burlington in the early 80's, and is also true of every bit of evidence relied on by appellant. There is the possibility that deceased and Richard Fleming, Jr., were, in fact, one and the same person. If, however, deceased was born in New York, and his father's name was not Richard Fleming, it is clear that he was not the Richard Fleming, Jr., referred to in the evidence. There was ample evidence to sustain a conclusion to such an effect. It must be held, in view of what we have said, that the findings of the trial court to the effect that neither appellant, nor any one of her three nieces was in any way related to deceased, or one of his heirs at law, are sufficiently sustained by the evidence. We have examined the few rulings that are complained of in the matter of striking out certain evidence given by witnesses for appellant bearing on the issues we have discussed, and find nothing therein prejudicial to appellant.

[3] What we have said disposes of the appeal of Ella Fleming Carter, and requires an affirmance of the decree; she being the only appellant. Learned counsel urge several reasons why, even if appellant and her nieces are adjudged to be without interest in the estate of deceased, the distribution of the property to the assignee of George A. and Ann Myles was erroneous, such as that George A. Myles was estopped from asserting any right to succeed to any of the property because of an alleged adjudication against him on the proceeding for letters of administration when he and the public administrator were opposing claimants; that, even if appellant and her nieces were in no way related to deceased, there are other nearer heirs and next of kin than George A. and Ann Myles; and that there was no proof that the property left by deceased was the common property of deceased and his deceased spouse while such spouse was living (a condition essential to the right of relatives of the deceased spouse to take any part of his estate under subdivision 8 of section 1386, Civ. Code). But, it being once established that appellant was in no way related to deceased and is absolutely without interest in his estate, it is of no concern to her how the estate is distributed, and, as said in Estate of Walker, 148 Cal. 166, 82 Pac. 771, "she is in no position to contest the decree, it matters not to her to whom the estate is distributed." There being no sufficient legal ground for the granting of a new trial as to the issues material to her relationship to deceased and her interest in his estate, the findings on which being as already stated, she is in no sense an aggrieved party as to the finding on any other issue, or as to the disposition of the property made by the decree. See Estate of Walker, supra; Blythe v. Ayres, 102 Cal. 254, 36 Pac. 522; Estate of Piper, 147 Cal. 606, 82 Pac. 246. Even if such a condition would assist appellant there is no foundation for the claim that the decree of distribution is void on its face. The utmost that might be contended for against it is that the findings do not support the judgment in so far as the distribution to the assignee of the Myles is concerned.

[4] But the fact that the findings do not support a judgment does not render a judgment void, but only erroneous, a condition warranting a reversal on an appeal therefrom by an aggrieved party. Such a point, as has often been held, may not be considered on a motion for a new trial, even when such motion is prosecuted by the party aggrieved, but only on direct appeal from the judgment. But, as we have said, it is a matter of no concern to appellant under the circumstances, who was found entitled to take this property or how it was in fact distributed, it being established that she, in any event, has no right to any part of it.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(162 Cal. 506)

GORDON v. ROBERTS et al. (L. A. 2,546.)

(Supreme Court of California. April 2, 1912.)

1. APPEAL AND ERROR (§ 856*)—MOTION FOR NEW TRIAL—REVIEW.

Where a motion for a new trial is based on various grounds, and the order granting the motion is general in its terms, it should be affirmed, if it could be properly granted on any of the grounds assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406–3434; Dec. Dig. § 856.*]

2. APPEAL AND ERROR (§ 856*)—MOTION FOR NEW TRIAL—REVIEW.

Where an order granting a new trial specifies the grounds upon which it was granted, it should be sustained on appeal, if properly granted on any other grounds specified in the motion, except that of the insufficiency of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3406–3434; Dec. Dig. § 856.*]

3. APPEAL AND ERROR (§ 979*) — ORDERS GRANTING NEW TRIAL—DISCRETION.

The action of a trial court in granting a new trial for insufficiency of the evidence is conclusive on appeal, unless the discretion of the court has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873; Dec. Dig. § 979.*]

4. NEGLIGENCE (§ 134*)—PRESUMPTION FROM ACCIDENT.

If a person standing on the sidewalk in front of a building in process of construction is injured by a falling trestle used in the building, the accident establishes a prima facie case of negligence on the part of those responsible for the management of the trestle.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267–273; Dec. Dig. § 134.*]

5. NEGLIGENCE (§ 33*) — INJURY TO TRESPASSER—LIABILITY.

If a person with no lawful business therein enters a building in process of construction, with no invitation and in defiance of warnings, and is injured while in the building, he cannot recover, unless his injury was the result of a willful or malicious act.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 45–47; Dec. Dig. § 33.*]

6. NEW TRIAL (§ 71*) — EVIDENCE — SUFFICIENCY.

Evidence, in an action for injuries from a falling trestle, used in a building in process of construction, *held* to present a substantial conflict as to whether the injured party was a trespasser in the building when injured, or on the sidewalk in front of the building; and hence the trial court did not abuse its discretion in granting a new trial on defendant's motion for insufficiency of the evidence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

7. NEGLIGENCE (§ 138*)—INSTRUCTIONS—INDEPENDENT CONTRACTOR — "VICE PRINCIPAL."

In instructing the jury in an action for negligence, it is improper to refer to an independent contractor as a "vice principal"; this term being applicable only in actions by a servant against a master.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354–370; Dec. Dig. § 138.*

For other definitions, see Words and Phrases, vol. 8, pp. 7313–7316; vol. 8, p. 7827.]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John A. Gordon against William B. Roberts and another, doing business as the Roberts Construction Company, and others. From an order granting a new trial to defendants James B. Lankershim and Achille Biorci, plaintiff appeals. Affirmed.

Gavin W. Craig and C. H. Slease, for appellant. M. E. C. Munday, for respondents.

SLOSS, J. The action was brought to recover damages for personal injuries, alleged to have been sustained by plaintiff through the negligence of the defendants. The trial resulted in a verdict and judgment in favor of the plaintiff in the sum of $2,000. The defendants Lankershim and Biorci moved for a new trial, and the court below made an order granting their motion. From this order, the plaintiff appeals.

The complaint alleges that the defendant Lankershim was erecting a building in the city of Los Angeles; that the defendants Biorci and Roberts Construction Company were employed by him in the construction; that, while plaintiff was standing on the sidewalk in front of said building, he was struck and injured by a timber which, through the negligence of the defendants, fell from within the building. Lankershim and Biorci answered separately. It is sufficient for the present purpose to say that each of the answers denied that plaintiff had sustained injuries in the manner asserted by him, and averred that such injuries were received by plaintiff while he was, in disregard of warnings posted at the entrance, within the building as a trespasser, and were caused by the accidental tipping and falling of a trestle, which was being used in the work of painting the walls.

[1, 2] The motion for new trial was based on various grounds. The order granting the motion was general in its terms. It must therefore be affirmed, if it could properly have been granted on any of the grounds assigned. White v. Merrill, 82 Cal. 14, 22 Pac. 1129; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481; Thompson v. Cal. Constr. Co., 148 Cal. 35, 82 Pac. 367; Wendling Lumber Co. v. Glenwood L. Co., 153 Cal. 411, 95 Pac. 1029; Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 Pac. 695. Even if the court had undertaken to limit the reasons for granting the motion, the appellate court would not be precluded from considering any of the grounds which the trial court had excluded from view (Kauffman v. Maier, supra), excepting only the one of insufficiency of evidence. Weisser v. S. P. Ry. Co., 148 Cal. 426, 83 Pac. 439, 7 Ann. Cas. 636; Bresee v. Traction Co., 149 Cal. 131, 85 Pac. 152, 5 L. R. A. (N. S.) 1059. And this ground will also be looked to for justification of the order granting a new trial, unless the trial court

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has, by the express terms of its order, excluded it as one of the grounds for making the order. Weisser v. S. P. Ry. Co., supra; Ben Lomond Wine Co. v. Sladky, 141 Cal. 619, 75 Pac. 332; Morgan v. J. W. Robinson Co., supra. As suggested, the order before us was not limited in any way, and it must, on this appeal, be treated as if granted on the ground of insufficiency of evidence, or any other ground assigned.

[3] This court has frequently commented upon the wide extent of the discretion of the trial court in granting or denying a new trial for insufficiency of evidence. "Its action," as was said in Domico v. Casassa, 101 Cal. 411, 35 Pac. 1024, "is conclusive upon this court, unless there has been an abuse of discretion." And, if there is a substantial conflict in the evidence, the trial court will not be deemed to have abused its discretion when it has determined that the verdict or the finding is against the weight of the evidence, and that there should be a new trial. "When the evidence is conflicting, the trial court is authorized to review it; and if, in its opinion, the verdict is against the weight of evidence, it is its duty to grant a new trial." Warner v. Thomas, etc., Works, 105 Cal. 409, 38 Pac. 960. See, also, Bjorman v. F. B. R. R. Co., 92 Cal. 500, 28 Pac. 591; Cole v. Wilcox, 99 Cal. 549, 34 Pac. 114; Bledsoe v. De Crow, 132 Cal. 312, 64 Pac. 397.

[4, 5] We think that, on the main question in controversy here, there was a sufficient conflict to justify the court below in concluding, as it must be deemed to have concluded, that the verdict was against the weight of the evidence, and that justice would be promoted by a new trial. The decisive issue relates to the position of the plaintiff at the time of the injury. That he was injured by the fall of a wooden trestle used in the building is not open to doubt. If, as he claimed, he was standing on the sidewalk, the mere fact that the trestle fell upon him from within is sufficient to make out a prima facie case of negligence on the part of the person or persons responsible for the management of the trestle. Byrne v. Boodle, 2 H. & C. 722; Scott v. London Dock Co., 3 H. & C. 596; Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530. And there was nothing to overcome this prima facie showing. On the other hand, if the plaintiff, without having any lawful business or occasion to enter the building, did enter it without invitation, and in defiance of warnings, and while therein was injured, he would have no redress, unless his injury was the result of the willful or malicious act of one of the defendants.

[6] It was shown on the trial that the defendant Lankershim was the owner of a building in course of construction, situated at the southeasterly corner of Main and Fourth streets, in the city of Los Angeles. The contractors in charge of the general work of construction were the defendants William B. and James A. Roberts, doing business as the Roberts Construction Company. Their contract did not, however, include the painting and decorating of the entrance hall. This part of the work was being done by the defendant Biorci, who was working under a contract with the owner, Lankershim. There was testimony to the effect that, under this contract, Lankershim agreed to have the general contractors furnish the scaffold or trestle required for the painting, and move it as needed.

At the time of the occurrence in question, such a trestle had been provided, and was in use by one of Biorci's men, occupied in painting the north wall of the entrance hall. The testimony on the part of the plaintiff tended to prove that another man attempted to move the trestle, whereupon it fell over in such manner that one end protruded from the entrance of the building, striking the plaintiff upon the left shoulder. The plaintiff, according to the testimony of two witnesses besides himself, was standing on the sidewalk, about five feet from the entrance of the building. No witness directly contradicted this statement, and none testified that he had at any time seen the plaintiff within the building.

But the defendants offered testimony to show the physical conditions and surroundings which, as they claimed, demonstrated that plaintiff could not have been struck by the falling trestle, unless he had been inside of the building. The principal entrance was on the westerly, or Main street, frontage of the building. The opening was 12 feet in width, and led to a hall of like width, running easterly into the building from the sidewalk line. On the southerly side of this hallway there was a stairway, running down to the basement. The stairs were separated from the hallway by a concrete coping, running along the northerly line of the staircase for a distance of about 15 feet, and thence at a right angle, across the width of the stairs, to the south wall of the hallway. This coping, which was about 22 inches high, began about 2½ feet from the front of the building. The distance between the coping and the north wall of the entrance hall was about 8 feet.

The trestle which, in its fall, struck and injured the plaintiff was about 16 feet long, and about 14 feet high. The top, upon which workmen were to stand, consisted of a 2 by 10 plank running the length of the trestle. The upper part of the trestle was supported by four legs, two at either end of the trestle. These legs, which were braced by crosspieces, were spread so as to separate each pair at the floor end by about 4 feet.

There was evidence that, just prior to the accident, this trestle was standing within the entrance hall, parallel with and close to the north wall of said hall, and that one of Biorci's employés was on the trestle, painting the north wall. The end of the trestle nearest Main street was inside (i. e., east) of a column, 18 inches deep and 3 feet wide, which was placed at the northerly end of the entrance opening. The testimony on behalf of plaintiff was that the trestle was placed diagonally; but there was a conflict on this point, and the version of the defendants was far from improbable, in view of the fact that a man standing on the trestle would not have been within easy reach of more than a small space on the wall which he was painting, if the trestle had been placed at an angle. Biorci himself, with another of his employés, was working further back in the hall. He heard something fall, and, coming forward, found the trestle lying on its side. The man who had been on it was just coming up the stairs from the basement. He had apparently been thrown over the coping onto these stairs, when the trestle fell. His pot of paint was lying on the third or fourth step, and paint was running down the steps, and was scattered over some marble which was leaning against the concrete coping. The trestle did not "go out in the street." Another witness, who was on the spot shortly after the fall of the trestle, and before it had been righted, found it lying "right square over the curbing (coping) and marble," and not "out in the street." A third testified to the same effect, stating that no portion of the trestle was "beyond the line of the front of the entrance," or "extending onto the sidewalk."

In this state of the evidence, it seems clear that there was a substantial conflict on the question whether any part of the trestle projected over or onto the sidewalk, and, consequently, whether the plaintiff, when he was struck, was on the sidewalk, as he and his witnesses testified. While no one testified directly to having seen the plaintiff within the building, the facts concerning the location and dimensions of the trestle, and the measurements of the space in which it was, were such as to justify the inference that the witnesses who stated that the trestle projected over the building line, and struck the plaintiff while he was on the sidewalk, were not stating the facts correctly. We do not say that the case comes within the rule that the trial court or jury is not bound to accept even the uncontradicted testimony of a witness, if the statement be inherently improbable. Blankman v. Vallejo, 15 Cal. 645; Baker v. Fireman's Fund Ins. Co., 79 Cal. 41, 21 Pac. 357; McLennan v. Bank of Cal., 87 Cal. 575, 25 Pac. 760. Here the testimony regarding plaintiff's position *was* contradicted by evidence of physical conditions tending to show that such testimony was untrue. If the trestle, 16 feet long and 14 feet high, standing parallel to the north wall inside of an entrance 8 feet wide, tipped over in such manner that it lay entirely within the building, directly across the coping on the southerly side of the hall, these circumstances were very persuasive evidence to show that the falling trestle did not strike any one standing on the sidewalk. Under the rule announced above, it cannot be said that the trial court abused its discretion in granting a new trial on the ground of insufficiency of evidence.

This conclusion renders it unnecessary to consider at any length the other assignments of error relied on by respondents to justify the order under review. Some of the questions are not likely to arise again. Of this class is the alleged error of the court in permitting the foreman to sign the special findings after the discharge of the jury.

Whether, under the facts in evidence, Biorci or the Roberts Construction Company, or both, were independent contractors, so as to exempt Lankershim from liability for the negligence, if any, of either is a question discussed in the briefs. There is no substantial difference between the parties regarding the nature and legal effect of the relation of independent contractor. Ordinarily, of course, the existence or nonexistence of this relation is a question of fact for the jury; but there are cases in which the proof is such that the court may declare the result as a matter of law. As the evidence may be different on another trial, we express no opinion on the conclusions to be drawn from the facts here shown.

[7] Of the instructions, all that need be said is that any reference to "vice principal" should have been omitted, as the expression is not applicable to a case of this character, but is used in connection with actions of servants against masters to recover damages sustained by the negligence of other servants.

The order is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

162 Cal. 497

JONES & LAUGHLIN STEEL CO. v. ABNER DOBLE CO. (S. F. 5,790.)

(Supreme Court of California. April 2, 1912.)

1. Pleading (§ 126*)—Answers—Admission.

An answer in an action for building materials sold and delivered, which denies that plaintiff delivered all of the materials agreed on, is an insufficient denial, and is equivalent to an admission that substantially all were delivered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. § 126.*]

2. Contracts (§ 304*)—Building Contracts—Plans—Acceptance.

Where plaintiff, under contract, delivered plans and drawings, and they were received without objection and acted on by defendant after opportunity to ascertain their character, and the only objection to them was made several months after they were received and repeatedly examined by defendant's officers in charge of the work, they were sufficiently approved by defendant to make it liable therefor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1457-1465, 1467-1479; Dec. Dig. § 304.*]

3. Appeal and Error (§ 931*)—Findings—Evidence—Sufficiency.

The court in reviewing the sufficiency of the evidence to sustain the findings for plaintiff must take the evidence most favorable to him, and the testimony of a witness for defendant contradicted in all essential particulars by a witness for plaintiff must be disregarded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762-3771; Dec. Dig. § 931.*]

4. Sales (§ 81*)—Building Contracts—Construction—Time for Delivery.

Defendant by letter of June 14th requested plaintiff to furnish plans for a steel frame building and the steel frame construction, and asked for an answer as to when shipments of the building could be made. On July 7th plaintiff inclosed a blue print showing suggestions regarding the work and asking approval. On July 12th, defendant, in reply, inclosed the suggested plans, and asked as to how soon the material could be shipped. Plaintiff by wire replied that shipments could begin in six weeks. Defendant by wire entered his order for rush work. The plans were not finally determined on until September. *Held*, that the statement of plaintiff as to when shipments could begin was but a mere estimate, and not a promise, and, as no time was expressed, the law implied an agreement to deliver the materials within a reasonable time.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.*]

5. Contracts (§ 322*)—Building Contracts—Warranties—Evidence.

Evidence *held* to warrant a finding that a contractor for the steel frame construction of a building did not warrant that the floors of the building should bear any specified weights, and he could recover for the work, complying with a detailed plan, though not sufficient to bear the specified weights.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1306, 1307, 1339, 1347, 1348, 1465, 1492; Dec. Dig. § 322.*]

6. Contracts (§ 320*)—Building Contracts—Performance—Actions.

Where one has contracted to erect a building for a fixed price and the contract is entire, he cannot recover on the contract where he has failed to perform a substantial part thereof, but he may recover the price less the damages caused by defects where he has endeavored in good faith to perform, and has substantially performed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1493-1527; Dec. Dig. § 320.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by the Jones & Laughlin Steel Company against the Abner Doble Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Campbell, Metson, Drew, Oatman & Mackenzie, J. C. Campbell, and Marcus Purcell, for appellant. Albert J. Dibblee and Alex. G. Eells, for respondent.

SHAW, J. This is an action to recover the sum of $27,641.20, alleged to be due as the reasonable value of certain building material sold and delivered by plaintiff to the defendant at its request. The materials were to be used by the defendant in the construction of certain buildings upon its land. Plaintiff also claimed a lien therefor upon the land and building, and certain other lien claimants were made parties defendant. The appeal is by the Abner Doble Company alone. The only dispute is in relation to the sum for which judgment was given, and the liens and the other claims are not material to our consideration of the case.

The complaint alleges the following facts: In 1906 the defendant ordered from plaintiff, whose place of business was Pittsburg, Pa., all the structural steel, metal window frames, sash, doors and wire glass and other metal material required for a warehouse, a forge shop and a lavatory, to be erected by defendant according to plans and drawings prepared and to be prepared by plaintiff, based on general suggestions in letters and certain outline or preliminary plans theretofore written and furnished by defendant. Plaintiff prepared the plans, and they were sent to and approved by defendant. No price or specific time for delivery was agreed upon. It was agreed that payment was to be made 30 days after date of shipment, with the privilege to defendant of 6 months' additional time by giving notes due in that time at 5 per cent. annual interest. Plaintiff furnished the materials ordered. The reasonable value of that used in the warehouse is $19,176.33, of which $3,819.80 was paid. That used in the forge shop was worth $10,323.80, of which $21.84 was paid. That used in the lavatory was worth $1,982.72, none of which was paid. The total balance unpaid was $27,641.21, all of which was past due. In pursuance of the agreement for credit some notes were given by defendant to plaintiff, which plaintiff tendered for such disposition as the court deemed proper.

The answer of the Abner Doble Company admits that a contract was made between said defendant and plaintiff for the furnishing of the materials alleged. It avers as a counterclaim that it was agreed that plaintiff would draw and furnish to defendant "all the detailed plans and specifications" for the aforementioned buildings, that the said plans and specifications were to be for "a good, first-class, substantial steel framed building, of sufficient strength to carry, on one half of the second floor of the warehouse, a weight of five hundred pounds to the square foot, and on the other half one hundred and fifty pounds to the square foot"; and that all said material was to be delivered by the plaintiff in San Francisco, in condition for placing in said buildings, the material for the warehouse to be delivered between August 1, 1906, and October 15, 1906, and that for the forge shop on or about September 13, 1906. It then avers that plaintiff did not deliver said materials until eight months after the times agreed upon as aforesaid; that the building, as planned by plaintiff, and the material as constructed by plaintiff, was not strong enough to carry the weights above mentioned; that the doors were not made as planned, or of good material, and could not be used in the buildings, and that by reason of these breaches of the contract the defendant has suffered damage, to wit, from deprivation of the use of said buildings during the delay in completion thereof caused by said delay in shipment, in the sum of $16,000, by reason of the insufficient strength of the building, in the sum of $10,000, by reason of defective doors, in the sum of $3,000, in all, $29,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The answer also denies that plaintiff delivered "all" of the materials agreed upon. This is an insufficient denial, and is equivalent to an admission that substantially all were delivered. The omission of a single rivet or bolt would satisfy the denial. There is a denial that the value exceeds $16,982.71, but it is conceded that the proof was sufficient to support the findings on this point. The principal points relied on by appellant relate to the counterclaim, under the claim that the findings thereon are contrary to the evidence.

The court found that the plaintiff did not agree to furnish "specifications" for the buildings, but only plans and drawings; that the plans and drawings were prepared by plaintiff and were sent to and approved by the defendant; that no specific time was agreed on for the deliveries, except that they were to be furnished as speedily as circumstances would permit; that plaintiff substantially performed its contract, except that there were certain minor defects, for which allowance was made. As to these, the findings are that the value of the material furnished, less payments thereon, was, for the warehouse, $15,300.98, for the forge shop, $10,301.96, and for the lavatory $1,982.72, making the total $27,585.66. The minor errors in the warehouse material caused defendant to expend $964.14, and it would cost $140 to remedy the defects in the doors. Deducting the $1,104.14 for these defects, the balance remaining is $26,481.52, for which, with interest, judgment was given. The court also found that plaintiff agreed to furnish no plans or drawings for the buildings, other than working plans showing the details of the erection and construction of the material which plaintiff was to furnish, and that plaintiff did not agree that the plans it prepared should provide a second floor strong enough to bear 500 pounds, or 150 pounds, to the square foot, or any other weight, that only such portion of the material to be furnished by plaintiff was to be fabricated by plaintiff as might be necessary to enable the defendant to conveniently and in the usual manner erect the same upon its lot, and that there was no agreement that all the material was to be framed by plaintiff. It is claimed that these findings are not sustained by the evidence.

1. There is no evidence that specifications were to be furnished by the plaintiff. The evidence on the subject related to plans and detail drawings, and they were furnished.

[2] 2. The plans and drawings were sent to defendant long before the material was furnished, and they were either expressly approved, or received without objection, and acted on by defendant, after full opportunity to ascertain their character. The only objection, if it can be called such, which is called to our attention, was made in a letter written several months after the plans and drawings were received by defendant, and after they had been repeatedly examined by its officers in charge of the work. The finding that the plans and drawings were approved by defendant is amply supported by the evidence.

[3] 3. With respect to the alleged agreement as to time of deliveries, there is some conflict. We must take that most favorable to the plaintiff, because it is presumed that the trial court did so. In May, 1906, Abner Doble, as agent for defendant, had a conversation with Geddes, who was a special agent of plaintiff for the sale of a different kind of material from that sold to defendant by plaintiff. Doble said his company was making designs for a warehouse and forge shop to be erected on its lot. Geddes requested that, when it got its plans ready, the defendant would place its order for the fabricated steel and iron work with plaintiff, suggesting that plaintiff's engineers could assist in arriving at the constructional details. No contract or agreement was made between them. The testimony of Abner Doble, as to there being a parol contract between himself and Geddes at that time, is contradicted in all essential particulars by Geddes. It must therefore be disregarded.

[4] The contract between the parties was made by the interchange of letters and telegrams. These begin with a letter of June 14, 1906, from defendant to plaintiff. It inclosed blue prints of a foundation plan, a cross-section of the elevation, and some details of second floor construction for the proposed warehouse. It stated that defendant desired a plain, thoroughly substantial steel frame building to carry a weight of 500 pounds a square foot on one part of the second floor and 150 pounds a square foot on the remainder. It gave many particulars as to the proposed building, and stated that "what we desire to secure from you is the entire steel frame construction of the building, with the roof trusses, doors and windows as outlined," and it asked an answer "at the earliest possible moment, as to just when you can make shipment of this building" saying further, "as this is our main warehouse building, it is imperative that shipment should be made at an early date," and that "we would appreciate drawings from you

just as soon as possible." The general style and the angles and details of construction were left to the plaintiff's engineers, and their suggestions and comments were solicited. This letter was written in pursuance of suggestions made in the conversation between Doble and Geddes in May. On July 7th plaintiff answered, inclosing a blue print showing "our suggestions regarding this work" and asking approval. On June 26th defendant sent plaintiff drawings showing the design for the proposed forge shop, with an explanatory letter requesting that plaintiff's engineers "work out a type of building" for it, and that plaintiff state the price and time of delivery of the materials. This was not received by plaintiff until about July 11th. In the meantime defendant wrote again, inclosing blue prints showing the windows and doors of the forge shop. In this letter defendant said: "We trust that you will be able to get out the designs for these buildings promptly, so that we can get prompt shipment on the same," and asked plaintiff to send detail drawings immediately, so that defendant could have the foundation done at once, "as we are now working on same." On July 12th defendant, having received plaintiff's letter of July 7th inclosing suggested plans, sent plaintiff this telegram: "How quick can you ship warehouse building. Crane runway already shipped. How soon forge building. Must have immediately drawings showing placing foundation bolts." To this on July 13th plaintiff by wire answered, "Could begin shipment warehouse building six weeks, complete twelve weeks. Could begin shipment forge building eight weeks, complete fourteen weeks. Drawing showing foundation bolts can be sent promptly upon receipt of advice that we are to proceed with work." To the latter defendant, by wire, replied, July 13th: "Enter order rush work on warehouse and forge buildings. Anticipate promised shipment if possible. Send immediately drawing showing foundation bolts and necessary information to build foundation. Work on foundation delayed for this information." Plaintiff on July 13th wrote defendant, referring to the telegrams, and saying: "We have made a careful canvass of the matter. The best we think we can do for the warehouse would be to begin shipment in about six weeks and complete in about six weeks thereafter. For the forge building, we could begin shipment in about eight weeks and complete in about six weeks later. * * * From a careful canvass of the conditions now existing we do not think they would justify a quicker promise than above." On July 26th plaintiff forwarded to defendant drawings of foundation plans for warehouse and forge shop and general design for forge shop. On August 3d it sent detail plans of window frames and sash. On August 17th defendant sent to plaintiff plans for an alteration consisting of a lavatory to be put between the two buildings at the second story and to be attached to the walls and to communicate with each building and asking detail plans for the metal work therefor and that plaintiff furnish the fabricated material necessary.

Other correspondence was had making various changes in the plans, which were suggested by the defendant, and the final plans were apparently not determined until in September. Some changes were made even later. In defendant's letter of August 2d, containing a suggestion of a material change of the warehouse plan, it said: "We should be pleased to have you advise us as to when you expect to be able to ship the building." In its letter of September 17th, it said: "You will note that from your letter of July 13th that you expected to begin shipment of the warehouse building in six weeks and the forge shop in eight weeks, and in accordance with this promise the buildings should be coming along rapidly now."

Defendant claims that this correspondence shows a positive contract to ship the steel and iron work for the buildings at the times stated in plaintiff's letter and telegram of July 13th. We do not think it necessarily had that effect, and that from the circumstances and the entire correspondence the court below was warranted in holding that it did not. On July 13th the plans were not settled, many of them were not made, and plaintiff could not then know when they would be completed to the satisfaction of both parties. Until they were settled, plaintiff could not definitely know what it was to construct or how the material was to be fabricated. If the statements of July 13th had been in the positive language of a promise, they could not be understood as anything more than a promise to begin and complete the shipments within the times stated, such time to be computed, not from the date of the statement, but from the time of the complete agreement on the plans. But, in view of the uncompleted condition of the negotiations and of the plans at that time, it is more reasonable and natural to construe it as a mere estimate and not as a promise. The court below, as we understand, so interpreted the statement, and we think it was correct. The subsequent conduct and letters of the defendant at least suggests that this was its understanding, also, at that time. The result is that, as no time was expressed, the law would imply an agreement to deliver within a reasonable time, or, as the court found, "as speedily as circumstances would permit."

[5] 4. There was sufficient evidence to support the finding that there was no contract or warranty by plaintiff that the floors of the warehouse should bear the weights above mentioned. The general plans sent to plaintiff by defendant showed a detail plan of the second floor, stating the weights to be carried thereon, and the accompanying letter also stated the same things. But plaintiff's advice was not asked on that point.

Both the plan and the letter gave the sizes of the supporting beams for this floor, and beams of those sizes were furnished. The statements as to weights were apparently intended as information, and not as a request for advice. The defendant was, and for years had been, engaged in heavy iron and steel manufacture and professed to do the work of engineers therein. The inference is that it could and would judge for itself as to the sizes of beams required. It had a competent and experienced architect in its employ. There is nothing necessarily showing that the defendant was not, or did not consider itself, competent to determine the matter, or that it relied on plaintiff's advice or suggestions regarding it; or that plaintiff offered or undertook to give such advice. These observations also apply to the claim that the building was not sufficiently braced. Upon the latter point there is, moreover, a conflict of evidence, and sufficient to sustain a finding in favor of plaintiff thereon, that it was properly braced.

[6] 5. Defendant contends that plaintiff cannot recover because of the minor defects in the materials on account of which the lower court deducted $1,104.14. It cites on this point cases declaring that, where one has contracted to erect a building or sell property for a price to be paid when he has fully performed his obligation, the contract being what is called an entire contract, he cannot recover on the contract, if he has himself failed to perform a substantial and material part of his own agreement. It is true that in such cases the party cannot prevail in an action technically on the contract for the price, but it is well settled, and the cases cited recognize the rule, that he may recover in a proper action the reasonable value of the goods delivered to and retained by the buyer. Katz v. Bedford, 77 Cal. 322, 19 Pac. 523, 1 L. R. A. 826. If the plaintiff suing for the value, or for the price, has endeavored in good faith to perform his part of the agreement, and has substantially performed, but there are unimportant defects arising from accident or inadvertence, and which do not defeat or materially change the object of the contract, he may recover the price, less the damage caused by the defects. Perry v. Quackenbush, 105 Cal. 308, 38 Pac. 740; City St. I. Co. v. Kroh, 158 Cal. 325, 110 Pac. 933. There is much doubt whether the contract was entire and indivisible as to either of the three structures involved. See Sterling v. Gregory, 149 Cal. 120, 85 Pac. 305; Los Angeles, etc., Co. v. Amalgamated O. Co., 156 Cal. 779, 106 Pac. 55. But, conceding it to be so, the complaint counts upon the implied contract to pay the reasonable value of the materials furnished and the case falls within the rule last stated.

6. Our conclusion that the finding that the plaintiff did not agree to deliver the materials within a specific time, as alleged in the counterclaim and that there was no agreement that the second floor should bear certain weights, is sustained by the evidence, makes it unnecessary to consider the asserted errors of law in the admission or exclusion of evidence relating to the damages claimed to have been suffered by defendant from the failure to perform these alleged agreements, and also unnecessary to consider the rule as to the proper measure of damages from such breaches of contract or warranty, or as to the right to recover upon such contracts or warranties. There are no other points that require notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

162 Cal. 513

DAVIS v. CRUMP et al. (S. F. 5,752.)

(Supreme Court of California. April 3, 1912. Rehearing Denied May 3, 1912.)

1. Trial (§ 165*)—Dismissal or Nonsuit—Hearing and Determination.

On a motion for a nonsuit, the evidence in favor of plaintiff must be taken as true, and all evidence in conflict therewith disregarded; every favorable inference or presumption must be considered in favor of the plaintiff; that construction of the evidence most favorable to him should be adopted; and if, with all these aids, a verdict or decision in favor of plaintiff would be held by an appellate court to be supported by the evidence, a nonsuit should be denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. Ejectment (§ 108*) — Quieting Title (§ 47*)—Nonsuit in Part.

If the plaintiff in an action of ejectment or to quiet title makes out a prima facie case as to only a part of the land claimed, the nonsuit should be limited to the particular portion as to which no case has been made.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 316; Dec. Dig. § 108;* Quieting Title, Cent. Dig. §§ 95–97; Dec. Dig. § 47.*]

3. Quieting Title (§ 35*)—Proceedings—Pleading—Alleging Possession.

Under Code Civ. Proc. § 738, providing that an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim, the plaintiff need not allege possession; an allegation that he is the owner in fee being a sufficient statement of his interest.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 73, 74; Dec. Dig. § 35.*]

4. Quieting Title (§ 44*)—Proceedings—Evidence.

While a plaintiff in an action to quiet title can recover judgment only on the strength of his own title, he need only establish a prima facie case of ownership in order to put defendants to the necessity of meeting such case.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 89; Dec. Dig. § 44.*]

5. Quieting Title (§ 43*)—Proceedings—Pleading—Variance.

The fact that a plaintiff in an action to quiet title pleads ownership only, and not possession, does not prevent him from proving possession in order to show ownership.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84–87; Dec. Dig. § 43.*]

6. Quieting Title (§ 44*)—Proceedings—Evidence.

Proof of possession of land makes out a prima facie case of ownership in an action to quiet title as against persons not shown to have any title thereto, or to have had any possession thereof, in view of Code Civ. Proc. § 1963, subds. 11, 12, providing that things which a person possesses are presumed to be owned by him, and that a person is to be presumed the owner of property from exercising acts of ownership over it.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

7. Quieting Title (§ 44*)—Proceedings—Evidence—Ownership—Possession.

The inclosure of a piece of land by a substantial fence, followed by a claim of ownership, shows actual possession sufficient to establish a prima facie case of ownership in an action to quiet title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

8. Quieting Title (§ 44*) — Proceedings — Evidence—Ownership—Possession.

In an action to quiet title, the fact that possession of the land involved was taken by plaintiff only two days before the action was commenced does not detract from its force as prima facie evidence of title, where there is no evidence that such possession was obtained otherwise than peaceably, or that any one else had possession at the time plaintiff took possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by George M. Davis against J. C. Crump and others. From a judgment of nonsuit, plaintiff appeals. Reversed and remanded.

Milton Shepardson, for appellant. R. H. Countryman, H. L. Breed, Benj. R. Aiken, F. J. Solinsky, S. W. Molkenbuhr, Reed, Black & Reed, J. W. Bingaman, Edward W. Engs, Geo. E. Samuels, Mervyn J. Samuels, Irving Magnes, J. J. McDonald, Johnson & Shaw, Lilienthal, McKinstry & Raymond, L. Oppenheimer, Fitzgerald & Abbott, Pieree A. Fontaine, Cooper, Gray & Cooper, F. W. Shay, John T. Pidwell, Ben F. Woolner, Wm. H. O'Brien, T. J. Lyons, Cullinan & Hickey, and George Lull, for respondents.

ANGELLOTTI, J. This is an action to quiet plaintiff's alleged title in fee to a tract of land containing some 16.75 acres described in the complaint as being situate in the county of Alameda, state of California, and sufficiently shown by the evidence to be in the city of Oakland in said county. There were exceeding 100 defendants. The defendants answered, setting up their respective claims. At the trial, plaintiff having introduced his evidence and rested, a motion for a nonsuit, based upon 17 grounds, was granted. Judgment of nonsuit was thereupon given. This is an appeal by plaintiff from such judgment.

[1] The rules applicable in determining the question of the correctness of a ruling granting a nonsuit are well settled in this state. As was said in Freese v. Hibernia Savings & Loan Society, 139 Cal. 392, 394, 73 Pac. 172: "It is not disputed, and cannot well be under the decisions, that a motion for a nonsuit should not be granted where plaintiff's evidence is such, if the case had gone to a jury on that evidence, and a verdict had been rendered for him, the evidence would be held sufficient to support the judgment upon the verdict. The rules as to nonsuit are the same, whether the trial is by the court or by a jury." See, also, Goldstone v. Merchants', etc., Co., 123 Cal. 625, 56 Pac. 776. In determining whether a nonsuit should be granted, all the evidence in favor of the plaintiff must be taken as true and all evidence in conflict therewith disregarded, "every favorable inference fairly deducible and every favorable presumption fairly arising from the evidence produced must be considered as facts proved in favor" of the plaintiff, and where the evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the plaintiff. If with all these aids the evidence is in such condition that a verdict or decision in favor of the plaintiff would be held by an appellate court to have sufficient legal support in the evidence, a nonsuit should not be granted. See Estate of Arnold, 147 Cal. 583, 82 Pac. 252, and cases there cited.

[2] It is also to be borne in mind that if the plaintiff either in an action of ejectment or to quiet title makes out a prima facie case as to a part only of the land claimed, it is error to grant a motion for nonsuit not limited to the particular portion as to which no case has been made. See Wright v. Roseberry, 81 Cal. 87, 92, 22 Pac. 336; Wolfskill v. Malajowich, 39 Cal. 276; Peterson v. Gibbs, 147 Cal. 1, 5, 81 Pac. 121, 109 Am. St. Rep. 107.

The real claim in support of the ruling of the trial court is that plaintiff failed to sufficiently show any title in himself as to any part of the land.

[3] The plaintiff did not in terms allege that he was in possession of any part of the land; his allegation in this regard being simply that he "is now and at all the times herein mentioned was the owner in fee of all that certain lot, piece or parcel of land," etc. No allegation of possession was essential, however, in view of the fact that our statute (section 738, Code Civ. Proc.) authorizes the maintenance of an action of this character by any person, whether in or out of possession. The allegation that plaintiff is "the owner in fee" was a clear and unqualified

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

allegation of a seisin in fee in "ordinary language" (see Payne v. Treadwell, 16 Cal. 224), and is a sufficient statement of the right of a plaintiff in either ejectment or an action to quiet title. The decisions upon this point are many and the rule is thoroughly established. See Payne v. Treadwell, supra; Garwood v. Hastings, 38 Cal. 216; Heeser v. Miller, 77 Cal. 192, 19 Pac. 375; Souter v. Maguire, 78 Cal. 543, 21 Pac. 183; Johnson v. Vance, 86 Cal. 128, 24 Pac. 863; Castro v. Barry, 79 Cal. 447, 21 Pac. 946; Riverside, etc., Co. v. Jensen, 108 Cal. 146, 41 Pac. 40.

[4, 5] It was incumbent upon plaintiff, of course, in order to put defendants to their proof, to make out a prima facie case of ownership, for learned counsel for defendants are undoubtedly right in their contention that a plaintiff can recover judgment in this character of action only upon the strength of his own title, and that if he shows no title it is unnecessary to inquire into a defendant's rights. But all that was necessary for him to do in order to put defendants to the necessity of meeting his claim was to present such evidence as would make out for him a prima facie case of ownership. We can see no force in the claim that by reason of the fact that he simply alleged ownership, without in terms alleging possession, he was restricted to evidence of a paper or record title.

[6] Plaintiff's only proof of ownership of the legal title was such as tended to show actual possession of the greater part of the property at the time of the commencement of the action. A quitclaim deed of the premises bearing date December 23, 1909, purporting to be the deed of the Oakland Prospect Homestead Association and Charles J. King and J. F. Crosset as the sole surviving trustees or directors of said corporation, and of Charles J. King and J. F. Crosset as individuals, to plaintiff, delivered to him on January 3, 1910, was introduced in evidence as the individual deed of Messrs. King and Crosset. There was nothing to show legal title to any interest in this land at any time in either King or Crosset. But there was absolutely nothing in the evidence tending to show that any of the defendants ever had any interest, legal or equitable, in any of the land, and so far as the land actually enclosed by plaintiff's fences is concerned, which will be referred to hereinafter, nothing to indicate any prior possession on the part of any of the defendants except in so far as a "real estate sign" indicating one Cameron as an owner of some indefinite portion of the property was on the land. Whether this was the Cameron who was named as a party defendant, but who apparently did not appear in the action, is not shown. There were some 10 or 15 other "real estate signs" on various portions of the property at the time plaintiff took possession, but what they indicated as to ownership, if anything, did not appear. There were also in one place the remnants of an old fence, a few posts, and old wires; but by whom constructed or originally maintained does not appear, and there was nothing to indicate any existing inclosure of any portion of the property involved in the action. There was an occupied dwelling house on the property, but no connection is shown between the occupant of this house and any of the defendants, and the ground upon which the same stood was not inclosed by plaintiff's fence, but was intentionally omitted from any taking of actual possession by him. There was also a dwelling house in course of construction on another part of the land, but there is nothing to indicate that any of the defendants had any interest in the land upon which the same was being constructed. Whether this was included in plaintiff's inclosure did not clearly appear, but the matter is not of any particular importance. We have said this much to make it clear that, at the time of the granting of the nonsuit, there was nothing tending to show that any of the defendants had any interest in the property or had ever been in possession of any part thereof, and that it must be held, so far as this appeal is concerned, that they each and all occupy the position of strangers to the title. There was no such admission on the part of plaintiff on the trial as would warrant a different conclusion. Under the circumstances, there can be no doubt that in so far as plaintiff showed actual possession of the property at the time of the commencement of his action, he made a prima facie case of ownership against the defendants, unless the evidence given was such as to compel the conclusion, in view of the rules we have already referred to as applicable on a motion for nonsuit, that notwithstanding such possession he had no interest therein.

Learned counsel for defendants claim, as we have already indicated, that proof of actual possession is not sufficient to make out a prima facie case of ownership in an action to quiet title, and especially under such allegations of title as we have in the complaint before us. The contrary is thoroughly established by the decisions in this state. We have already shown that, under such allegations as are presented, the plaintiff was entitled to prove ownership by any evidence competent for that purpose. It is declared by our statutory law to be presumed "that things which a person possesses are owned by him," and "that a person is the owner of property from exercising acts of ownership over it." Code Civ. Proc. § 1963, subds. 11, 12. These provisions are in accord with the settled law everywhere, and while such presumptions are disputable and may be controverted by other evidence, they afford full and sufficient evidence of ownership of land unless controverted. Section 1961, Code Civ. Proc. As against an entire stranger to the title, actual possession of land has uniformly been held, both in ejectment and actions to quiet title, to make out a prima facie case.

sufficient to sustain a conclusion of ownership. See Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; McGovern v. Mowry, 91 Cal. 383, 27 Pac. 746; Morris v. Clarkin, 156 Cal. 16, 103 Pac. 180; Leonard v. Flynn, 89 Cal. 543, 26 Pac. 1097, 23 Am. St. Rep. 500; Sepulveda v. Sepulveda, 39 Cal. 13. See, also, Tate v. City of Sacramento, 50 Cal. 242; Scorpion S. M. Co. v. Marsano, 10 Nev. 378. In the last case cited, an action to quiet title, an allegation of present possession in plaintiff was not denied by the answer, and it was said through Beatty, J., "that the burden is upon the defendant, if he admits plaintiff's possession, or does not disclaim, to plead and prove a good title in himself." In Sepulveda v. Sepulveda, supra, an action to quiet title, it was said that, if the plaintiff showed possession, she should not have been nonsuited, even if she had attempted to show paper title in herself and had failed, for the deeds read in evidence did not show any title in the respondent, "and until their title was in some way made to appear, the appellant might rest safely upon the mere fact of her possession of the lands and the presumptions arising therefrom in her favor." In McGovern v. Mowry, supra, an action to quiet title, it was held, after quoting section 1006 of the Civil Code, that actual occupancy and possession of the premises at the time of the commencement of the action is sufficient evidence of ownership as against "one who, like defendant, never had any title, but who claimed to have title to the premises." In Morris v. Clarkin, supra, an action to quiet title, a judgment of nonsuit was reversed; the court saying: "So far as the evidence goes, Lunnun is an entire stranger to the title. Actual possession for any period, under claim of ownership, is sufficient evidence of title in plaintiff as against a trespasser or one who establishes no title in himself." In Zilmer v. Gerichten, supra, which was an action in ejectment, a judgment of nonsuit was reversed, one of the grounds being that, even if plaintiff had failed to show a paper title as attempted, he had shown prior actual possession of the property, while there was nothing to show prior possession in defendants, or that they had any kind of title, and that this was enough to constitute prima facie evidence of title in plaintiff. The court also said: "A nonsuit should be denied when there is any evidence tending to sustain plaintiff's case, without passing upon the question as to the sufficiency of such evidence." There is absolutely nothing in our decisions in conflict with these views, which may properly be said to state simply elementary propositions. There is nothing in McGrath v. Wallace, 85 Cal. 622, 24 Pac. 793, an action to quiet title, in conflict therewith. There the plaintiff did not show possession at the time of the commencement of the action, but alleged in her complaint that the defendants were then in possession. It was said that "a complaint quia timet, counting upon title alone, as this one does, is not supported by evidence of *prior possession* insufficient to make title under the statute of limitations." (The italics are ours.) The distinction between that case and those we have cited is obvious.

[7] There can be no doubt that the evidence was sufficient to support a conclusion that plaintiff did take actual possession of the greater portion of the property described in the complaint under claim of title in himself thereto on January 8, 1910, and did remain in such possession thenceforth. This action was commenced January 10, 1910. During the afternoon of January 8, 1910, between about 1:30 and 6:30 p. m., he inclosed such greater portion of the property in two separate parcels by the construction of substantial five-strand barbed wire fences, with redwood posts, 12 or 14 feet apart, making two complete inclosures. It cannot well be claimed that these two parcels were not thenceforth each protected by a substantial inclosure (maintained by him), to an extent sufficient to satisfy the requirements of section 325, Code of Civil Procedure, as to the kind of possession essential to an adverse possession. Plaintiff thenceforth claimed to be the owner of such property so inclosed. This was sufficient to support a conclusion of actual possession of the inclosed portion on the part of the plaintiff. See Morris v. Clarkin, 156 Cal. 16, 18, 103 Pac. 180; Knowles v. Crocker Estate Co., 149 Cal. 279, 283, 86 Pac. 715; Brumagim v. Bradshaw, 39 Cal. 24, 46. Respondents rely in this behalf upon certain early cases on the question of what constitutes such actual possession as was required by the terms of the Van Ness ordinance in San Francisco, such as Polack v. McGrath, 32 Cal. 15, and Wolf v. Baldwin, 19 Cal. 308, which cannot be accepted, especially in view of the later decisions, as establishing that a court would not be warranted in holding that one who has by a substantial fence completely inclosed land claimed by him has thereby established actual possession thereof.

It is also to be borne in mind that, so far as the evidence shows, none of the defendants had ever been in possession of any portion of the property, and that the evidence was not such as to compel the conclusion that any one at all was at the time of plaintiff's entry in possession of the property that was actually inclosed by him.

[8] But the evidence must be taken as showing without conflict that plaintiff's possession was taken by him in contemplation of this action less than two days before the commencement thereof, and with a view to the possible advantage to be obtained by him by being in possession at the time of the commencement of the proposed action. But we do not see that this detracts from the

effect of his actual possession at the commencement of the action, as prima facie evidence of title in him as against third persons who are not shown to have any interest in the property or to have ever been in possession of any portion thereof. Learned counsel for defendants have cited some cases from other states as supporting the propositions that "the possession contemplated by the law is limited to possession peaceably and rightfully acquired," that "courts will not assume jurisdiction where the possession was acquired by use of unfair or corrupt means," and "that possession taken in contemplation of an action is not sufficient." As we have seen, there is nothing here to compel the conclusion that the possession was taken otherwise than peaceably, or that any portion of the property inclosed was in the actual possession of any other person at the time. This sufficiently distinguishes this case from that of Rubert v. Brayton, 82 Mich. 632, 46 N. W. 935, where the plaintiff, contemplating an action, forcibly removed the tenant of a claimant in possession and retained possession by force and arms. Most of the cases cited by defendants in support of the propositions stated above were decided under laws making possession by plaintiff at the commencement of the action essential to the jurisdiction of the court to entertain the action at all, and there are expressions in some of them tending to support the proposition that a possession taken for the mere purpose of securing advantage ground for such litigation, especially when obtained by unfair means or by force, is not the possession essential to jurisdiction of an action to quiet title contemplated either by the old equitable rule limiting such action to those in possession, or by statutes adopting that rule. While much may be said in support of such a conclusion, it has been distinctly held in this state under a statute requiring possession as a condition to the maintenance of such an action, that it is immaterial how possession was acquired (see Reed v. Calderwood, 32 Cal. 109, and Calderwood v. Brooks, 45 Cal. 519), and the same ruling was made in Nevada in Scorpion S. M. Co. v. Marsano, 10 Nev. 378, where the court said that it was immaterial if the actual possession was obtained by illegal means, vi et armis; the statute making no exception as to the manner in which possession is acquired. But, as we have, by statute, dispensed with the necessity of any possession by plaintiff, as an essential to jurisdiction of such an action, the particular question involved in the cases we have referred to is no longer of importance. We are concerned here solely with the question as to the character of possession essential to constitute prima facie evidence of ownership, and we can see no warrant for holding that the mere fact that the possession was taken by plaintiff only shortly before the commencement of his action, and with a view to the advantage to be derived in such litigation from being in possession, necessarily precludes it from constituting such prima facie evidence. It is constantly to be borne in mind that the evidence was not such as to compel the conclusion as matter of law that there was at the time of plaintiff's inclosure, actual possession of any portion of the property inclosed by him by any other person.

We have gone over the evidence word by word to ascertain whether there was anything in the evidence to compel the conclusion as matter of law that, notwithstanding plaintiff's actual possession of the greater portion of the land, he nevertheless was not the owner of any interest therein. If such a condition was affirmatively shown by the evidence, doubtless the prima facie presumption of ownership arising from mere actual possession should be held to be overcome. See Shelton Logging Co. v. Gosler, 26 Wash. 126, 66 Pac. 151. But we are satisfied that no such effect can be given to such evidence as was actually elicited on the cross-examination of plaintiff and Mr. Shepardson, his attorney, which constitutes the only evidence as to which any such claim could plausibly be made. In fact, learned counsel for defendants do not press any claim of this kind, as we understand their brief.

We are unable to escape the conclusion that, as to the property actually inclosed by plaintiff, a sufficient case was made to preclude the granting of a nonsuit for want of evidence of ownership of any interest in plaintiff. If, as is suggested by counsel for defendants, the plaintiff is, as matter of fact, without any interest in the property, and his action was "as bold and brazen a piece of land jumping as appears in the history of land jumping in this state," it is unfortunate that defendants did not introduce the necessary evidence, which must have been easily procurable, and press the case to a judgment on the merits, thus terminating the litigation, instead of resorting to a motion for a nonsuit, generally a proceeding of the most doubtful expediency for one who is able to prove a good defense on the merits.

We see nothing in other claims made in respondents' brief in support of the action of the trial court in granting the motion for nonsuit. What has been said disposes of the claim made by the seventeenth specification of the motion. The tenth specification referred only to lands lying outside of the plaintiff's inclosure, as to which it may be assumed plaintiff made no case; but, as we have seen, the fact that a plaintiff fails to make a prima facie case as to a portion of the land involved does not warrant the granting of a motion for a nonsuit as to the remainder of the property as to which he has made such a case. There was sufficient evidence to support a conclusion that the lands inclosed by plaintiff's fences are a portion of the land described in plaintiff's amended complaint, with the possible exception of a "small portion, northwesterly portion" of one of the inclosures, which, according to the testimony of Mr. Squires, a civil engineer, had been improperly included within plaintiff's fence. But even if we should assume that by reason of the presence in such inclosure of this somewhat indefinite quantity of land not embraced in the description contained in the complaint, as to the ownership of which there is no evidence whatever, except plaintiff's possession, a motion for nonsuit could properly have been granted as to all the land embraced in said inclosure, which, of course, is not conceded, it would still remain that the motion should not have been granted as to the other inclosure. No other special ground stated as a basis for the nonsuit requires discussion.

In view of our conclusion that the motion for nonsuit was erroneously granted, it is unnecessary to consider any other question discussed in the briefs.

The judgment is reversed, and the cause remanded for further proceedings.

We concur: SHAW, J.; SLOSS, J.

(18 Cal. App. 464)

BEHYMER v. SUPERIOR COURT, LOS ANGELES COUNTY. (Civ. 1,123.)

(District Court of Appeal, Second District, California. March 5, 1912.)

JUSTICES OF THE PEACE (§ 155*)—APPEAL — FAILURE TO SEASONABLY PERFECT—EXCUSABLE NEGLECT—RELIEF—DISCRETION.

In holding that defendant's failure to perfect his appeal from a justice by making a deposit for costs within 30 days after notice of appeal, as required by superior court rule 27, thereby subjecting the appeal to dismissal, was not due to excusable neglect, entitling him, under Code Civ. Proc. § 473, to relief, it cannot be said the superior court abused its discretion; the showing being the affidavit of defendant's counsel that he neglected to make the deposit "solely because of forgetfulness, brought about by his physical condition," due to a minor surgical operation, and during all the time in question worked under physical difficulties, due to nervousness resulting from said operation, by reason whereof, according to the affidavit of his physician, "he suffered discomfort and distress which rendered him unable to properly attend to his business."

Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 524–533; Dec. Dig. § 155.*]

Application by Charles E. Behymer for writ of mandate to the Superior Court of Los Angeles County. Writ denied.

C. Ibeson Sweet, for petitioner. Richard A. Dunnigan, for respondent.

SHAW, J. Application for a peremptory writ of mandate, commanding the superior court and the Honorable George H. Hutton, judge thereof, to vacate and set aside an order dismissing an appeal from a judgment rendered in the justice's court, in an action wherein one O. W. Hobbs was plaintiff and petitioner was defendant.

The judgment from which the appeal was taken was rendered on September 26, 1911, on which date defendant served his notice of appeal and filed the required undertaking, which action was followed, on October 3, 1911, by depositing with the clerk of the superior court a transcript of the justice's docket and the files and papers required upon hearing the case on appeal. The order of dismissal was made upon a motion, based upon the ground that appellant had failed and neglected to pay to the clerk of the court the sum of $6 as a deposit for costs, as required by rule 27 of the superior court, which is as follows: "In any civil action appealed from an inferior court, if the transcript and papers are not filed in the clerk's office and $6 paid to the clerk as a deposit for costs, within thirty days after the notice of appeal and undertaking on appeal are filed in such inferior court, such appeal will be dismissed on motion made upon notice to the appellant." That such requirement is a reasonable one, and the court authorized to adopt the rule, is unquestioned. Section 129, Code Civ. Proc. The notice of the motion was given on November 3, 1911, and on the day following, some 39 days after taking the appeal, appellant paid the fee of $6 as a deposit for costs, thus for the first time perfecting his appeal. Clearly he was in default; and, unless entitled upon the showing made to relief under section 473, Code of Civil Procedure, the writ should not issue. An examination of the affidavits presented at the hearing of the motion fails to disclose any abuse of discretion on the part of the court in denying the appellant relief upon the ground of mistake, inadvertence, surprise, or excusable neglect. Indeed, it appears from the affidavit of petitioner's attorney that he was familiar with rule 27 and the requirement that the costs should be paid within 30 days; and, while conversing with respondent's attorney as to paying the costs of the appeal, he expressed himself as being opposed to paying the same. He nevertheless, on September 26, 1911, the day on which the appeal was taken, at petitioner's request, promised to pay the costs, upon his client's promise to come to his office and pay them later. That petitioner's attorney, according to his affidavit, "fully intended to pay said costs, and neglected to do so solely because of forgetfulness, brought about by his physical condition," due to the fact that on September 28, 1911, he submitted to a minor surgical operation, and during all of the time from September 26th to November 4th worked under physical difficulties, due to nervousness resulting from said operation, by reason whereof, according to the affidavit of the physician, "he suffered discomfort and distress which rendered him unable to properly attend to his business affairs." It further appears from a counter affidavit filed that on November 4th petitioner's attorney, in conversation with the attorney for respondent, assigned as a reason for noncompliance with said rule the fact that appellant had not paid to him the said costs, and that he personally refused to advance the same for his said client. Not only does it appear there was a conflict in the evidence as to the reason for appellant's neglect and failure to pay the costs necessary to perfect his appeal; but, even if uncontradicted, the showing made by appellant fails to exhibit facts upon which this court would be justified in holding the trial court abused its discretion in making the order complained of.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The case of Kraker v. Superior Court, 15 Cal. App. 651, 115 Pac. 663, upon which petitioner relies, has no reference to the facts under review. It differs from this in the fact that the appeal there had been perfected in all respects as required by law within the time allowed therefor; whereas, in the case at bar, the appeal was not perfected by paying the fees required as a condition of filing the papers until after the expiration of the time prescribed therefor.

The writ is denied.

We concur: ALLEN, P. J.; JAMES, J.

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18 Cal. App. 421

KNOBLOCH v. BADER et al. (Civ. 926.)

(District Court of Appeal, First District, California. March 1, 1912.)

1. Bills and Notes (§ 520*)—Action on—Fraud Inducing Signing—Evidence.

In an action on promissory notes given in payment for certain real estate and an assignment of a right to take gravel from certain lands, evidence *held* to show no fraudulent representation as to the length of time the right to take gravel would run.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1813, 1832, 1836, 1837; Dec. Dig. § 520.*]

2. Bills and Notes (§ 97*)—Action on—Failure of Consideration.

Where, as consideration for notes, there passed to the maker a deed to certain property with two different licenses to take gravel from other lands, the cancellation of one of the licenses after the removal of gravel thereunder would not avoid the notes as a failure of consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166–212, 1372–1376; Dec. Dig. § 97.*]

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by F. Knobloch against F. Bader and others. From a judgment for plaintiff and from an order denying a motion for new trial, defendants appeal. Affirmed.

Everts & Ewing, for appellants. E. S. Van Meter and N. C. Coldwell, for respondent.

KERRIGAN, J. This is an appeal from an order denying defendants' motion for a new trial in an action on two certain promissory notes. The case was thus: On the 19th day of April, 1904, the plaintiff made and executed a deed of certain described real estate containing gravel; also an assignment of all right which the plaintiff had to take gravel from certain lands of the Pacific Improvement Company at a place called Pollasky, by virtue of a contract between one T. W. Pratt and said company; and also all the right that the plaintiff had under a certain verbal contract with one J. M. Braly to take gravel from described lands opposite Pollasky. In partial consideration of the deed and assignment, the defendants executed and delivered to the plaintiff two promissory notes—the subject of this action.

Defendants set forth in their pleadings, and now claim, that plaintiff represented to them that he had an assignment from Pratt of a right granted him by the Pacific Improvement Company to remove gravel from their lands for a period of two years in such quantities as he might desire; that this representation was fraudulently made, Pratt's right to remove gravel not being in fact for any definite period; that it was upon the strength of this false and fraudulent representation, and upon no other consideration whatever, that defendants accepted the said deed and assignment and made the said promissory notes.

[1] The court found against the defendants' position, which finding, upon an examination of the record, we conclude is amply supported by the evidence.

In the course of the negotiations, there evidently was something said to the effect that plaintiff's interest in the lands of the Pacific Improvement Company was for the period of two years; but plaintiff did not, as is asserted by defendants, pretend or represent that he had a definite arrangement for that length of time. On the contrary, according to the testimony introduced by the plaintiff, he told the defendants that he was selling them only such interest as Pratt had transferred to him in said gravel land at Pollasky. The attorney who drew up the papers in the transaction for the parties testified that the plaintiff, in the presence of defendant Bader, referring to his interest in the land, said: "I do not know just exactly what it is, * * * whether a contract or a lease. I do not know just what it is, but it is some kind of an agreement that Pratt has with the Pacific Improvement Company to take gravel from the land for two years." At this time Pratt was on his deathbed and unable to be seen, and apparently the parties were unable to learn just what the nature and extent of Pratt's interest in this land was; but the plaintiff nevertheless gave the defendants all the light he could on the subject, and they knew as much about it as he did himself. Hence it is plain that he practiced no deceit upon them.

[2] On the point of failure of consideration, in addition to the three property rights transferred as above mentioned, there were two others, and they all passed as one consideration in solido; and the defendants, according to the evidence introduced by plaintiff, having received just what they bargained for, and having removed gravel from the property of the Pacific Improvement Company for about a year under the Pratt lease or license, we cannot conceive how it can be successfully contended that the transaction was without consideration.

Having come to this view on the evidence in the case, it is unnecessary to discuss the questions as to whether or not defendants' pleadings and evidence allege and prove facts showing a rescission by them.

The order appealed from is affirmed.

We concur: LENNON, P. J.; HALL, J.

(18 Cal. App. 339)

FIDDYMENT v. JOHNSON et al. (Civ. 948.)

(District Court of Appeal, First District, California. Feb. 24, 1912.)

1. Sales (§ 218½*)—Delivery—Question for Jury.

Civ. Code, § 1140, declares that the title to personal property sold passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified. Plaintiff agreed to sell to defendant all the baled hay belonging to him, situated in a certain barn, at an agreed price per ton, and at the time of the agreement received $400 on the purchase, and subsequently made deliveries from time to time, and after the balance of the hay, while in the barns, was ruined by flood brought action to recover the balance of the agreed price as upon a completed sale. *Held*, that the question whether the parties had agreed upon a present transfer was one of fact for the trial court.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

2. Sales (§ 218½*)—Delivery—Sufficiency of Evidence.

Evidence, in an action to recover the balance of hay, alleged to have been sold and delivered to plaintiff, *held* sufficient to support a finding that there was a present sale or transfer of title at the time of making the agreement.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 586, 587; Dec. Dig. § 218½.*]

3. Sales (§ 200*) — Delivery — Weighing or Measuring.

Where goods are identified, and the parties agree upon a present transfer, the fact that weighing or measuring is necessary to ascertain the price to be finally paid does not affect the question of the transfer of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524–528; Dec. Dig. § 200.*]

4. Sales (§ 201*)—Delivery—Weight of Evidence—Place of Delivery.

Where goods are identified, and the parties agree upon a present transfer, the fact that the seller has to deliver them at some point of shipment is not necessarily controlling on the question of the transfer of title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529–541; Dec. Dig. § 201.*]

Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by Frank A. Fiddyment against M. Johnson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jas. P. Sweeney, for appellants. Meredith, Landis & Johnson, J. D. Meredith, and J. W. Henderson, for respondent.

HALL, J. This is an appeal from a judgment and order denying defendants' motion for a new trial.

On or about the 15th day of January, 1907, plaintiff sold or agreed to sell to defendants all the baled hay belonging to plaintiff, situate in two certain barns, at an agreed price per ton. At the time of the agreement, $400 was paid on the purchase, and thereafter, from time to time, as appellants sent their schooners for the hay, portions were delivered and subsequently paid for. On the 23d day of March, however, a flood occurred, which ruined and damaged the balance of the hay as it remained in the barns, and, the purchasers refusing to pay therefor, this action was brought to recover the balance as upon a completed sale of hay.

The theory of plaintiff was and is that by the contract entered into the title to the hay passed to the purchasers, and that its subsequent loss before actual delivery and removal, occurring without the fault of the plaintiff, must be borne by the purchasers.

The principal and really only point to be determined upon this appeal is as to whether or not the evidence supports the finding that title to the hay passed from the seller to the buyers at the making of the contract.

It is true that appellants, in their brief, raise the question as to the authority of Webber to make any contract for purchase, other than one of delivery f. o. b. at the river bank or landing. But all discussion as to the agency of Webber in whatever contract he did make is foreclosed by the stipulation entered into by the appellants at the trial. It was stipulated by appellants that, in the negotiations between Mr. Webber and Mr. Fiddyment in the transaction of the sale of the hay from Fiddyment to appellants, Mr. Webber was the agent of appellants. This was a full and complete stipulation that Webber was the agent of appellants in the transaction involved in this suit; and it is now too late to urge that appellants were not bound by his contract, because, forsooth, he might have violated his instructions as to the terms upon which he might make purchases.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] Returning, now, to the only real question involved in the appeal, does the record show sufficient to support a finding of a present sale or transfer of title at the time of making the agreement? We think it clearly does. "The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not." Civ. Code, § 1140.

The hay in this case, as the evidence abundantly shows, was fully identified. It was all the baled hay belonging to plaintiff contained in two certain barns, a smaller and a larger barn. The smaller barn contained only baled hay, all belonging to plaintiff. The larger barn contained, besides the baled hay, some loose unbaled hay belonging to him, and some baled barley hay belonging to one Chambers. The baled hay of plaintiff in the larger barn consisted of a small portion of barley hay and alfalfa hay. The barn was divided into separate compartments. In one was baled hay belonging to Mr. Chambers; in another was baled hay, barley, and alfalfa belonging to plaintiff; and in another baled alfalfa belonging to plaintiff, and on top of this baled barley hay belonging to Mr. Chambers. There was no other baled hay in the barn. The sale was of all of plaintiff's baled hay. It was all examined and identified by Mr. Webber, who also was shown, and examined, the Chambers hay, with a view to purchasing it, which he subsequently did. Nothing remained to be done to identify any of the hay sold. It was ready for delivery whenever it should be called for. The evidence as to what occurred at the transaction shows that Mr. Webber examined the hay, and finally agreed to buy all of plaintiff's baled hay in the two barns at a stipulated price per ton. Plaintiff then consented, at Webber's request, that the hay might remain in the barns until June 1st, to be delivered as the purchasers might send their schooners for it from time to time. After that had been agreed upon, Webber asked plaintiff if he would get the hay to the river when the purchasers sent their schooners for it; and plaintiff agreed to do so. The smaller barn was situated on the river bank; but the larger barn was some 200 yards away, and the hay had to be hauled from the larger barn to the river bank. The entire contract was in parol. No time of payment seems to have been stated; but $400 was paid as a deposit, and other payments made from time to time as deliveries were made. Webber was called as a witness, and remembered buying some hay from plaintiff in January, 1907, but did not remember anything of the details.

From the evidence presented to the court, it was a question for the court to determine as to whether or not the parties had agreed upon a present transfer. Where the intention of the parties is not clear, but must be determined from the facts and circumstances of the case, it is a question of fact for the jury or trial judge. 35 Cyc. 278; Prowers v. Nowles, 42 Colo. 442, 94 Pac. 347; Lobdell v. Horton, 71 Mich. 681, 40 N. W. 28; Sherwood v. Walker, 66 Mich. 568, 33 N. W. 919; Toohey v. Plummer, 65 Mich. 688, 32 N. W. 897; Fuller v. Bean, 34 N. H. 290; Dyer v. Libby, 61 Me. 45; Smith v. Friend, 15 Cal. 125.

[3] If the goods are identified, and the parties agree upon a present transfer, it does not matter that weighing or measuring is necessary to ascertain the price to be finally paid. Blackwood v. Cutting Packing Co., 76 Cal. 212, 18 Pac. 248, 9 Am. St. Rep. 199; Lassing v. James, 107 Cal. 349, 40 Pac. 534.

[4] Neither is the fact that the seller has to deliver at some point of shipment necessarily controlling. In Dyer v. Libby, 61 Me. 45, the seller was to haul and deliver at a specified point; and it was held not controlling. In Bill v. Fuller, 146 Cal. 50, 79 Pac. 592, the seller was to deliver oranges, then on the tree, at the railroad station, when wanted by the purchaser. The oranges sold were all that were grown by the seller, except the St. Michaels. The court, speaking through Mr. Justice Shaw, in concluding its opinion, said: "Nor do we wish to be understood as holding that the title to the crop did not pass as soon as the contract was executed. The agreement in form imports a present sale; the thing sold was in existence, and was identified and separated from other things. Under section 1141 [1140?] of the Civil Code, it would seem that title passed at once, and that the oranges remained on the tree at the risk of the buyer." See, also, Greenbaum v. Martinez, 86 Cal. 459, 25 Pac. 12.

In the case at bar, the subject-matter of the sale was perfectly identified; and the evidence was such as to justify the conclusion of the court that the parties had agreed upon a present transfer. The evidence therefore supports the finding that title passed to the purchaser at the execution of the contract, and the judgment and order should be affirmed. It is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

18 Cal. App. 423

STOECKLE v. KARR et al. (Civ. 922.)

(District Court of Appeal, First District, California. March 1, 1912.)

Appeal and Error (§ 1011*) — Findings—Conclusiveness.

Where the evidence, though conflicting, supports the court's findings, they will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by J. A. Henry Stoeckle against William Karr and others. From a judgment against him, William Karr appeals. Affirmed.

Lee M. Olds and Frank Shilling, for appellant. J. C. Flannery, for respondent.

KERRIGAN, J. This is an appeal by defendant, William Karr, from a judgment against him in favor of the plaintiff.

On the 9th day of August, 1910, the appellant and the plaintiff entered into a contract whereby appellant was to sell to the plaintiff a certain cigar store on Devisadero street in San Francisco. On that day plaintiff paid on account of the purchase price the sum of $30, and two days later he paid the balance of $820. Subsequently a dispute arose between the parties, and the property never changed hands. Plaintiff demanded the return of his money, and, his demand being refused, he brought this action for money had and received, upon the theory that no sale of the cigar store had been effected, and recovered judgment as above stated. The sole ground urged for a reversal of the judgment is that the evidence is insufficient to support the findings. Our study of the record leads us to the conclusion that this view is untenable.

The evidence introduced by defendant tends to show that the plaintiff was offered the cigar stand on either of two propositions. By one he was to pay for it the sum of $850 as it stood without condition or limitation of any kind. By the other proposition an invoice of the stock of goods was to be made, and the plaintiff was to pay therefor at wholesale rates, together with the sum of $150 for the good will of the business. Defendant's evidence tended to show that the plaintiff accepted the former proposition, and accordingly paid the agreed price of $850. Plaintiff, on the other hand, introduced evidence tending to prove that he paid the $850 with the understanding that $150 was for the good will of the business, and with guaranty and arrangement that the stock of goods would amount in value to $700; that unless it did so no sale was to be considered effected. It is true that the evidence is not at all direct and clear on this point, but that is largely due, we think, to the fact that the plaintiff is of foreign birth and not very familiar with the English language. The circumstances of the case tend, however, strongly to support this view. No arrangement was made for the assignment of the lease of the store to plaintiff until after the $850 was paid, and no assignment of it was in fact made to the plaintiff. It was agreed, according to the evidence on behalf of plaintiff, that an inventory of the stock was to be made, and it is not contradicted that the plaintiff with his son repeatedly called by appointment with the appellant at the store for the purpose of taking the same. Each time, however, the plaintiff was put off on what must have seemed to the trial court a disingenuous excuse and one indicating bad faith on the part of the appellant. On the last of these visits appellant asked plaintiff to take possession of the store and to make the necessary inventory afterwards, and upon plaintiff's refusal to do so declared that no inventory of the stock was necessary, and moreover that plaintiff's receipt would not disclose that he was entitled to one. All this time appellant apparently remained in charge of the business, taking and keeping for his own use the receipts thereof. According to the contract, the agent of the appellant, through whom the sale was negotiated, was to file with the recorder a five days' notice of the sale, which he failed to do until the day that plaintiff gave notice of rescission, and it was not until this day either that the agent paid over the amount of the second payment to appellant.

To say the least, it is certain that there is evidence in the case amply sufficient to support the findings, and under the familiar rule that when there is a substantial conflict appellate courts will not disturb the findings of the trial court, the judgment must be sustained.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 433

BAKER v. BOARD OF FIRE PENSION FUND COM'RS. (Civ. 1,083.)

(District Court of Appeal, First District, California. March 2, 1912.)

Municipal Corporations (§ 200*)—Employés—Municipal Departments — Fire — Right to Pension—Death of Fireman—"Died in Performance of Duty."

San Francisco Charter, c. 7, art. 9, § 5, requires, as a condition to the duty of the board of fire pension fund commissioners to provide a pension for a widow, that her husband shall have died "in the performance of his duty." A fireman driving a hose wagon received a broken back and other injuries by the overturning of the wagon, and, as a result of the pain he suffered, became insane and committed suicide. *Held* that, as he was neither legally nor morally responsible for killing himself, his death was caused without the intervention of any outside or independent cause, and he died in the performance of his duty, so as to entitle his widow to the pension.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 547; Dec. Dig. § 200.*]

Appeal from Superior Court, City and County of San Francisco; W. M. Conley, Judge.

Mandamus by Catherine Baker against the Board of Fire Pension Fund Commissioners of the City and County of San Francisco. From a judgment granting a peremptory writ, defendants appeal. Affirmed.

Percy V. Long, City Atty., and J. F. English, Asst. City Atty., for appellants. John T. Williams, for respondent.

HALL, J. This is an appeal from a judgment granting to plaintiff a peremptory writ of mandate against defendants, upon their refusal to answer after the overruling of their demurrer to plaintiff's petition, requiring defendants to grant, approve, and allow a pension to plaintiff, as the widow of one Frederick Joseph Baker, alleged to have been killed while in the discharge of his duty as a fireman of the city and county of San Francisco.

Section 5 of chapter 7, art. 9, of the San Francisco charter, makes it the duty of the board of fire pension fund commissioners to provide a pension in a designated amount, out of the firemen's relief fund, for the widow of any "member or employé of the fire department who may be killed while in the performance of his duty."

The real question to be determined is: Do the admitted facts in the case show that Frederick Joseph Baker, the late husband of plaintiff, was killed while in the performance of his duty?

In this connection, it may be noted that respondent claims that it is alleged in the complaint, and so admitted by demurrer, as an ultimate fact that said Baker was killed while in the performance of his duty. However, we think that from the whole record and the connection in which this allegation occurs it should properly be treated as a conclusion drawn by the pleader from the particular facts, which are pleaded in detail. For the purposes of this discussion, we shall so treat it; and the question then arises: Do the particular facts pleaded show that said Baker was killed in the performance of his duty as a member of the fire department?

In substance, these facts are that on the 15th day of June, 1910, said Baker, while in the performance of his duty in driving a hose wagon, received a broken back and other bodily injuries by the overturning of said hose wagon; that, as a result of such injuries, he suffered great pain and anguish, which caused him to become insane, and while so insane, and because thereof, he killed himself on the 3d day of September, 1910. Under these circumstances, can it be said that Baker, within the meaning of the provisions of the charter, was "killed while in the performance of his duty?" The trial court was of the opinion that he was, and accordingly directed that his widow be allowed the pension provided by law.

Neither side to the appeal has been able to cite to us any authority which may be said to be squarely in point. While the case is not without difficulty, we think that the decision of the trial court was correct. The injuries which Baker received may justly be said to have been the proximate cause of his death. They set in motion a train of events, operating from cause to effect, that, without the intervention of any outside and independent cause, resulted in his death.

We say that his death was not brought about by the intervention of any outside and independent cause advisedly; for, although his own hand inflicted the wound of which he died, this was not an act for which he was either legally or morally responsible. Upon this phase of the argument, the cases holding that suicide or self-destruction while insane does not exempt an insurer from liability under a policy, excepting from the risk a death by suicide or the insured's own hand, where the insured commits suicide while insane, are illuminative. See Mutual Life Ins. Co. v. Terry, 82 U. S. 580, 21 L. Ed. 236; Breasted v. Farmers' Loan & Trust Co., 8 N. Y. 299, 59 Am. Dec. 482; Newton v. Mutual Benefit Life Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Accident Ins. Co. v. Crandal, 120 U. S. 527, 7 Sup. Ct. 685, 30 L. Ed. 740.

It has been said that "self-destruction by a fellow being bereft of reason can with no more propriety be ascribed to the act of his own hand than to the deadly instrument that may have been used by him for the purpose," and was no more his act in the sense of the law "than if he had been impelled by an irresistible physical force." Accident Ins. Co. v. Crandal, supra.

So, in the case at bar, Baker cannot be said to have been the cause, either morally or legally, of his own death. The primary and efficient cause of his death was the dreadful injuries he received. These injuries set in motion a chain of events that, operating in a direct line from cause to effect, and without the intervention of any independent force, resulted in his death. His death resulted without the intervention of any independent force; for the self-inflicted wound was the result of the insanity, which was in turn caused by the injuries. The injuries were thus the efficient and proximate cause of his death. "An efficient, adequate cause, being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result." Travelers' Ins. Co. v. Murray, 16 Colo. 296, 26 Pac. 774, 25 Am. St. Rep. 267.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The conclusion reached by the trial court certainly accords with the general purpose and spirit of the provision of the charter, which intends a provision for the support of those dependent upon firemen whose death results from a faithful performance of a very hazardous duty. Buckendorf v. Minneapolis Fire Department Relief Ass'n, 112 Minn. 298, 127 N. W. 1053, 1133.

The judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

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18 Cal. App. 442

REED v. HAMMOND, County Auditor.
(Civ. 1,065.)

(District Court of Appeal, Second District, California. March 2, 1912.)

1. Counties (§ 61*)—Creation of Offices—Power of Legislature.

Subject to the provisions of the Constitution, the Legislature may create county offices, prescribe the tenure thereof, fix the salary, and determine the qualifications required to render one eligible to election or appointment thereto.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 86; Dec. Dig. § 61.*]

2. Infants (§ 17*) — Assistant Probation Officer.

Under Pol. Code, § 4013, providing that the officers of a county are the sheriff, auditor, etc., "and such other officers as may be provided by law," the office of assistant probation officer of a county of the seventh class, created by an act specifying the tenure of the office, fixing the salary and making it chargeable on and payable out of the county treasury, is a county office.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 17; Dec. Dig. § 17.*]

3. Officers (§ 20*)—Qualifications—"Election"—Women.

Under Pol. Code, § 58, providing that, except where otherwise specially provided, an elector is eligible to an office for which he is an elector, and that no person is eligible who is not such an elector, and County Government Act (Gen. Laws 1910, Act 837) § 54, providing that no person shall be eligible to a county office who, at the time of his election, is not an elector of the county in which the duties of the office are to be exercised, a person who is not an elector of a county is not eligible to any office of that county, whether filled by election or appointment, the term "at the time of his election" not being limited in meaning to an election in the popular sense, in which all electors participate, but also including an appointment to office; and hence, prior to the constitutional amendment extending the elective franchise, a woman was not eligible to the office of assistant probation officer of a county.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 24, 25; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 3, pp. 2329–2336; vol. 8, pp. 7647–7648.]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by J. A. Reed against Chauncey R. Hammond, as Auditor of the County of San Diego, for a peremptory writ of mandate. From an order and judgment for plaintiff, defendant appeals. Reversed.

H. S. Utley, Dist. Atty., for appellant. Luce & Luce, for respondent.

SHAW, J. This is an appeal from an order of court, pursuant to which a peremptory writ of mandate was issued, commanding defendant, who was auditor of San Diego county, to issue to Lillie A. Reed, the wife of petitioner, his warrant upon the county treasurer in the sum of $120, claimed as salary for the month of May, 1911, as assistant probation officer of San Diego county, to which office, on May 1, 1911, she had been appointed, pursuant to the provisions of the Juvenile Court Act (St. 1911, p. 658) approved April 5, 1911.

The sole question involved is whether, prior to the constitutional amendment extending the elective franchise, women were eligible to appointment to the office of such assistant probation officer.

[1] It is unnecessary to cite authority in support of the proposition that the Legislature, subject to the provisions of the Constitution, may create county offices, prescribe the tenure thereof, fix the salary, and determine the qualifications required to render one eligible to election or appointment to such office. Section 55 of the County Government Act (Gen. Laws of Cal. p. 137), as codified in section 4013, Political Code, provides that the officers of a county are the sheriff, auditor, etc., "and such other officers as may be provided by law."

[2] The office of assistant probation officer of San Diego county was one created by the Legislature in and for all counties of the seventh class, to which San Diego belongs. The act specified the tenure of office, fixed the salary of the incumbent, and made it chargeable upon and payable out of the county treasury. Clearly it was a county office; indeed, respondent, upon the authority of Nicholl v. Koster, 157 Cal. 416, 108 Pac. 302, concedes it so to be.

[3] Section 58, Political Code, as enacted in 1872, provided that "every elector is eligible to the office for which he is an elector, except where otherwise specially provided; and no person is eligible who is not such an elector." In 1891 this section was amended by adding thereto the words "except when otherwise specially provided." It is apparent that this amendment was by the Legislature deemed necessary, in order to render effective an amendment, adopted at the same time, to section 792 of the Political Code, whereby women were made eligible to appointment as notaries public. Stats. 1891, p. 29. Section 54 of the County Government Act (Gen. Laws of Cal. p. 137), as codified in section 4023 of the Political Code, so far as it concerns the question here in-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

volved, was enacted on the same day, in 1872, as said section 58 of the Political Code. As originally enacted, it was as follows: "No person is eligible to a county office who, at the time of his election, is not of the age of twenty-one years, a citizen of the state, and an elector of the county in which the duties of the office are to be exercised." While it has been amended from time to time, no change has been made in the requirement that in order to render one eligible to a county office, other than superintendent of schools, school trustee, or member of the board of education, to which a woman may be elected or appointed, he must, at the time of his election, be an elector of the county wherein the duties of the office are to be exercised. In 1907 (St. 1907, p. 354) it was repealed and re-enacted as a part of the County Government Act, consisting of 234 sections.

Respondent contends that the provisions of this section have reference solely and alone to those officers selected by popular vote at an election in which the electors of the county give expression to their choice in filling the office, and not to county officers selected and designated by appointment. The case turns on the meaning to be given the words "at the time of his election," as used in the statute. An appointment is generally made by one person, or by a limited number constituting a board or tribunal acting under delegated power; while an election, in the popular sense, is a proceeding wherein all the electors at large participate in the designation of an official, and the one thus chosen to fill the office is said to be elected. In this sense, no incumbent of an office could be said to be elected to an office, in the absence of an election affording an opportunity to the electors to give such expression to their wishes in choosing the official. Hence, under this narrow construction, the fact that, while one who was not an elector or citizen, or of the age of 21 years, would be ineligible to an office, if elected thereto, nevertheless, the want of any of such qualifications, since there was no "time of his election" to which the possession of the qualifications could relate, would constitute no obstacle to his appointment to fill a vacancy occurring therein. Clearly it was not the intent of the Legislature that such interpretation should be given the statute. Considering the scope of the entire legislative scheme embodied in the County Government Act, and the fact that it provides for the selection of officers both by election and appointment, it is clear to our mind that the purpose of the section before us was to prescribe the qualifications of all county officers, in the absence of the possession of which they are ineligible, and this whether designated at an election, in the popular sense of the term, or designated by appointment. "In the construction of a statute, the intention of the Legislature is to be ascertained, not so much from the phraseology in which the intent has been expressed, as the general tenor and scope of legislation on the subject." People v. Eichelroth, 78 Cal. 141, 20 Pac. 364, 2 L. R. A. 770; Palache v. Pacific Ins. Co., 42 Cal. 419. In our judgment, the words "at the time of his election," as used in the statute, have reference to the time of the selection or designation to the office; and the provision as to eligibility contained in section 4023, Political Code, applies alike to all county officers, whether designated at an election, commonly so termed, or by appointment.

The declared purpose of the juvenile court act is to give to dependent and delinquent children of both sexes care and discipline approximating as nearly as possible that which should be given by parents. It is impossible to accomplish this purpose in full measure without the aid and assistance of women ready and willing to sacrifice their personal comfort and ease for the good and welfare, not only of such dependent children, but for the good of society in general, of which they form an important part. The Legislature having this in mind, it is undoubtedly true that its failure to remove the disability of women to fill this important office, in the performance of the duties of which she is peculiarly fitted, was due solely to an oversight. Fortunately the disability due to the omission on the part of the Legislature has been removed by the constitutional amendment extending the franchise, since the adoption of which the ground here urged for denying petitioner compensation for services rendered can no longer furnish a subject for the zeal of those whose duty it is to protect the county treasury from the payment of moneys to persons who, under the law, are not entitled thereto, and this whether they be alleged officials or extra deputies allowed to county officers.

With great reluctance, we are forced to the conclusion that the judgment and order from which this appeal is prosecuted should be reversed; and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

18 Cal. App. 460

SAN DIEGO COUNTY v. BRYAN. (Civ. 1,056.)

(District Court of Appeal, Second District, California. March 5, 1912. Rehearing Denied by Supreme Court May 3, 1912.)

1. JUSTICES OF THE PEACE (§ 17*)—COMPENSATION—MARRIAGE FEES.

Under the county government act (Pol. Code, § 4238), providing that in counties of the ninth class justices of the peace in townships having a population of 16,000 or more shall receive $150 a month in full of all compensation in both civil and criminal cases, and section 4290, providing that salaries and fees provided in that title shall be in full compensation for all services of every kind rendered by the officers therein named, a justice of the peace in a township having more than 16,000 population, in a county of the ninth class, cannot retain for his own use fees received by him for solemnizing marriages.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 28; Dec. Dig. § 17.*]

2. COUNTIES (§ 80*)—OFFICERS—EXTRA COMPENSATION — STATUTES — STRICT CONSTRUCTION.

Under the county government act (Pol. Code, § 4292), providing that all salaried officers of the several counties and townships of the state shall collect for the use of their respective counties, and pay into the county treasury, the fees allowed by law, except where such fee, or a percentage thereof, is allowed to the officers, such fees cannot be retained by an officer to his own use, unless specially provided by law; the statute being strictly construed in favor of the government against the claimant for extra compensation.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 125, 131–134; Dec. Dig. § 80.*]

Appeal from Superior Court, San Diego County; W. A. Sloane, Judge.

Action by the County of San Diego for a peremptory writ of mandamus against Solon Bryan. From a judgment denying the writ, plaintiff appeals. Reversed, with directions.

H. S. Utley, Dist. Atty., for appellant. Adam Thompson and J. C. Hizar, for respondent

ALLEN, P. J. This is an appeal from the judgment of the superior court of San Diego county, denying a peremptory writ of mandamus, directing the defendant to pay into the county treasury of said county money received by him, as a justice of the peace, for solemnizing marriages.

[1] The only question presented upon the appeal involves the right of the defendant as such justice to retain as his own such fees; it not being disputed that if such fees belong to the county the proceeding sought is an appropriate one. The defendant, a justice of the peace, was elected and inducted into office since the adoption of the county government act, as amended in 1909. San Diego, by said act, is made a county of the ninth class. Section 4238 of such county government act (Pol. Code) provides: "In counties of the ninth class the county officers shall receive as compensation for the services required of them by law, the following salaries, to wit: * * * 15. Justices of the peace, in all townships having a population of sixteen thousand or more, one hundred and fifty dollars per month, in full of all compensation in both civil and criminal cases." The answer admits that the population of San Diego township is such as to bring respondent within this limitation as to salary; his contention, however, being that the solemnizing of a marriage is neither a civil nor a criminal case, and therefore the fees received by him are his personal property. The authority of a justice of the peace to solemnize marriages is conferred by section 70 of the Civil Code. Section 4290 of the county government act provides "the salaries and fees provided in this title shall be in full compensation for all services of every kind and description rendered by the officers named in this title, either as officers or ex officio officers, their deputies and assistants, unless in this title otherwise provided," with certain exceptions, not here applicable. This section seems to us to comprehend all of the fees received for services rendered in an official capacity, whether performed in a strictly civil or criminal case, or otherwise. We are not of opinion that a proper construction of the county government act confers upon a justice of the peace of the township named the right to retain as his own any fees received by him in his official capacity. In County of Humboldt v. Stern, 136 Cal. 63, 68 Pac. 324, in construing the county government act of 1897 (St. 1897, p. 518), and that portion thereof identical with section 4290, the Supreme Court says: "This provision is a legislative declaration that the officers shall not receive any compensation from the county, other than the salaries therein named for any services they may render it, either in the line of their official duty or otherwise. * * * If he is of the opinion that the services asked of him are not within the line of his official duty, he can decline to perform them; but if he performs such services he cannot afterwards insist that it was not a part of his official duty, and claim a compensation therefor." By analogy, when an officer performs an act, the sole authority for which performance rests upon his official position, he may not insist that the same, when performed, is not an official act.

[2] The county government act provides (section 4292) that all salaried officers of the several counties and townships of this state shall charge and collect for the use of their respective counties, and pay into the county treasury, on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except where such fees, or a percentage thereof, is allowed such officers, and excepting, also, such fees as are a charge against the county. The allowance of such fees, in order that they may be retained by the officers, must be specially provided by law. The rule of strict construction in favor of the government as against a claimant for extra compensation, where the enactment in reference thereto admits of two constructions, is applicable here. Irwin v. County of Yuba, 119 Cal. 686, 52 Pac. 35, and cases cited. We do not regard the case of City of St. Louis v. Sommers, 148 Mo. 398, 50 S. W. 102, as an authority in point. In that case, the statute only provided that the salary should be received in full of services

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

performed in court; in other words, for strictly judicial duties. The Code provisions of this state under consideration are to the effect that such salary shall be in full of all services of any and every kind rendered.

We are of opinion that the court erred in its judgment denying the writ, and the same is reversed, with instructions to issue a peremptory writ of mandate, commanding and directing the respondent forthwith to pay into the county treasury the fees collected for solemnizing marriages during his present term of office.

We concur: JAMES, J.; SHAW, J.

18 Cal. App. 457

POOLE v. GRAND CIRCLE, WOMEN OF WOODCRAFT. (Civ. 1,009.)

(District Court of Appeal, Second District, California. March 5, 1912.)

INSURANCE (§ 291*)—LIFE—AVOIDANCE FOR MISREPRESENTATION—"ILLNESS."

Under Civ. Code, § 3533, which states the maxim that the law disregards trifles, an insurance policy was not invalidated by answers of the insured, in her application, that she had not been confined to her house by illness or consulted a physician since childhood, though, about two years prior to the application, she had been confined to the house by an acute cold, causing suppressed menstruation and a soreness and congestion of the womb, at which time a physician paid her one visit, as "illness" contemplated in the application is a disease or ailment which affects the soundness and healthfulness of the system.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681–690, 694–696; Dec. Dig. § 291.*

For other definitions, see Words and Phrases, vol. 4, pp. 3390–3391.]

Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by John R. Poole against the Grand Circle, Women of Woodcraft. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 119 Pac. 201.

John H. Foley, for appellant. Charles S. Burnell, for respondent.

SHAW, J. Plaintiff, as the surviving husband of Gertie S. Poole, deceased, sues to recover upon a life insurance policy which had been issued to his wife by defendant, and wherein he was made the beneficiary. Judgment went for plaintiff, from which defendant appeals.

The policy was issued on October 26, 1908, upon an application therefor signed by the applicant on September 19, 1908. Defendant resists payment upon the ground of an alleged breach of warranty, in that certain statements made in the application, and which are claimed to constitute strict warranties, were untrue. Counsel for the respective parties devote a large part of their briefs to a discussion of the question as to whether statements made by the applicant should be construed as strict warranties. A determination of such question, however, is not essential to a decision of the appeal. Appellant's contention in this regard may be conceded. The question then arises, Were the statements untrue? The trial court found they were true; hence, if this finding is sustained by the evidence, the judgment must be affirmed, upon the ground that there was no breach of the alleged warranties.

The questions and answers thereto alleged to be false are as follows: "Q. When were you last confined to the house by illness? A. Not since childhood, 3½ years old. Q. When did you last consult a physician? A. Not since childhood. Q. Have you now, or have you had, any illness, disease, or injury not mentioned in the foregoing questions and answers? A. No. Q. Is the menstruation regular and normal? A. Yes. Q. Have you ever had any inflammation or other disease of the ovaries or tubes? A. No." Gertie S. Poole died on February 21, 1909. At the trial, Dr. Bacon, the physician who attended deceased in her last illness, was called as a witness, and testified that, some two years prior to the making of the application for insurance by deceased, he made one visit to her, at which time she was confined to her bed, suffering from an acute cold, and as a result of which there was temporary difficulty during the menstrual period; that he gave her a little medicine, and she got better right away; that on October 1st following she called at his office, when he made an examination and found everything normal, except that the womb was a trifle small and a little bit sore, due to the congestion resulting from the cold; that early in 1907 he gave her a general tonic to build her up and give her an appetite. There is no evidence, other than the fact that when the physician called at her house he found her in bed, that the insured was ever confined to her house by illness. Whether her being in bed at the hour of his call was due to the cold with which she was afflicted is not made to appear. Indeed, for aught that is shown by the evidence, she may have been in bed only during the time of his single visit; and at what time in the day this occurred is not shown. He says he could not say how long she was confined to the house. Moreover, "illness," as here used, must be construed as something more than a mere indisposition, due to a temporary cold, accompanied by a painful menstrual period. "'Illness,' as used, means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system, * * * and not a mere temporary indisposition, which does not tend to undermine and weaken the constitution of the insured." Billings v. Metropolitan Life Ins. Co., 70 Vt. 477, 41 Atl. 518. A cold is "not to be construed as importing an absolute freedom from any bodily ailment, but rather as freedom from such ailments as would ordinarily be called disease or sickness." Metropolitan Life Ins. Co. v. McTague, 49 N. J. Law, 587, 9 Atl. 766, 60 Am. Rep. 661. Illness "relates to matters which have a sensible, appreciable form, * * * and applies ordinarily to matters of a substantial character," and not to a slight and temporary indisposition, speedily forgotten. Hubbard v. Mutual Reserve Fund Life Ass'n, 100 Fed. 723, 40 C. C. A. 665. Remaining in the house for a few hours, or abstaining from the labors of one's usual calling, owing to a temporary cold or headache, cannot be construed as "confinement to the house by illness." Applying the maxim, "The law disregards trifles" (section 3533, Civ. Code), the evidence wholly fails to show the statement made by the applicant, to the effect that she had not been confined to the house by illness, to be untrue.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

What we have said is equally applicable to the alleged untrue statement that she had not consulted a physician. A reasonable construction of the question implies that it should be interpreted as relating to a consultation as to some disease or illness with which the applicant was or had been afflicted, not to some feeling of trivial discomfort or temporary indisposition, not affecting the general health.

The right of a beneficiary to recover upon an insurance policy, the application for which contains a statement that the applicant has not consulted a physician since childhood, should not be defeated by evidence that years before the date of his application he consulted a physician as to a headache, due to an overlibation at a banquet, and was advised to visit a soda fountain and drink a bromo-seltzer. We concur with the learned trial judge that, if the facts presented constitute a defense to the plaintiff's right to recover, very few life insurance policies justify the faith therein of their holders.

Upon the theory contended for by appellant, that the statements made constitute strict warranties, the finding of the court that there was no breach of said warranties is fully sustained by the evidence.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

18 Cal. App. 446

PAYNE v. MURPHY. (Civ. 1,040.)

(District Court of Appeal, Second District, California. March 4, 1912. Rehearing Denied by Supreme Court May 3, 1912.)

1. STATUTES (§ 92*)—CLASSIFICATION OF COUNTIES BY POPULATION.

Under Const. art. 11, § 5, which authorizes the Legislature to regulate the compensation of county officers in proportion to duties and for this purpose to classify the counties by population, the power of the Legislature can be exercised only for the limited purpose of enabling the compensation of county officers to be fixed and adjusted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 101; Dec. Dig. § 92.*]

2. STATUTES (§ 93*)—GENERAL OR SPECIAL LAWS—CREATION OF COUNTY OFFICES.

St. 1911, p. 1165, amending Pol. Code, § 4256, relating to the compensation of officers in counties of the twenty-seventh class, affecting only one county, and which provides that in that county a stenographer should be appointed by the judge of the superior court to hold office at the pleasure of such judge, and fixes his compensation at $100 per month to be paid as the salaries of other officers were paid, is in conflict with Const. art. 4, § 25, subd. 28, which declares that the Legislature shall not pass local or special laws creating offices or prescribing powers and duties of officers in counties.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

Appeal from Superior Court, San Luis Obispo County; Robert M. Clarke, Judge.

Mandamus by H. M. Payne against P. H. Murphy. Demurrer to petition sustained, and judgment for defendant, and plaintiff appeals. Affirmed.

C. P. Kaetzel, for appellant. Albert Nelson, S. V. Wright, L. A. Enos, Carpenter & Gibbons, and Lamy & Putnam, for respondent.

JAMES, J. In the year 1911 the Legislature enacted certain amendments to section 4256 of the Political Code relating to the compensation of officers in counties of the twenty-seventh class. San Luis Obispo was the only county in the state affected by that legislation. Subdivision 13 of the section mentioned was amended to read as follows: "Justices of the peace, such fees as are now or may be hereafter allowed by law; provided, however, that in counties of this class a stenographer shall be appointed by the judge of the superior court in and for such counties, to hold office at the pleasure of said judge, whose duty it shall be to report and transcribe the testimony and proceedings in all preliminary examinations in all of the justices' courts in and for each and every township in said counties, as provided by section 869 of the Penal Code; and whose further duty it shall be to report the testimony and proceedings in all inquests held by the coroner and transcribe the same into longhand and file a certified copy thereof with the county clerk. Such stenographer shall receive as compensation for his services the sum of one hundred dollars per month to be paid in the same manner and at the same time as the salaries of other officers are paid; and for all transcripts made as required herein he shall receive the same fees now allowed to phonographic reporters by section 274 of the Code of Civil Procedure; he shall also be allowed his necessary traveling expenses while engaged in the performance of his duties." Stats. 1911, p. 1165.

The provisions of this subdivision, wherein it is provided that a stenographer should be appointed by the judge of the superior court, were added by the amendment. Acting under the authority assumed to be given by the amendment, on the 13th of May, 1911, the superior judge of the county of San Luis Obispo appointed appellant herein as stenographer to fill the office so created. Acting under this appointment, the stenographer proceeded to perform the duties of his office until the 6th day of June, 1911, when he demanded that the auditor deliver to him a warrant for the sum of $58 in payment of his salary for that portion of the preceding month during which he had served. The auditor refused to draw such warrant, and this proceeding of mandamus was brought to compel that officer to comply with the demand of petitioner. A demurrer to the petition was thereafter sustained, without leave to amend, and judgment followed in favor of respondent, from which an appeal has been taken.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The contention of respondent is that the act in question is special in its nature and violative of the prohibition of the Constitution in that regard.

[1] It seems to be conceded by all parties that the power of the Legislature to classify counties by population is a power to be exercised for the limited purpose of enabling the compensation of the various officers to be fixed and adjusted. The Constitution, in section 5 of article 11, seems to make that proposition very clear, and our Supreme Court has so held in a number of cases, of which we cite: Pratt v. Browne, 135 Cal. 649, 67 Pac. 1082; Sanchez v. Fordyce, 141 Cal. 427, 75 Pac. 56.

[2] If the effect of the amendment referred to was to create an office, which office is made one special to counties of the twenty-seventh class alone, then the objection of respondent that such legislation is unconstitutional must be sustained. We think that no other construction can be given to the language used by the Legislature. The stenographer was one to be appointed by the judge of the superior court, and he was to "hold office at the pleasure of said judge," and "receive as compensation for his services the sum of one hundred dollars per month, to be paid in the same manner and at the same time as the salaries of other officers are paid." It cannot be said that the intent was merely to provide assistants to the justices of the peace, and so affect the matter of their compensation, which would be a proper subject for special act applying alike to all counties of the same class. The justices of the peace had been already by general law given authority to employ a reporter to report proceedings had at preliminary examinations of persons charged with crime and to fix their compensation, which when so fixed became a county charge. Section 869, Pen. Code. It is true that one of the duties of the stenographer was to report testimony and proceedings at coroner's inquests, and that this was a duty which had theretofore been imposed upon the coroner and for which he was required to pay out of the inquest fee allowed him. To this extent it may be said that the compensation of the coroner was affected by the amendment, but the subject-matter of the amendment taken as a whole indicates very clearly that it was the design to create an office. The superior judge of the county is called upon to make the appointment, and not the officer under whom the stenographer is required to render service, and the term of office is provided to be during the pleasure of the appointing power, and a salary is affixed which is to be paid in the same manner as the salaries of other county officers are paid. The amendment seems to have had no proper place under a subdivision treating alone of fees to be paid to justices of the peace. Subdivision 28 of section 25 of article 4 of the Constitution of the state provides that the Legislature shall not pass local or special laws creating offices or prescribing the powers and duties of officers in counties. We are of opinion that the amendment under consideration is properly subject to the objection made by respondent, in that it creates an office by special law not authorized under the Constitution.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 454

SCHERMERHORN v. LOS ANGELES PAC. R. CO. (Civ. 1,068.)

(District Court of Appeal, Second District, California. March 4, 1912. Rehearing Denied by Supreme Court May 3, 1912.)

1. ACTION (§ 48*)—JOINDER AND SEVERANCE—INJURIES TO PROPERTY AND PERSON FROM ONE TORT.

When one's person and property are both injured through the same tort, he properly brings separate actions for the injuries. Code Civ. Proc. § 427, which declares that several causes of action may be united in the same complaint, "where they all arise out of * * * (6) injuries to person, (7) injuries to property," providing that "the causes of action so united must all belong to one only of these classes."

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 490–510; Dec. Dig. § 48.*]

2. JUDGMENT (§ 948*)—BAR OF ACTION—NECESSITY OF PLEADING.

Where plaintiff recovered in one action for injury to property and then brought action for injury to his person from the same tort, the recovery in the first action, if available as a bar to the second, must be pleaded in the answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1787–1794; Dec. Dig. § 948.*]

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by C. P. Schermerhorn, administrator with the will annexed of E. B. Osborne, deceased, substituted for E. B. Osborne, against the Los Angeles Pacific Railroad Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. McKinley (W. R. Millar, of counsel), for appellant. John M. York, for respondent.

JAMES, J. Plaintiff in this action suffered personal injuries through the occurrence of a collision between an automobile in which he was riding and a car of defendant company. He brought a separate action to recover damages sustained by reason of the injury to his automobile, in which judgment was rendered in the sum of $700. This action, being one to recover for the personal injuries suffered, came to trial after judgment had been rendered and satisfied in the first-mentioned cause. In the course of the trial of this action the plaintiff offered in evidence the judgment roll in the other action referred to for the purpose of showing an adjudication of some of the facts involved in the cause then on trial, which evidence was admitted by the court. The jury found that plaintiff had been damaged in his person in the sum of $6,000, and judgment was entered accordingly.

[1] On this appeal but one point is made in support of the contention of appellant that a reversal should be ordered: It is insisted that, where damage has been caused to the person and property of an individual by the same tortious act committed by another, separate actions cannot be brought to recover the different damages so resulting, and that as it appeared in this action that plaintiff had recovered judgment, which had been satisfied, as to the injury suffered by damage to his automobile, he was barred from any further recovery on account of damages of any kind which may have been caused him by the same negligent act of defendant. There are two very conclusive answers to be made to this contention: First, it is expressly provided by section 427 of the Code of Civil Procedure that the plaintiff may unite several causes of action, where they arise out of "(6) injuries to person, (7) injuries to property," and "the causes of action so united must all belong to one only of these classes." In construing this provision of the Code, it has been held that causes of action for damages to person and property, based upon a forcible trespass as the wrongful cause, could not be united in one action. Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56. The case of Thelin v. Stewart, 100 Cal. 372, 34 Pac. 861, is also in point.

[2] The second answer that may be made to the contention of appellant is that nowhere in the course of the proceeding had in the trial court was the objection which is here made raised. It was incumbent upon the defendant, if it intended to rely upon the adjudication of the claim for damages caused to the automobile of plaintiff, as a bar to a recovery here, to have pleaded that defense in its answer. This it did not do.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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18 Cal. App. 437

UNITED STATES FIDELITY & GUARANTY CO. v. FIRST NAT. BANK OF MONROVIA. (Civ. 1,037.)

(District Court of Appeal, Second District, California. March 2, 1912. Rehearing Denied by Supreme Court May 1, 1912.)

BANKS AND BANKING (§ 130*)—DEPOSITS—TRUST FUNDS—LIABILITY.

A check payable to a guardian was sent to a bank with instructions to deliver to the guardian. It was so delivered and was deposited by him in an account which he then opened in his individual name. Thereafter the guardian drew out and embezzled the deposit. It was not claimed that the bank received any part of the amount embezzled. *Held*, that the bank was not liable to the minor or the guardian's bondsman.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 319–325; Dec. Dig. § 130.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the United States Fidelity & Guaranty Company against the First National Bank of Monrovia. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

Flint, Gray & Barker, for appellant. Shankland & Chandler, for respondent.

SHAW, J. The complaint, in so far as essential to a consideration of the question involved, shows: That one Henry F. Kenyon was the duly appointed and qualified guardian of the person and estate of Frank C. Kenyon, alias Frank C. Davis, a minor. That for the purpose of enabling Kenyon to qualify as such guardian, pursuant to an order of court, plaintiff duly executed an undertaking in favor of the minor conditioned for the faithful performance of the duties imposed upon Kenyon as such guardian. That in February, 1908, one C. T. Clifford, of Clarksville, Mo., sent to defendant bank a check reading as follows: "Clarksville, Mo., Feb. 7, 1908. Citizens' Bank. Pay to Henry Kenyon, guardian for Frank C. Kenyon, a minor, alias Frank C. Davis, a minor, or order, $438.14, four hundred thirty-eight and 14/100 dollars. C. T. Clifford, Curator for Frank C. Davis, a Minor"—with instructions to deliver the same to Henry F. Kenyon as guardian of Frank C. Kenyon, alias Frank C. Davis, a minor, upon obtaining his receipt therefor. That the bank delivered the check as instructed and took Kenyon's receipt therefor as such guardian, and forwarded the same to Clifford. That

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Kenyon duly indorsed the check as such guardian, presented it to the bank, and requested that it open an account with him in his individual name and when collected place the amount of the check to such account. That the bank collected the amount of the check and, as requested by Kenyon, placed the proceeds thereof to his individual credit, having knowledge at the time that the money did not belong to him and that he individually had no right thereto or interest therein, and that his sole right and interest to and in the same was in his capacity as such guardian. That thereafter Kenyon drew his checks upon such account, which checks the bank paid to him personally, or as thereby ordered, the amount so paid out of said fund being $437.50, all of which belonged to said minor, and for all of which the guardian failed to account or pay over to his ward. That said Henry F. Kenyon died insolvent, and plaintiff thereafter paid to his successor as guardian of the minor the sum of money so embezzled from the estate of his ward, and which sum, after demand therefor made by plaintiff upon defendant, it refused to pay. Defendant demurred to the complaint, alleging, among other grounds therefor, the failure to state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff standing upon its complaint, judgment was entered for defendant, from which plaintiff appeals.

In our opinion there was no error committed by the court in sustaining the demurrer upon the ground stated. For our purposes, it may be conceded that plaintiff, as surety for the faithful performance of the duties of Henry F. Kenyon, as guardian, by paying to the estate of the minor the amount due from the estate of the deceased guardian, acquired by operation of law the right of the minor to recover against the estate of the deceased guardian, or, if such right existed in favor of the minor, against the defendant herein. The question therefore presented for determination is whether the acts of the defendant bank in connection with the transaction were of a character which rendered it liable to the minor for the loss sustained by the admittedly wrongful acts of his guardian. Appellant has cited numerous authorities in support of its contention that the bank, by reason of accepting the check wherewith it opened an account with Kenyon individually, and when collected placed the amount thereof to his credit in such account, became a party to the fraud and participant in the wrongful acts of the guardian. The extent to which such authorities go in sustaining the contention is sufficiently illustrated by reference to Carroll Co. Bank v. Rhodes, 69 Ark. 43, 63 S. W. 68; Bank v. Fidelity & Dep. Co., 108 Ky. 384, 56 S. W. 671; Skipwith v. Hurt, 94 Tex. 322, 60 S. W. 423; Boone Co. Bank v. Byrum, 68 Ark. 71, 56 S. W. 532; U. S. F. & G. Co. v. Adoue et al. (Tex.) 137 S.W. 648. These cases merely sustain the general principle announced in Daniel on Negotiable Instruments, vol. 2, § 1612a, that: "If a deposit be made in bank to the credit of a certain person as agent or trustee, the use of such terms would charge the bank with notice that the funds were there in a fiduciary relation; it would have no lien upon them for the private debts of the depositor, and if it permitted them to be used for his private purposes in transactions with the bank it would be bound." The principle is by no means new or novel, having been promulgated with the 10 commandments when it was said, "Thou shalt not steal." The decisions to which we have referred, as well as others cited by appellant, wherein it was held the bank was liable to the cestui que trust or sureties of his trustee, were based upon admitted facts showing that the bank, with full knowledge that the fund was held in a fiduciary relation, permitted it to be used by the trustee in the payment of a personal debt due from him to the bank, thereby obtaining profits for itself by knowingly participating in the wrongdoing of the trustee. The case at bar is clearly distinguished from the facts upon which such decisions were rendered. Here no part of the fund was received by the bank other than as a temporary deposit thereof, to be paid out on checks as ordered by the depositor. In the absence of a law to the contrary, and our attention is called to none, there is no legal reason, whatever may be said as to the policy of so doing, which prevents a trustee from depositing the funds of a cestui que trust in a bank to his individual account. If he possesses the right so to do, it must necessarily follow that the bank has the right to receive the deposit, to his individual account, and, in the discharge of its duty to the depositor, subject to the limitation that the bank having knowledge of the fiduciary character of the fund cannot honor checks thereon drawn in its own favor in payment of personal indebtedness due from such depositor to it, pay it out in the usual course upon checks drawn thereon.

It is conceded that the bank upon presentation of the check duly indorsed might properly, and without cause for complaint, have paid the full amount thereof to Kenyon in cash. This being true, we conceive no reason preventing it with equal propriety from holding it at his request, either as a general or special deposit, subject to his order. The case of Duckett v. Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513, has no application to the facts here involved. In that case the bank, in effect, was instructed to deposit a sum of money, specified in a check payable to its cashier, to the credit of Henry W. Clagett, trustee. Instead of following these instructions, it made the deposit to the individual account of Clagett, who squandered the fund. It was held the bank in violating the express instructions participated in the breach of trust by taking the first wrongful step in the spoliation of the trust fund, the result of which was the dissipation thereof. Appellant's contention, if accepted as applicable to the facts presented, would render banks ex officio trustees in general for all cestui que trusts. In our opinion, the law does not impose such duties upon banks or other depositaries of trust funds. The complaint discloses no wrongful act in connection with the transaction on the part of the defendant, and there is no pretense that it was the recipient of any part of the fund embezzled by the guardian. It follows from what has been said that the court did not err in sustaining the demurrer upon the ground that the complaint failed to state facts essential to a cause of action.

We deem it unnecessary to discuss other grounds of demurrer interposed.

Judgment affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(18 Cal. App. 482)

McCOWEN et al. v. PEW. (Civ. 882.)

(District Court of Appeal, Third District, California. March 8, 1912.)

1. INTEREST (§ 1*) — RIGHT TO ALLOW — EQUITY.

Civ. Code, § 3287, providing that persons entitled to damages which are certain, or capable of being made certain by calculation, and recoverable on a particular day, shall recover interest, and section 1917, providing for the recovery of legal interest on money from the day on which the balance due is ascertained, do not take away all the court's discretion as to allowing interest in an action in equity.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. INTEREST (§ 1*) — RIGHT TO ALLOW — EQUITY.

Courts of equity may allow interest not recoverable at law.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. INTEREST (§ 14*)—RIGHTS—EQUITY.

Where the purchaser of land required as a condition precedent to his paying the purchase price that there be a grossly excessive reduction from the contract price for timber cut by the vendor, and thereby caused long delay and expensive litigation, the vendor was entitled in equity to interest upon the amount due him on the purchase price as properly reduced.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 26, 27; Dec. Dig. § 14.*]

4. INTEREST (§ 19*)—WHEN ALLOWED—CERTAINTY OF CALCULATION—"CAPABLE OF BEING MADE CERTAIN BY CALCULATION."

The amount due under a contract to convey, at an agreed price per acre, land valuable principally for its timber, was "capable of being made certain by calculation," within the meaning of Civ. Code, § 3287, providing that persons entitled to damages certain or capable of being made certain by calculation may recover interest, though there was a deduction to be made as a mere matter of calculation for timber cut by the vendor from an ascertained number of acres.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*

For other definitions, see Words and Phrases, vol. 1, p. 953.]

5. INTEREST (§ 19*)—WHEN ALLOWED—UNLIQUIDATED SET-OFF OR COUNTERCLAIM.

Where an amount demanded is sufficiently certain that interest may be allowed upon it, the existence of an unliquidated set-off or counterclaim will not prevent the recovery of interest on the balance found due from the time it became due.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 35-40; Dec. Dig. § 19.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by George McCowen and others against J. W. Pew. From the portion of the judgment awarding interest to the plaintiffs, defendant appeals. Affirmed.

Jesse W. Lilienthal and J. E. Pemberton, for appellant. H. C. McPike and Robert Duncan, for respondents.

BURNETT, J. A full recital of the facts involved in this litigation may be found in 147 Cal. 299, 81 Pac. 958, and in the decision rendered in this court on the 21st day of February, 1912, and reported in 123 Pac. 191. This is an appeal by defendant from that portion of the judgment "which directs and requires of said defendant the payment of any interest on any sum of money required by said judgment to be paid by him to the said plaintiffs as a condition of the conveyance to him by the said plaintiffs" of the real property in controversy. Defendant was required to pay $15 per acre for the land "less the sum of $410.00 deducted on account of the cutting of said timber, within thirty days from the rendition of judgment herein together with interest thereon at the rate of seven per cent. per annum, simple interest, from the 6th day of December, 1900, to the date of said payment, or tender thereof." It may be stated that the 6th day of December, 1900, was the date on and after which "plaintiffs were able to give good title." It is admitted by appellant that we have no decision in this state directly in point; but it is contended that "the California cases go to the extent of deciding that, where there is a quantum meruit or a quantum valebat to be proved in order to establish the amount recoverable, no interest can be recovered in California until the amount is settled and fixed by the judgment of the court. Here the amount due under the original contract was fixed by the contract, but the amount to be paid must be calculated on the principle of a quantum meruit. In the calculation of that there was sharp difference of opinion between the parties and also their respective counsel. That the position taken by us was finally declared to be incorrect by the Supreme Court we must admit, but it was taken by defendant on the advice of counsel and in good faith, and all the time he was offering to pay whatever the court said he should pay."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We need not discuss the difference as to interest between an express and an implied contract. The subject is fully considered and the authorities reviewed by this court in Courteney v. Standard Box Co., 117 Pac. 778. Generally speaking, it may be said the former comes under the provisions of section 3287 and the latter of section 1917 of the Civil Code. But we do not think either section was intended to take away all discretion, as to interest, in a case like this. This was an action in equity to quiet title on the part of plaintiff with a cross-complaint by defendant demanding specific performance of a contract to convey.

[2] The court found that the contract should be performed, and, under the general principles of equity which it was at liberty to apply, the court had discretion to impose such terms as seemed just and reasonable, subject, of course, to review for any abuse of discretion. In equitable actions, it is true, the rule of law as to interest is generally followed; "but interest is sometimes allowed by courts of equity in the exercise of a sound discretion, when it would not be recoverable at law. On the other hand, courts of law are sometimes affected by equitable considerations in the allowance of interest." 22 Cyc. 1475. Respondents put the question as follows: "Is it conceivable that equity demands that for the last 12 years these plaintiffs shall have borne the taxes upon that land, the insurance, the care of it, preserved it to this day, when it is worth 10 times what it was then, and it is to be wrenched from them at one-tenth its present value, but that even they are to be deprived of the poor modicum of compensation which has remained in the pockets of this defendant who has never spent a cent?"

[3] But it is clear that the important question with us is whether the court had any discretion at all in the matter of interest. As far as equitable considerations are concerned, we must assume on this appeal, that the judgment is altogether just. The appeal being on the judgment roll, we may accept as established any fact, not inconsistent with the findings, that may have influenced the lower court in awarding interest. For instance, we may take for granted the following circumstances, which are disclosed in the transcript before us: On October 11, 1900, appellant gave written notice of his election to exercise his option, and he offered to pay for the property as he had agreed, less the loss occasioned by the said destruction of timber caused by respondents. The latter promptly replied that they were willing to make a liberal concession, trusting that appellant "will not be extortionate." They asked for the figures that appellant thought he should pay. Later they gave notice of having deposited a deed of the premises to appellant subject to his acceptance for the agreed price with an allowance of $300 for 20 acres cut over. Afterwards they sent a communication to appellant in which they stated that all of his objections to and criticism of the title had been obviated and that the "trifling loss in value of the said real property occasioned by the removal or destruction or injury to timber upon part thereof can readily be made certain by computation. We have carefully calculated such loss and find the same to amount to less than the sum of $400. For the sake of doing full justice and making adequate compensation to you in the premises, we have made an allowance of $400 on the contract price payable for said real property as aforesaid." Subsequently they offered to allow $600, but appellant insisted that it should be over $4,000, estimating it upon a basis entirely untenable, as held by the Supreme Court in said decision in 147 Cal., 81 Pac. The unreasonable demand of appellant, therefore, led to the long delay and expensive litigation in the cause. As a condition precedent to his payment for the property, he required a reduction from the contract price of 10 times as much as he was entitled to. Hence it is clearly a case for the application of the principle of moratory interest. It is allowable ex æquo et bono, as held by authorities of the highest character. It is said by the Supreme Court of the United States, in Curtis v. Innerarity, 6 How. 146, 12 L. Ed. 380, that: "It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from the breach. Hence every nation, whether governed by the civil or common law, has established a common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Every one who contracts to pay money on a certain day knows that if he fails to fulfill his contract he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties." Here, as we have seen, it was the fault of appellant that the sale was not consummated years ago, and it is only just that he should repair the damage that has followed from the breach of his obligation.

[4] But outside of the strictly equitable view, the foregoing suggests the application to the situation of said section 3287 of the Civil Code. Said section allows interest, as we have seen, when the damages are certain and also when they are "capable of being made certain by calculation." Appellant was informed of the number of acres from which the timber had been removed, the land was valuable principally for the timber, the

agreed price was $15 an acre, and it would seem to be a mere matter of calculation to determine what allowance should be made for said removal. Robinson v. American Fish & Oyster Co., 119 Pac. 388.

[5] There is another view, also taken by respectable authority, which would lead to an affirmance of the judgment. It is expressed in 22 Cyc. p. 1514, as follows: "Where the amount of the demand is sufficiently certain to justify the allowance of interest thereon, the existence of a set-off or counterclaim which is itself unliquidated will not prevent the recovery of interest on the balance of the demand found due from the time it became due."

In Healy v. Fallon, 69 Conn. 228, 37 Atl. 495, the Supreme Court of Connecticut held that "in an action for the price under a building contract, plaintiff may be allowed interest as damages for the detention of the amount found to be due him, though such price was subject to unliquidated deductions for plaintiff's deviations from the contract." The court stated that: "The claim was wholly a pecuniary one, and was not at large, as are claims for damages for assault and battery, slander, or others of like nature. It represented a loss of a pecuniary value ascertainable with reasonable certainty, as of a definite time; and we think damages in the shape of interest should be recoverable from that time, for such a loss, for only in this way can equity be done between the parties in the case at bar."

In Tappan & Noble v. Harwood, 2 Speers, 551, the Supreme Court of South Carolina said: "By the decisions of this state, wherever a party stipulates in writing to pay money on a certain day, or on the performance of any stipulation or contract, interest is allowed. On the admitted completion and receipt of the buildings, interest would have been unquestionably allowable from the time of completion. The discount claimed by the defendant (for defective workmanship) may reduce the amount covenanted to be paid, but does not impair the claim for interest on the balance, when adjusted by the verdict of the jury."

In Smith v. Turner, 33 Or. 379, 54 Pac. 166, the Supreme Court of Oregon held that a counterclaim for unliquidated damages in an action on a note does not cut off the recovery of interest on the note from the time the claim accrued; the court stating, through Mr. Justice Wolverton, that: "The plaintiff's claim bears interest because there is a contract to pay it, while, under the rule announced, the defendant's counterclaims do not, but it is attempted to counterclaim as respects the first separate defense as of the date when it is alleged the damages accrued, and thereby cut off the running of interest upon the note. This cannot be done, however, because it required the verdict of the jury, or at least the confession or default of the plaintiff, to liquidate the defendants' demand for their alleged damages arising by reason of plaintiff's supposed breach of contract, while the note draws interest by force of its direct stipulations." Other cases holding similarly are Howard v. Behn, 27 Ga. 174; Stephens v. Burgess, 69 Mo. 168; Greenly v. Hopkins, 10 Wend. (N. Y.) 96; Watkins v. Junker, 90 Tex. 584, 40 S. W. 11. Two or three decisions are cited by appellant apparently holding to the contrary, but the weight of authority seems to be against him. But whatever rule may be adopted in this state, in the case at bar, considering the trifling amount of the set-off in comparison with what was due under the contract, it is reasonable and just to hold that the balance should bear interest from the time it was due.

In fine, under the circumstances, we think it would be manifestly unjust and inequitable to deprive respondents of the interest, and the portion of the judgment appealed from is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(18 Cal. App. 450)

HELMER v. PARSONS et al. (Civ. 1,082.)

(District Court of Appeal, Second District, California. March 4, 1912.)

1. Bills and Notes (§ 166*)—Negotiability—Notes Secured by Mortgage.

A note secured by mortgage is nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 418; Dec. Dig. § 166.*]

2. Bills and Notes (§ 342*) — Notice of Nonnegotiability.

The recital in a note that it is secured by mortgage is notice to one taking a transfer thereof from its payee of its nonnegotiability, and of any defense available to the maker against the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830–841; Dec. Dig. § 342.*]

3. Bills and Notes (§ 370*)—Transfer—Defense Against Transferee.

The defense of partial failure of consideration of a nonnegotiable note was one existing at the time of the transfer of the note by the payee, and so, under Civ. Code, § 1459, and Code Civ. Proc. § 368, available to the maker against the transferee, though such failure arose through the payee not paying the maker the part of the loan for which the note was given, which, under the agreement of loan, was not to be paid till a time subsequent to the transfer of the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 864, 963; Dec. Dig. § 370.*]

4. Mortgages (§ 238*)—Transfers—Record—Notice.

Under Civ. Code, § 2934, declaring the record of the assignment of a mortgage notice "to all persons subsequently deriving title to the mortgage from the assignor," it is not notice to the mortgagor as regards the question of whether a defense to the mortgage existed before notice to him of the transfer.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 673–675; Dec. Dig. § 238.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Willard A. Helmer against Henry B. Parsons and others. From an adverse judgment, plaintiff appeals. Affirmed.

Frank G. Bryant, for appellant. Elmer R. McDowell, E. Earl Crandall, William Hazlett, Sheldon Borden, and George H. Moore, for respondents.

SHAW, J. Action to foreclose a mortgage given to secure the payment of a promissory note in the sum of $3,500.

It appears from the findings that on December 4, 1908, defendant Parsons executed and delivered to one L. E. Jones a note and mortgage, which was made the subject of the action; that upon delivery thereof Jones paid to Parsons the sum of $1,000, agreeing orally to pay him $1,000 in 10 days, and the balance in 35 days; that on February 11, 1909, Jones paid to Parsons an additional $250, making in all $1,250, and no more, received by Parsons in consideration of the note and mortgage; that, prior to the making of this last payment, to wit, on December 29, 1908, Jones sold and, by an instrument executed in writing and duly recorded, transferred the note and mortgage to plaintiff, who paid Jones the full face value thereof; that plaintiff acquired the note and mortgage without notice of any existing equities or defenses thereto. Upon these findings, the court gave plaintiff judgment for $1,250 and interest, from which he prosecutes this appeal, claiming that judgment should have been entered thereon for the full face value of the note.

[1, 2] As the note was secured by a mortgage, it was nonnegotiable (Meyer v. Weber, 133 Cal. 681, 65 Pac. 1110; Trinity County Bank v. Haas, 151 Cal. 553, 91 Pac. 385), and, as this fact appears upon its face, notice of such nonnegotiability was thereby imparted to plaintiff, who, as a matter of law, was chargeable with notice that, if the maker thereof had any defense thereto as against Jones, he (plaintiff) took it subject to such defense. Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11; Bouche v. Louttit, 104 Cal. 230, 37 Pac. 902. In protection of his interest, the duty devolved upon plaintiff to make inquiry of the mortgagor as to the validity of the instrument and existing equities which might be pleaded in defense of a recovery. Had he done so, and defendant had stated, as Jones is found to have done, that the note was valid and he (defendant) had no defense thereto, then the maxim here invoked by appellant, that, "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happened must be the sufferer" (section 3543, Civ. Code), would apply. Briggs v. Crawford, 121 Pac. 381. "One about to take an assignment of a mortgage is bound in his own interest to inquire of the mortgagor as to the validity of the instrument and of the transaction on which it was founded and as to the amount due, and whether the mortgagor has any defenses or set-offs to interpose against it. If he neglects to do this, he takes the mortgage subject to all infirmities or objections which could have been set up against it in the hands of the original mortgagee, being charged with knowledge of all facts which such an inquiry would have disclosed." Volume 27, Cyc. p. 1324.

[3] Appellant invokes section 1459 of the Civil Code, as follows: "A non-negotiable written contract for the payment of money or personal property may be transferred by indorsement, in like manner with negotiable instruments. Such indorsement shall transfer all the rights of the assignor under the instrument to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the indorsement." He insists that, inasmuch as there was no breach on the part of Jones in the payment of the $1,000, which was not to be paid until 35 days from the date of the making and delivery of the note, there was no defense existing as to such sum in favor of the maker at the time when plaintiff acquired the note on December 29th. Section 368 of the Code of Civil Procedure provides: "In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any set-off, or other defense existing at the time of, or before, notice of the assignment; but this section does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, and upon good consideration, before maturity." In the case of St. Louis Nat. Bank v. Gay, 101 Cal. 286, 35 Pac. 876, the court said: "These two sections must be construed as though they had been passed at the same moment of time, and were parts of the same statute * * * and the law as declared by the two sections is that a defendant may avail himself of set-off acquired before notice of assignment, provided the set-off be in other respects good." The partial failure of consideration for the note would have been a complete defense to the extent of such failure in an action instituted by Jones to foreclose the mortgage. It was a defense existing at the time of the transfer; and since, under the statute, the action by the assignee is declared to be without prejudice to defenses existing at the time of the assignment, it follows that the right to interpose such defense could not be affected by notice of the assignment given defendant.

[4] Moreover, even conceding, as claimed by appellant, that the defense based upon the failure of consideration due to default

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in payment of the promised $1,000 could be affected by notice of the transfer, nevertheless no notice of the transfer, other than the recording of the instrument, was given. The mere recording of the assignment constituted no notice to defendant of the assignment to plaintiff. Section 2934 of the Civil Code provides that "an assignment of a mortgage may be recorded in like manner as a mortgage, and such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." Defendant, however, was not a person deriving title to the mortgage from any assignor thereof, and hence was not one chargeable with constructive notice of its transfer by the recording of the assignment. "The provision about the recordation of an assignment of a mortgage is in section 2934, and the provision is that such record operates as notice to all persons subsequently deriving title to the mortgage from the assignor." Adler v. Sargent, 109 Cal. 42, 41 Pac. 799. And in Murphy v. Barnard, 162 Mass. 72, 38 N. E. 29, 44 Am. St. Rep. 340, it is said: "A mortgagor is not chargeable with constructive notice by the record of an assignment of the mortgage." See, also, McCabe v. Grey, 20 Cal. 509. While we deem the question of notice in the case at bar as unimportant, for the reason given, nevertheless we are of opinion that the mere recording of the assignment was insufficient to constitute notice of such fact.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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18 Cal. App. 426

CASSIDY v. CANNON, Justice of the Peace. (Civ. 1,045.)

(District Court of Appeal, Second District, California. March 1, 1912. On Petition for Rehearing, March 30, 1912. Rehearing Denied by Supreme Court April 26, 1912.)

1. PROHIBITION (§ 10*)—GROUNDS FOR RELIEF—WANT OR EXCESS OF JURISDICTION.

Prohibition lies only where a public officer is acting without or in excess of jurisdiction, which is not the case where a justice of the peace, having jurisdiction of misdemeanors, has, even though erroneously, determined that an affidavit filed before him, attempting to set up facts constituting a misdemeanor, is sufficient, and is about to proceed with the trial thereon.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37-56; Dec. Dig. § 10.*]

On Petition for Rehearing.

2. OFFICERS (§ 121*)—OMISSION TO PERFORM DUTY OF OFFICE—CRIMINAL LIABILITY.

Refusal to perform a public duty amounts to an omission, so that an officer so doing is subject to Pen. Code, § 176, declaring that every willful omission to perform any duty enjoined by law on any public officer is punishable as a misdemeanor.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 207, 208; Dec. Dig. § 121.*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Petition by Thomas V. Cassidy for writ of prohibition to T. B. Cannon, Justice of the Peace of Gardena Township, County of Los Angeles. Judgment for petitioner, and respondent appeals. Reversed.

Rehearing denied by Supreme Court, 123 Pac. 359.

Randall & Gaines, for appellant. Hester, Merrill & Craig, for respondent.

ALLEN, P. J. Petitioner presented his affidavit to the superior court of Los Angeles county, in which it was alleged that he was a qualified and acting justice of the peace; that respondent, Cannon, was also a justice of the peace in said county; that one Kent filed an affidavit before said Cannon, charging that petitioner "did willfully, unlawfully, and maliciously, on June 1, 1911, omit and refuse to perform his duty enjoined upon him by law, and refused to permit Jesse W. Kent, during office hours, the right to inspect and examine a public record, to wit, the justice's docket, of which record and docket the said Thomas V. Cassidy was then and there the custodian; the said Jesse W. Kent then and there being a citizen of said township, county and state, and being entitled by law to inspect and examine said public record." That respondent, Cannon upon the filing of such affidavit, issued his warrant for the arrest of petitioner, and that said petitioner was taken before the said magistrate, and, objecting to the jurisdiction of the justice, refused to plead; that the said justice of the peace then entered a plea of not guilty and set the cause down for trial; and that the same is pending before said justice of the peace. It is alleged that he will proceed to try petitioner upon such charge, unless prohibited from so doing. Upon this affidavit, the superior court issued an alternative writ of prohibition, and, upon a hearing, a peremptory writ was issued, prohibiting said Cannon from trying the case, or taking further proceedings therein, and taxing costs of $10 against him. From this judgment, an appeal has been taken.

Counsel for both parties upon this appeal present only the question involved as to the sufficiency of the affidavit to disclose a public offense; it being respondent Cannon's contention that a justice's docket is a public record, and that under section 1032 of the Political Code public records and other matters in the office of any officer are, at all times during office hours, open to the inspection of any citizen of this state; and he contends that section 176 of the Penal Code is applicable, which provides: "Every willful omission to perform any duty enjoined by law upon any public officer, or person holding any public trust or employment, where no special provision shall have been made for the punishment of such delinquency, is punishable as a misdemeanor." Upon the other hand, it is petitioner's contention that section 1032 of the Political Code guarantees only the right of examination and inspection, and in terms does not provide for the officer in charge of the records to permit or assist or aid in such inspection; that no duty in that regard devolves upon him by law, and claims that a case is presented similar to that of Ex parte McNulty, 77 Cal. 165, 19 Pac. 237, 11 Am. St. Rep. 257, in which our Supreme Court has said that the question whether or not the conduct in question is made a crime must be determined from the language used in the statute; that "constructive crimes—crimes built up by courts with the aid of inference, implication and strained interpretation—are repugnant to the spirit and letter of English and American criminal law."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We are of opinion that it is unnecessary to enter into a discussion of this matter. We think it sufficient to say that justices of the peace have jurisdiction of misdemeanors, and that the affidavit filed before the justice in this case was an attempt to set up facts constituting an offense over which the justice had jurisdiction to hear and determine, jurisdiction to determine rightfully or wrongfully. Conceding that his determination as to the sufficiency of the affidavit of complaint was wrong, and that the facts set forth did not show that defendant had committed an offense, nevertheless he had jurisdiction so to determine. We perceive no difference between this and any other case where a defective information or affidavit of complaint has been filed, and the court has erroneously determined the same to be sufficient, in which cases the relief of defendant is not through prohibition; for prohibition only lies where a public officer is proceeding without or in excess of jurisdiction, and no plain, speedy, and adequate remedy at law exists. Keith v. Recorder's Court, 9 Cal. App. 380, 99 Pac. 416. If, as claimed by petitioner, no facts are averred constituting a public offense, he has ample relief through a writ of habeas corpus, in the event the justice should find him guilty. The justice, then, in our opinion, not being without or having exceeded his jurisdiction, prohibition does not lie, and the court erred in granting the writ.

Judgment reversed.

We concur: JAMES, J.; SHAW, J.

On Petition for Rehearing.

PER CURIAM. [2] The refusal to perform a public duty amounts to an omission in that regard, and is comprehended within section 176 of the Penal Code. One refusing to perform a public duty is amenable to both sections 176 and 772 of the Penal Code. Ex parte Keeney, 84 Cal. 310, 24 Pac. 34.

Rehearing denied.

18 Cal. App. 426

CASSIDY v. CANNON, Justice of the Peace. (L. A. 3,200.)

(Supreme Court of California. April 26, 1912.)

In Bank. Petition by Thomas V. Cassidy for writ of prohibition to T. B. Cannon, Justice of the Peace of Gardena Township, County of Los Angeles. Judgment for petitioner was reversed by the District Court of Appeal (123 Pac. 358), and petitioner asks for rehearing. Rehearing denied.

PER CURIAM. The petition for rehearing of this cause in the Supreme Court is denied.

The grounds stated by the District Court of Appeal in the brief opinion, denying the petition for rehearing in that court, states sufficient grounds for the reversal of the judgment. We do not wish to be understood as expressing any opinion as to the doctrines stated in the original opinion of that court.

162 Cal. 531

DILLER et al. v. NORTHERN CALIFORNIA POWER CO. (Sac. 1,900.)

(Supreme Court of California. April 6, 1912. Rehearing Denied May 6, 1912.)

1. ELECTRICITY (§ 19*) — SAGGING WIRES — DEATH OF TRAVELER — NEGLIGENCE — EVIDENCE.

In an action against an electric power company for death of decedent while driving along a public road caused by his horses coming in contact with an electric wire, which sagged over the road, evidence *held* to warrant a finding of negligence of the company in constructing and maintaining the line.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

2. DEATH (§ 99*)—DAMAGES—EXCESSIVENESS.

Twenty thousand dollars was not excessive recovery for negligent death of a real estate broker 57 years old, with a life expectancy of 15.39 years, where there was evidence warranting a finding that he contributed $200 a month for the support of his family.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 125–130; Dec. Dig. § 99.*]

3. APPEAL AND ERROR (§ 1004*)—REVIEW—DAMAGES—ASSESSMENT.

In assessing damages for negligent death, much is left to the sound discretion of the jury, and their action and that of the trial court will be reversed on the ground of excessiveness only where the amount of damages is obviously so disproportionate to the injury as to justify a conclusion that the verdict did not result from cool and dispassionate discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944–3947; Dec. Dig. § 1004.*]

4. DEATH (§ 78*)—DAMAGES—ELEMENTS.

In actions for negligent death, plaintiffs are limited to the pecuniary loss suffered by them.

[Ed. Note.—For other cases, see Death, Dec. Dig. § 78.*]

5. ELECTRICITY (§ 19*)—SAGGING WIRES—DEATH OF TRAVELER—INSTRUCTIONS.

In an action against an electric power company, an instruction that the fact that a wire belonging to the company highly charged with a dangerous current of electricity was down across the public highway where the accident occurred, and that plaintiff's intestate while traveling along the highway came in contact with the wire and was killed, raises a presumption of negligence in maintaining the wire, and casts upon the company the burden of meeting such presumption, did not conflict with an instruction that such presumption need not be overcome by a preponderance of evidence; it being sufficient that the company produce sufficient evidence to balance the presumption.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

6. ELECTRICITY (§ 19*)—SAGGING WIRES—DEATH OF TRAVELER—RES IPSA LOQUITUR.

The res ipsa loquitur doctrine is properly applied to the falling upon or across a public highway in such way as to endanger persons traveling thereon of a wire carrying an electric current of 20,000 volts.

[Ed. Note.—For other cases, see Electricity, Cent. Dig. § 11; Dec. Dig. § 19.*]

7. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—INSTRUCTIONS.

Any error in an instruction which submits a particular ground of negligence not within the issues is harmless, where the special verdict shows that the only negligence found was within the issues.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

8. EVIDENCE (§ 380*)—PHOTOGRAPHS—ADMISSIBILITY.

It was not error to admit in evidence photographs of a scene constituting enlargements of pictures originally taken without calling the maker of the enlargements as a witness to prove the accuracy of the pictures offered; it being within the sound discretion of a trial court to determine from the evidence before it whether a photograph offered is a correct representation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1657; Dec. Dig. § 380.*]

9. EVIDENCE (§ 244*) — TRANSACTION WITH AGENT—ADMISSIBILITY.

In an action against an electric power company for death caused by the company negligently permitting a wire to sag, statements concerning the condition of the line made to an agent of the company in general charge of its power system, and the agent's statements in response, were properly admitted in evidence to show the company's knowledge of the unsafe condition of its line.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916–936; Dec. Dig. § 244.*]

10. EVIDENCE (§ 254*) — DECLARATIONS AGAINST INTEREST—ADMISSIBILITY.

Declarations or admissions against interest by a party or his authorized agent may be given in evidence, and it is not necessary to lay a foundation therefor by asking the preliminary questions appropriate to an attempt to impeach a witness by proof of contradictory statements made at another time.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1004; Dec. Dig. § 254.*]

11. WITNESSES (§ 37*)—DAMAGES—EVIDENCE—ADMISSIBILITY.

In an action for negligent death, it was not error to permit a witness to testify to the amount decedent had earned in his business; he having testified that he was familiar with decedent's affairs.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80–87; Dec. Dig. § 37.*]

12. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in excluding testimony whether an electric power line was of standard construction was harmless where witnesses subsequently stated that they had not observed the line so as to be able to say whether the construction was proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

13. APPEAL AND ERROR (§ 1015*)—MOTION FOR NEW TRIAL—CONCLUSIVENESS OF ORDER.

An order denying a new trial will be upheld when based on conflicting affidavits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860–3876; Dec. Dig. § 1015.*]

Department 1. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Mae H. Diller and others against the Northern California Power Company. From a judgment for plaintiffs and from an order denying a new trial, defendant appeals. Affirmed.

Reid & Dozier, for appellant. Frank Freeman and Charles L. Donohoe, for respondents.

SLOSS, J. The plaintiffs, widow and children, and the heirs at law of R. Diller, deceased, brought this action to recover damages from the defendant for the alleged negligent killing of said decedent. In May, 1907, the defendant owned and operated a line of poles and wires for the conducting of electric power to various places in the county of Glenn. The line ran along the county road between St. John and Hamilton in said county, and at one point crossed the road from the westerly to the easterly side thereof. On the morning of May 19, 1907, R. Diller was driving a team of horses, attached to a buggy, along said road. At the point where the power line crossed the road, one of the wires, highly charged with electricity, had become detached from one of the poles to which it has been fastened, with the result that it sagged down and hung on or near the surface of the road. Diller's team came in contact with the wire, and he (together with both horses) was instantly killed. The plaintiffs charged that the falling of the wire and the consequent death of Diller were caused by the negligence of the defendant in improperly and inefficiently and negligently constructing and maintaining the "said line and system of poles and wires at said place." The defendant in its answer denied negligence on its part, and averred that the deceased had been guilty of contributory negligence.

Upon a trial with a jury, a general verdict for $30,000 in favor of plaintiffs was returned. The jury also gave answers to special interrogatories. Upon defendant moving for a new trial, the court made a conditional order providing that the motion should be denied if plaintiffs would consent to a reduction of the verdict and judgment from $30,000 to $20,000; otherwise a new trial should be granted. The plaintiffs filed their consent to the reduction, and an order denying the motion for new trial was entered. The defendant appeals from the judgment and from the order denying a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The appellant argues that the evidence was insufficient to justify a finding of negligence on its part in constructing and maintaining its line of poles and wires. This position cannot, on the record, be supported. As will appear in the discussion of the instructions, the mere occurrence of the accident, under the circumstances shown, was enough to make out a prima facie case of negligence. But, regardless of this, there was further evidence to support the verdict. At the point where Diller met his death the road ran in a northerly and southerly direction. A line of poles ran along the westerly side of the road until it came to the place of crossing, where the wires were brought over to a line of poles on the easterly side. The power was conducted through three wires, two of which were strung on insulators placed at opposite ends of cross-arms attached to the poles, while the third ran on insulators fastened to the tops of the poles. The insulators were screwed onto eucalyptus pins which were fitted into holes in the cross-arms, or the top of the pole, as the case might be. Where the line took an angle, as at the place of the occurrence in question, the top wire was fastened to insulators attached by means of pins to a short cross-arm or "buck-arm," bolted to the pole about eight inches from its upper end. The wire which caused Diller's death was the one which had run along the tops of the poles. It had become detached from the pole which formed the point of the angle. The buck-arm was found lying in the road after the accident. One of the insulators was broken, as was one of the eucalyptus pins which had been affixed to the buck-arm. The jury found, in answer to special interrogatories, that the defendant's power line had been negligently constructed; that the negligence consisted in the use of a weak pin on the cross-bar (buck-arm) attached to the angle pole; that the falling of the wire was caused by this weakness; and that the line was negligently maintained, in that the man in charge neglected to repair said pin after his attention had been repeatedly called to its dangerous condition. While the defendant introduced evidence which would have fully warranted a finding that the fall of the wire was due to causes other than the one assigned in the verdict, it cannot be said that the conclusion reached by the jury was without substantial support. Several witnesses testified that they had, prior to the accident, observed that one or both of the pins on the buck-arm leaned over at an angle toward the road. There was also testimony that this condition had been called to the attention of Mr. Thomas, who was in general charge of the defendant's business in the district in which the line in question was situated. This testimony, together with the circumstance that one of the pins was, in fact, found to be broken immediately after the accident, furnished a sufficient basis for the inferences that the pins in question were not as strong as they should have been, that their weakness was the cause of the fall of the wire, and that this weakness was actually brought to the knowledge of the defendant. No amount of expert or other evidence that the construction of the line was "standard" precluded the jury from drawing these inferences.

[2, 3] The damages fixed by the jury, even when reduced by the action of the trial court to $20,000, were heavy, yet we cannot say that the award was so large as to require an appellate court to set it aside as excessive. It is, of course, well settled that in the assessment of damages in cases of this character much is left to the sound discretion of the jury, and the action of the jury and the trial court will be reversed only where the amount of the damages is obviously "so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury." Aldrich v. Palmer, 24 Cal. 513; Morgan v. S. P. Co., 95 Cal. 501, 30 Pac. 601; Redfield v. O. C. S. R. Co., 110 Cal. 277, 42 Pac. 822, 1063.

[4] In actions for injuries causing death, the plaintiffs are, of course, limited in their recovery to the pecuniary loss suffered by them. Taylor v. W. P. Co., 45 Cal. 323; Munro v. Dredging Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. The jury was so instructed here. The evidence was that Diller at the time of his death was a man in good health, a little over 57 years of age, and that his expectancy of life, according to the American Mortality Table, was 15.39 years. He was engaged in the real estate business in Chico. One witness testified that he was making about $6,000 per year in this business. It may be conceded that, in view of his cross-examination, this witness' testimony was not very satisfactory. But we have in addition the statement of the widow that during the years preceding his death Diller contributed not less than $200 per month for the support of his wife and children. There was testimony tending to weaken this statement. But with conflicts of evidence this court has no concern, and if the jury accepted the widow's testimony, as it had a right to do, the allowance of $20,000 cannot be overthrown as excessive. The amount is not manifestly in excess of a fair compensation for the loss, during the probable remainder of his productive years, of the support which had been, and would be likely to be, furnished by a healthy man, 57 years of age, who had been contributing at least $200 per month to his family. It can-

not, of course, be known what Diller would have earned had he lived, but evidence of what he had done in the past furnished at least some, if not, indeed, the most satisfactory, basis for estimating what he would in all likelihood have done in the future. Shaw v. S. P. Co., 157 Cal. 240, 107 Pac. 108; Bonneau v. North Shore R. R. Co., 152 Cal. 406, 93 Pac. 106, 125 Am. St. Rep. 68.

[5, 6] We find no error in the charge to the jury. The court, after instructing that the plaintiffs were "bound to prove by a preponderance of evidence the negligence upon the part of the defendant as alleged in plaintiffs' complaint," gave a further instruction as follows: "The fact that a wire belonging to the defendant, highly charged with a dangerous current of electricity, was down across the public highway at the point where the accident occurred, and that the plaintiffs' intestate, R. Diller, while traveling along said public highway, came in contact with that wire and was killed, raises a presumption of negligence on the part of the defendant company in maintaining the wire, and casts upon the defendant the burden of meeting such presumption. Such presumption need not be overcome by the defendant by a preponderance of the evidence. If the defendant company produces sufficient evidence to balance such presumption, the presumption is overcome." These two instructions are not in conflict. The court properly imposed upon the plaintiffs the burden of establishing by a preponderance of evidence the negligence upon which they relied. At the same time it ruled that proof of certain facts, standing alone, was sufficient to make out a prima facie showing of negligence. This did not relieve plaintiffs of the burden which had been declared by the earlier instruction to rest upon them. They were still required to establish their case by a preponderance of all the evidence, and the jury was expressly told that the verdict must be for defendant if it succeeded in balancing the prima facie case (or presumption, as the court termed it) made out by plaintiffs. The proposition that the facts supposed in the later instruction amounted to a showing of negligence which had to be met by countervailing evidence is simply a statement of the doctrine of "res ipsa loquitur." We do not doubt that the doctrine is properly applied to the falling upon or across a public highway in such a way as to endanger persons lawfully traveling thereon, of a line of wire carrying, as in this instance, an electric current of 20,000 volts. W. U. T. Co. v. State, 82 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; Newark E. L. & P. Co. v. Ruddy, 62 N. J. Law, 505, 41 Atl. 712, 57 L. R. A. 624; Ruddy v. Newark, E. L. & P. Co., 63 N. J. Law, 357, 46 Atl. 1100, 57 L. R. A. 624; Snyder v. W. E. Co., 43 W. Va. 661, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922; Boyd v. Portland G. E. Co., 41 Or. 336, 68 Pac. 810; Thomas v. W. U. T. Co., 100 Mass. 156.

[7] It is complained that instruction 20 left it open to the jury to find that the defendant had been negligent in failing to install guard wires, and that this element of negligence was not within the issues. We think the instruction is not open to the construction which defendant seeks to put upon it. But, even if it were, the special verdict shows that the only negligence found and acted upon by the jury was the use and maintenance of a weak insulator pin. The instruction could not, therefore, have harmed the defendant.

The appellant assigns numerous errors in the admission and rejection of testimony. The more important may be noticed.

[8] Photographs of the scene were allowed to be given in evidence. They were enlargements of pictures originally taken. It is objected that the maker of the enlargements was not called as a witness to prove the accuracy of the pictures offered. But this was not required. It is for the trial court to determine, from the evidence before it, whether a photograph offered is a correct representation of the object or scene in question, and the ruling will be sustained on appeal unless it is apparent that there has been an abuse of discretion. Jones on Ev. (2d Ed.) § 411; 17 Cyc. 415; State v. Matheson, 130 Iowa, 440, 103 N. W. 137, 114 Am. St. Rep. 427, note, 8 Ann. Cas. 430; Carlson v. Benton, 66 Neb. 486, 92 N. W. 600, 1 Ann. Cas. 159. The preliminary proof of the accuracy of the photographs here in question was sufficient to justify their admission.

[9, 10] Evidence of statements made to Mr. Thomas concerning the condition of the pins on the buck-arm of the angle pole was proper to show the defendant's knowledge of the unsafe condition of its line. Thomas was its agent in general charge of its power system, and notice to him of a defective construction had a direct bearing on the issue of negligence in maintenance. Similarly it was proper to show what he had said in response to such statements. Declarations or admissions against interest by a party, or his authorized agent, may be given in evidence, and it is not necessary to lay a foundation for such declarations by asking the preliminary questions appropriate to an attempt to impeach a witness by proof of contradictory statements made at another time. So far as these matters were gone into in questioning Thomas himself, they were legitimate cross-examination.

[11] There was no error in permitting the witness Schuster to testify to the amount Diller had been earning in his business. The extent of his income was certainly relevant, and the witness had testified that he was familiar with Diller's business affairs. His testimony was, it is true, weakened on cross-examination, but this did not affect the admissibility of what he had already stated.

[12] Witness Kibby was not allowed to testify whether the line was of standard construction. But, since he subsequently stated that he had not observed the line so as to be able to say whether the construction was or was not proper, it is plain that the ruling, if erroneous, was not prejudicial. The witnesses who were allowed to state their opinions regarding the construction of the line testified in a manner which fully authorized the court to conclude that they were qualified to give expert evidence.

The other assignments of error in regard to evidence are either trivial in themselves, or are rendered unimportant by the nature of the answers to the special interrogatories.

[13] The motion for a new trial was based in part upon alleged misconduct of the jury. So far as this point is concerned, it is sufficient to say that the material averments of the affidavits relied on by the defendant were contradicted by the counter affidavits offered by the plaintiffs. Under these circumstances, the action of the trial court in denying the motion must, of course, be upheld.

The judgment and the order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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162 Cal. 539

SKOOKUM OIL CO. v. THOMAS.

(S. F. 5,351.)

(Supreme Court of California. April 8, 1912. Rehearing Denied May 8, 1912.)

1. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture.

Under a contract for sale of land in which time is of the essence and performance by the vendee a condition precedent to conveyance, after forfeiture is declared, the vendee cannot, without excuse shown, by tender, acquire a right to recover back the money paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

2. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture.

In a contract for sale of land in which time is of the essence, the vendor's right to retain purchase money on unexcused default is not dependent on existence of an express clause in the contract giving right to declare a forfeiture, or right to retain the money as liquidated damages.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

3. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture.

Time may be made of the essence of the contract for sale of land so as to give the vendor a right to declare a forfeiture and retain the purchase money without the precise expression that time is of the essence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

4. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture.

Under a contract for sale of land in four payments, providing that, if the vendee failed to comply with the conditions, any payments theretofore received should be forfeited as liquidated damages, and a subsequent provision extending time for one payment in consideration of $1,000 paid down stipulated that, if the vendee did not elect to purchase said land, the vendor was to retain said sum of $1,000 as and for liquidated damages, payment on time was a condition precedent and of the essence of the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

5. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture—Excuse.

That the vendee had not the money, and that at that particular time it was difficult to borrow money, was not a legal excuse for default as against a forfeiture of past payments.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

6. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture.

The inquiry whether time is of the essence of a contract as affecting the right to declare a forfeiture for nonpayment is to be determined from the terms of the contract, but consideration is to be given to the character of the property.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

7. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture—"Heretofore."

A contract for the sale of land for $40,000, payable in four equal payments, required the purchaser to pay "$10,000 (in addition to the sum of $10 herein paid)," etc., and provided that all sums paid herein shall apply to the purchase price, but, if the purchaser fails to comply with the conditions herein set forth, payments "heretofore" received, are to be forfeited as liquidated damages. *Held*, on forfeiture after two payments, the word "heretofore" would not be construed to limit the defendant's right to the $10 parenthetically referred to as "herein paid," but would be rejected as unnecessary or read as "theretofore," and include the $20,000 paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*

For other definitions, see Words and Phrases, vol. 4, pp. 3283–3285.]

8. Vendor and Purchaser (§ 335*) — Default in Payment—Forfeiture.

On a contract giving an option to purchase oil lands for $40,000 in four equal payments six months apart, and stipulating for forfeiture on default, that the vendor chose to declare the forfeiture as complete the day following the maturity of the third payment did not affect his right to forfeit.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 981–983; Dec. Dig. § 335.*]

9. Vendor and Purchaser (§ 341*) — Default in Payment—Action to Recover.

In an action by a purchaser of an undivided interest in property to recover payments declared forfeited, evidence *held* to show that a change of subject-matter by which the vendor had become owner of a divided interest was with the consent of the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1008–1017; Dec. Dig. § 341.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by the Skookum Oil Company against U. M. Thomas. From a judgment of the appellate court affirming a decision for defendant, plaintiff appeals. Affirmed.

Dudley Kinsell, C. C. Hamilton, and Mastick & Partridge, for appellant. Sutherland & Barbour and Geo. L. Warlow, for respondent.

LORIGAN, J. This appeal is here for further consideration after decision by the District Court of Appeal for the Third Appellate District affirming a judgment in favor of the defendant.

The action was brought to recover the sum of $20,000 received by defendant from R. L. Patterson, W. E. Dingley, and H. H. Dingley, assignors of plaintiff, and from plaintiff pursuant to a certain option to purchase land. The court made a general finding that the averments of the complaint, except as to the corporate capacity of plaintiff, were untrue, and rendered judgment in favor of defendant. The appeal is from the judgment on a bill of exceptions; the claim of appellant being that the evidence does not sustain the finding.

It appears that on January 17, 1907, defendant executed to R. L. Patterson, or assigns, a contract whereby he gave to the latter "the right and option to purchase from me all that certain tract or parcel of land in the county of Fresno, state of California, described as follows: An undivided one-half interest in and to all of the S. E. ¼, sec. 6, T. 26 S., R. 15 E., M. D. B. & M., * * * upon the following terms and conditions: The price of which is forty thousand dollars, payable in four equal payments of ten thousand dollars each at intervals of six months, commencing January 27th, 1907. If said R. L. Patterson elects to purchase said property, he shall on or before January 27th, 1907, three o'clock p. m., pay me the sum of ten thousand dollars (in addition to the sum of ten dollars herein paid), and upon such payment he shall have and he is hereby given until February 27th, 1907, three o'clock p. m., to search the title of said property; and if the title is found good and valid he is to pay me the balance of the money, to wit: Ten thousand dollars July 27th, 1907; ten thousand dollars January 27th, 1908; and the balance of the purchase price, ten thousand dollars, on July 27th, A. D. 1908, upon my tendering to him a grant, bargain and sale deed, conveying to him or his assigns, said above described property, with valid title free and unincumbered, which I hereby agree to do. Said deed to be placed in escrow with the Bank of Coalinga upon the deposit of the first payment of ten thousand dollars. * * * If the title cannot be perfected within said time I agree upon demand to return to said R. L. Patterson or his assigns, all sums paid on account of this option. All sums paid herein shall apply to the purchase price of said property, but if said R. L. Patterson or his assigns, fails to comply with the conditions herein set forth, any payments heretofore received by me are to be forfeited to me as liquidated damages. Upon payment of first installment said Patterson or his assigns shall be given possession of said land and permitted to enter upon and drill said land for oil." There are other provisions in the option immaterial to the present consideration.

Subsequently, and prior to January 27, 1907, the date provided for making the first payment under the contract, the defendant indorsed upon it that "for and in consideration of the sum of one thousand dollars to me in hand paid" he extended the time for payment therefor to February 25, 1907, the said $1,000 to constitute part of said payment of $10,000 if Patterson or his assigns should "elect to take the property." If he did not so elect, defendant was "to retain said sum of one thousand dollars as and for liquidated damages." In February, 1907, Patterson conveyed an undivided one-third interest in the option to H. H. Dingley and E. W. Dingley and notice of such conveyance was given to the Bank of Coalinga. On February 25, 1907, Patterson and the Dingleys paid into the Coalinga Bank for defendant the sum of $9,000. About the time of this latter payment defendant and Patterson deposited with the said bank the escrow papers and instruments, the defendant at that time also depositing therewith pursuant to the option agreement a deed in favor of Patterson to an undivided one-half interest in the property as described in the option, and to which interest it was stipulated on the trial that, when the option was executed, defendant had title. On March 25, 1907, before the second payment under the option became due, Patterson and the Dingleys transferred all their rights and interests under the option to the plaintiff, and on July 27, 1907, paid defendant said second installment of $10,000. It was stipulated on the trial "that there was a partition of the land described in said paper writing (the option) leaving the absolute title to the S. ½ of the S. E. ¼ of section 6 in the defendant U. M. Thomas, and that this partition took place on the 25th of March, 1907." Subsequent to the date when the partition was made the defendant deposited with the bank a deed dated March 27, 1907, in favor of Patterson conveying the S. ½ of the S. E. ¼ of the section. When the third payment under the option became due on January 27, 1908, it was not paid or offered to be paid and on the next day, in response to a telegraphic demand from defendant for the return of the two deeds to him they were sent to him by the cashier of the bank. Prior to January 27, 1908, plaintiff informed defendant of its probable inability to meet the third payment then falling due, and asked for an extension, which the defendant refused to grant. Subsequent to January 28, 1908, the parties had several conversations about the option, at one of which—in October, 1908—plaintiff offered to pay the $20,000 for which it was in default under the option, with interest and any damages which the defendant had sustained through failure of the plaintiff to make the payments when due, but defendant refused to consider the matter of the option at all. At no time did plaintiff or any one in its behalf tender to the defendant any money on account of the purchase price of the land. At all the meetings with defendant above referred to (which were sought by plaintiff alone), the defendant refused to talk with plaintiff on the basis of the option having any existence. His position after January 27, 1908, consistently adhered to, was that the option was at an end, and that he was in no way further obligated by reason of its having been executed, or, as described by one of the witnesses of the plaintiff, his position was "that he considered that the Skookum Oil Company had forfeited all of its rights under the option and he would not discuss the matter with reference to the option."

The points made by appellant are (1) that time was not of the essence of the option agreement, and that the offer of the plaintiff to pay for all damages sustained should have been held to excuse the delay; (2) that the condition in the contract for a forfeiture should have been strictly construed; (3) that the defendant at the time he treated the option as forfeited—default in the third payment—the entire subject-matter of the contract had been changed and defendant was not in a position to deliver the land specified in the contract, as he had converted an undivided interest in the whole quarter section held by him when the option was executed into a sole ownership by him of the south half thereof.

The first two points were fully discussed and the law respecting them clearly declared in the decision of the District Court of Appeal when this matter was before it, and we quote and adopt what is there said in disposing of them. That court said:

[1] "It seems to us that the principles so clearly presented in Glock v. Howard & Wilson Colony Co., 123 Cal. 1 [55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17], are determinative of the questions here involved. It was there held that under a contract for the sale of real estate, in which time is made of the essence of the contract and performance by the vendee is made a condition precedent to a conveyance and upon breach thereof he is declared to forfeit all rights thereunder, including payments made thereon, the vendee cannot, after his default, without excuse shown therefor, by a tender of the amount due, acquire either an equitable or a legal right to maintain an action to recover back the moneys paid under the contract, nor can the purchaser, in such case, put the vendor in default by mere tender, nor can he elect to consider the contract at an end, and recover what he has paid on the contract, when the vendor has not abandoned the contract, but stands upon its terms and conditions. It was also held that, under such a contract, the refusal of the vendor to accept a tender made by a purchaser in default, and to convey to the purchaser after such default does not affect a rescission of the contract, nor entitle the vendee to recover the money paid. Neither will equity relieve such purchaser who has made an unexcused default and has not fulfilled conditions precedent to the vesting of his right of action.

[2] "It was held, further, that the vendor's right to retain the purchase money, where default was unexcused, is independent of any express clauses in the contract for forfeiture of rights, or for the retention of the purchase money as liquidated damages, and that such express clauses are but declarations in express terms of the legal rights of the parties under such a contract, existing without them.

[3] "Appellant attempts to distinguish the present case from the Glock Case on the ground that there the contract expressly made time of its essence. But it is very clearly shown in the opinion in that case that time may be made of the essence of a contract without employing those precise expressions. Said the court: 'When the equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has at law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties thus give does not alter the fact nor change the vendor's rights.' See the authorities cited in the opinion.

[4] "The contract here expressly provides that, upon the failure of the vendee 'to comply with the conditions herein set forth, any payments heretofore received by me are to be forfeited to me as liquidated damages.' In the provision extending the time for the first payment of $10,000 it was expressly stipulated that, if the vendee did not elect to purchase said land, the vendor was to 'retain said sum of one thousand dollars as and for liquidated damages.' It seems to us that the stipulations of the contract show unmistakably that prompt payment on time was a condition precedent and became of the essence of the contract. Mr. Pomeroy

says: 'It is certain that when the contract is made to depend upon a condition precedent—in other words, when no right shall vest until certain acts have been done, as for example, until the vendee has paid certain sums at certain specified times—then also a court of equity will not relieve the vendee against forfeiture incurred by a breach of such condition.' In the Glock Case, supra, the court said: 'After the vendee's breach, the vendor may agree to a mutual abandonment and rescission, in which last instance, and in which alone, the vendee in default would be entitled to a repayment of the money.'

[5, 6] "There is in this case absolutely no excuse given for the failure to make the payment on January 27, 1908, except that the vendee had not the money, and that at that particular time it was difficult to borrow money—an excuse not deemed of any legal significance—and there is no pretense that there was any mutual abandonment or rescission of the contract. The Supreme Court said in Oursler v. Thacher, 152 Cal. 739, 745 [93 Pac. 1007, 1010]: 'There being no rescission or abandonment of the contract by the plaintiffs, and the plaintiffs at all times having insisted on the contract and stood on its terms, and being in no respect in default, the vendees in default were not entitled to recover either the moneys paid by them to plaintiffs or the moneys expended in developing the property,' which was a mine. The consideration to be paid was $500 per acre, and the vendees were given the right to go into possession and drill for oil. The inquiry whether time is of the essence of a contract is to be determined, it is true, from the terms of the contract; but some consideration is to be given to the character of the property. Mr. Lindley says: 'The authorities, both in England and America, recognize that, where mines or mining properties are the subject of contract, time is of the essence, independent of any express stipulation inserted in the instrument.' 2 Lindley on Mines, § 859. So held in Waterman v. Banks, 144 U. S. 394 [12 Sup. Ct. 646, 36 L. Ed. 479]. A syllabus reads: 'Time may become of the essence of a contract for the sale of property, not only by the express terms of the parties, but from the very nature of the property itself. Mineral property requires the parties interested in it to be vigilant and active in asserting their rights.'

[7] "Appellant seeks to escape the force of the contract by resort to the rule that conditions of forfeiture are to be strictly construed against the party in whose behalf they were created. The contention is that the word 'heretofore' used in the forfeiture clause must be construed to limit the defendant's right to the $10, parenthetically referred to as 'herein paid.' The rules of construction forbid seizing upon some isolated provision of a contract in order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument. Civ. Code, §§ 1641, 1650. True, the language is to govern, if it 'is clear and explicit, and does not involve an absurdity.' Civ. Code, § 1638. The paragraph in question reads: 'All sums paid herein shall apply on the purchase price of said property, but if said R. L. Patterson or his assigns, fails to comply with the conditions herein set forth, any payments heretofore received by me are to be forfeited to me as liquidated damages.' It seems to us that the vendor intended to refer to the 'sums paid herein * * * on the purchase price'; and it is not reasonably probable that he referred only to the $10 mentioned in a transaction involving property of such high value. The claim that the forfeiture must refer to the $10 paid as consideration seems to us wholly unreasonable if not absurd, because, if paid as the consideration, it became the vendor's, and the term forfeited could not reasonably be said to apply to it. The term 'heretofore' should be treated either as wholly unnecessary to express the intention and be rejected, or should read 'theretofore.' In Sprague v. Edwards, 48 Cal. 239, the phrase in a deed reading, 'subject, however, to the "appeal" of the said John A. Sutter,' the word 'appeal' was construed to mean 'approval.' The court said: 'The sole object to be attained in the construction of contracts is to ascertain the real intention of the parties; and with this view the whole contract and all its provisions, together with the relation of the parties toward each other, will be considered.' The provision immediately preceding the forfeiture clause lends support to our view. It reads: 'If the title cannot be perfected within said time I agree upon demand to return to said R. L. Patterson or his assigns, all sums paid on account of this option.'

[8] "That defendant chose to regard the forfeiture as complete the day following the maturity of the payment puts no different complexion on the transaction than if he had delayed a month or two months. His rights, whatever they were, accrued upon the vendee's default, and were immediately available to the vendor. The vendee's construction of the contract would permit him to continue prospecting for oil, and, whenever he chose or was compelled to desist, he could in any event recover the money paid. It was said in the Glock Case, supra: 'It would be to the last degree unjust and inequitable to allow a vendee, after his default under such a contract, to put the vendor in default by a mere tender. * * * Failing to make payment, he would three months, six months, one year, or as in this case over three years, after the date of the failure, make an offer to perform, and if the land had risen in value, according to the theory of respondent here, could compel per-

formance; but in every case he could recover the money paid.' It appeared that in October, 1908, seven months after the default in payment, and after all payments were past due, the president of plaintiff company and its attorney, Mr. Dudley Kinsell, met the defendant at Fresno, and asked him if he would receive the $20,000. Defendant said he would not as he had already obligated himself to convey the property to other people. No tender of any money was made. Plaintiff's witness testified: 'I will frankly say we didn't have the money with us and couldn't have done it that day'—i. e., make a tender."

[9] The third point made by appellant for reversal is that prior to the time defendant treated the option as forfeited there had been an entire change of the subject-matter of the option, and defendant was not in a position to convey to the plaintiff the interest in the lands specified and mentioned in the contract. This point is based on the fact that the option agreement called for the conveyance by defendant to Patterson on performance of its terms by him of an undivided one-half interest in the whole quarter section described in the option, a deed therefor to him having been originally deposited in the bank in escrow; and the further facts that, on the trial, it appeared that subsequent to the execution of the option contract and deposit of this deed, and prior to the default of the plaintiff in making payments there had been a partition of the land described therein leaving the absolute title in the defendant to the south half of the southeast quarter of the section, and that subsequently defendant deposited in bank in escrow a deed from himself to Patterson to said absolute interest as a substitute for the original deed by him of an undivided one-half interest in said quarter section as mentioned in the option.

Under these facts the appellant seeks to invoke the rule that "if the vendor is unable to convey a proper title according to his contract at the time of performance because he has no title, or has a defective title, or has a less estate in the land than he agreed to convey, the vendee may treat the contract as at an end and may recover in an equitable proceeding for rescission the money he has paid on account of the purchase price." 29 Am. & Ency. of Law, p. 727.

But it is quite apparent from an examination of the record in this case that the stipulation as to partition was only made in connection with the formal proofs which plaintiff was making respecting the option contract, the assignment from Patterson to the Dingleys, and from all of the latter to the plaintiff, and to show the situation, in fact, respecting the property to which the option applied when it was claimed by defendant that all rights under it had been forfeited. No claim was made in the court below that the legal effect of the partition and change in the subject-matter of the option operated as a rescission of the contract entitling plaintiff to recover back the payments previously made. The case was tried on no such theory, and the point was made for the first time in the District Court of Appeal, and insisted on here. This of itself would afford good reason for refusing to consider a claim upon which no reliance was placed in the trial court, and is urged for the first time on appeal as a ground for reversal. But it is not necessary to dispose of the point for any such reason. The claim of plaintiff is based solely on the ground that it was shown by stipulation that there had been a partition of the property. It does not appear who asked for the stipulation as to this fact, though from its place in the record it may be assumed that plaintiff did. No reason or purpose in asking for it was given by the plaintiff, and defendant seems to have made no inquiry as to why it was desired. There appears to have been just the bald stipulation entered into between the parties, early in the trial, of the fact of the partition without any reliance being placed on it by plaintiff upon the trial or until it is now relied on to overthrow the finding of the trial court in favor of defendant. If, under the stipulation, appellant had, on the trial, claimed a right to recover on account of the change in the subject-matter of the option contract affected by the partition, the defendant would have had the right, if he could, to show that the partition had been effected by mutual consent of the assignors of the plaintiff and the defendant; and if now, on an examination of the record, sufficient evidence appears from which this fact may be fairly inferred, it will dispose of the claim of appellant. Necessarily, as no claim was made by plaintiff under the partition on the trial, it could hardly be expected that evidence addressed directly to the circumstances under which the partition was made would appear. There was, however, evidence introduced on other subjects which, in a measure, also bears on the matter of the partition, and which we are satisfied sufficiently warrants a reasonable inference that the partition was effected with the knowledge and consent of Patterson and of the Dingleys, the assignors of the plaintiff.

The partition between defendant and his cotenant was made on March 25, 1907, and on that same day a deed to the property as described in the option was made to the plaintiff by Patterson and the Dingleys; the latter having theretofore acquired an interest in the option from Patterson. Prior to this date the plaintiff had been organized as a corporation and the Dingleys from the time of its organization had been officers thereof—W. H. Dingley being vice president up to March 9, 1908, and from that date thereafter its president, and W. E. Dingley had been its secretary ever since its organization. Both later owned all the issued stock of the corporation save five shares, and they were the persons most actively engaged in attending to the interests of the corporation under the option and who had the several interviews with the defendant subsequent to the default of the corporation in making payments under the option, at which interviews they endeavored to persuade the defendant to renew the option or allow it to be carried out, notwithstanding the default, or refund the moneys previously paid under it. In all these interviews, while various reasons were urged by them why the option should be extended or renewed or the payments refunded, no claim was made, or even intimated, in any of these interviews that the corporation had a legal right to have the payments returned on the ground that a rescission of the contract had been worked prior to the default of plaintiff by a change in the subject-matter of the option by reason of the partition and the substituted deed, although the defendant in all these interviews refused to recognize that the corporation had any rights whatever under the option or to discuss matters on the basis of the existence of any rights in favor of the corporation under it or to restore any payments which had been made. It further appears that the deed of March 27, 1907, from defendant to R. L. Patterson, deposited by the former with the bank in lieu of the original deed, was deposited there "after the division of the property between Mr. Webb and Mr. Thomas." This sufficiently indicates that the partition was effected between these two—Webb and Thomas—as cotenants of the property, though we attach importance to this only as it bears upon another item of evidence. Plaintiff introduced in evidence a letter written by defendant to the Coalinga Bank on April 2, 1907. In this letter were inclosed three deeds—the first a deed from Webb and others to the defendant; the second a deed from defendant to Webb; the third a deed from defendant to Patterson and others. Respecting these deeds the defendant wrote "the first deed [Webb to the defendant] is unsigned, but I am told Webb will have it executed in accordance with an agreement with Patterson. When this is done the deed [defendant to Webb] can be delivered to Webb; the third deed [defendant to Patterson] you will keep in escrow in place of the deed sent you, which deed you can return to me. This third deed [defendant to Patterson and others] can be delivered to Patterson when the last of the $40,000 payments is made." It is quite apparent from this letter, in connection with the testimony previously referred to showing that the division or partition of the land was between the defendant and Webb as cotenants, that the partition was effected and the deed from Webb to defendant and from the latter to Patterson and others of an absolute portion of the quarter section was made under an arrangement and agreement with Patterson prior to the deed to the plaintiff. It further appears in the record that prior to the commencement of the present action the plaintiff had brought an action against defendant which had been tried, though it does not appear what was the result. That action was to enforce specific performance of the option contract against defendant and the complaint was verified on behalf of the plaintiff by H. H. Dingley as its president. It was alleged that plaintiff, as assignee of Patterson had offered to perform all the covenants contained in the agreement between defendant and Patterson and pay the balance under the agreement, and that defendant refused to make a deed to the land and refused to return the $20,000 theretofore paid to him, and the prayer was for a decree to compel defendant to make and execute to it a deed to the "south half of the southeast quarter of section six," being the absolute interest which defendant had acquired under the partition, and to which the substituted deed in escrow applied.

Taking into consideration these facts disclosed by the record, and without further discussing them, it is sufficiently apparent that the partition was effected with the consent of Patterson, the assignor of the plaintiff, and from the relations between Patterson and the Dingleys, individually and as officers of the plaintiff, that the partition was effected by Patterson with the understanding and consent of all of them and for their benefit. When all the matters recited are fairly considered, this is the reasonable inference to be deduced.

In his answer to the petition for rehearing, respondent incorporated therein as an exhibit a copy of the complaint in the former action just referred to, certified by the clerk of the superior court as being correct. In this copy of the complaint is set forth, among other things, a power of attorney by plaintiff to Patterson dated January 19, 1907, authorizing him to effect a partition of the property and an agreement for a division of the property between Patterson, representing defendant, and Webb, the cotenant of the defendant and persons claiming under an agreement to sell executed by Webb, and the interchange of the deeds effecting a partition of the land and vesting title in plaintiff to the S. ½ of the S. E. ¼. But this is not part of the record, and cannot be considered by us. If we could do so, it would only strengthen what is reasonably inferable from the record properly before us, namely, that the partition and the substituted deed to the segregated portion of the quarter section were effected and made with the consent of the assignors of plaintiff prior to their assignment to plaintiff of their rights under the option.

The judgment appealed from is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.

162 Cal. 553

RUGGLES v. HELFRICH et al. (S. F. 5,990.)

(Supreme Court of California. April 10, 1912. Rehearing Denied May 8, 1912.)

1. ATTACHMENT (§ 308*)—CLAIMS—PRIORITY —SUFFICIENCY OF EVIDENCE.

In an action by a trustee for the benefit of creditors to compel parties to interplead in respect to their claims to a fund to which the trustee made no claim, evidence *held* sufficient to sustain a finding that an attachment under which one creditor claimed was levied prior to the making of an assignment under which the other claimed.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1102-1113; Dec. Dig. § 308.*]

2. EXCHANGES (§ 12*)—MEMBER'S LIABILITY TO THIRD PERSON—EXECUTION—SERVICE.

The constitution of a stock and exchange board, providing for suspension of a member on which his seat should revert to the board and be appropriated to satisfy his creditors in the board, and made the president of the board ex officio a trustee for such person and for his creditors. After the reverter and sale of a member's seat, writs of attachment and of execution in an action against a creditor of the ex-member were levied upon all moneys belonging to defendant therein "in possession or under control" of such board, but notice was served upon the president of the board. *Held*, that the money was under the control of the board, and that the notice was sufficient to fix the execution creditor's lien upon the fund.

[Ed. Note.—For other cases, see Exchanges, Cent. Dig. § 15; Dec. Dig. § 12.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Jas. M. Troutt, Judge.

Action by A. B. Ruggles, trustee for J. B. Hill and his creditors, interpleading Cora A. Helfrich and Alphonsine Romer. Judgment in favor of defendant Helfrich, and defendant Romer appeals. Affirmed.

See, also, 118 Pac. 458.

Humphrey & Hubbard and William P. Hubbard, for appellant. W. H. Barrows and Aitken & Aitken, for respondent.

MELVIN, J. This is an appeal by one of two interpleading creditors from a judgment in favor of the other and from the order denying a motion for a new trial.

Ruggles, who was president of the San Francisco Stock and Exchange Board, and as such officer the trustee of $5,000 realized from the sale of a suspended member's place on the said board, brought this action, in accordance with the provisions of section 386 of the Code of Civil Procedure, to compel the defendants to interplead regarding their right to the sum of $437 to which each made claim. He alleged that he had no claim upon the money, and that he was ignorant of the respective rights of the defendants. He offered to deposit and did deposit the money in court. Each defendant filed a cross-complaint. Their claims were litigated, and judgment was rendered in favor of Cora A. Helfrich, a creditor of one Robert Romer. She claimed the money by virtue of an attachment and a subsequent levy of execution in a suit against Robert Romer. The other defendant, who is appellant here, is the mother of said Robert Romer. She sought to establish title by an assignment from her son antedating respondent Helfrich's attachment.

The first assignment of error made by appellant is that her demurrer to the complaint should have been sustained, but without quotation from the complaint we may say that it sufficiently complies with the requirements of section 386 of the Code of Civil Procedure. As before stated, A. B. Ruggles was president of the San Francisco Stock and Exchange Board. Article 13 of the constitution of the board provides that any member who has been suspended for six months, and has not made a satisfactory settlement of his contracts in the board, shall be deprived of all privileges of membership, "and his seat shall revert to the board and shall be appropriated to satisfy his creditors in the board." The article further provides a calling by the president of the board of a meeting of the creditors in the board of the delinquent member and the presentation of their claims to said president. Then follows the enactment that the "president in all such cases shall be ex officio a trustee for such person and for his creditors in the board, and the said trustee shall be vested with all the rights and privileges formerly held by such person in the board, and shall dispose of the same in the same manner that a person retiring in good standing may dispose of his seat and privileges. The proceeds of any such disposition so made shall be devoted by the said trustee to discharging the obligations due by such person to members of the board." The rest of the article pertains to the disposition of the surplus, if any, or the prorating by the trustee of the proceeds of the sale if they be insufficient to pay all the debts of the ousted member due to his associates. It is agreed by all parties that the seat of one J. B. Hill was sold, pursuant to said article 13 of the constitution of the Stock and Exchange Board, on December 12, 1906, and at that time there came into the possession of A. B. Ruggles, as president of said board, the sum of $5,000 as the proceeds of this sale; that said J. B. Hill was indebted to Robert Romer in the sum of $437; and that Ruggles holds possession of said sum in his capacity as trustee. Alphonsine Romer's purported assignment from her son bears date July 27, 1906, and is as follows: "For value received I hereby sell, assign, transfer and set over unto Alphonsine Romer all sums of money belonging to me, in the hands of the San Francisco Stock and Exchange Board from the said Hill for me. Said sum being about $437.00 as found owing from said Hill to me by said board. Robert Romer."

It is admitted that notice of this alleged assignment was not served upon the San

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Francisco Stock and Exchange Board by delivery to the assistant secretary until February 25, 1908, more than a year after service of attachment in the case of Cora A. Helfrich v. Robert Romer, 118 Pac. 458, and only three days before the levy of execution in that case.

[1] The court, while making no finding of actual fraud, did find that the attachment, served February 9, 1907, was prior to any assignment made by Romer to his mother, although both of them testified that said purported assignment was made about the time of its date, July 27, 1906. The finding was justified by the evidence for several reasons. In the first place, the late delivery of the assignment to the board scarcely comported with the declarations by appellant and her son of its early existence; secondly, Robert Romer commenced suit on December 12, 1906, against Hill and the San Francisco Stock and Exchange Board as defendants, in which he asserted that all of the proceeds of the sale of Hill's seat belonged to him, and he prosecuted that suit until final judgment against him on October 24, 1907. Robert Romer also made formal and solemn affidavit in December, 1907, in the suit of Helfrich v. Romer that the $437 was his property; and, finally, the instrument itself is inconsistent with the admitted facts in the case, for, while it is dated two days after Hill's suspension from the board, the sale of Hill's membership did not occur until months later, namely, on December 12, 1906, and there were no "sums of money belonging to" Romer either in the custody of the board or the possession of A. B. Ruggles at the purported date of the assignment. In view of these undisputed facts, the court below would have been afflicted with wondrous credulity if any other finding had been made.

[2] But the all important question in the case is raised by appellant's attack upon the sufficiency of the levies of attachment and execution. The complaint alleged: "That at the time when said sum of $5,000 so came into plaintiff's possession said J. B. Hill was indebted to one Robert Romer in the sum of $437, and plaintiff as trustee for the said J. B. Hill and his creditors took possession of said sum and ever since has held and now holds possession of said sum of $437 in his said capacity as trustee." This averment was adopted by respondent Cora A. Helfrich in her cross-complaint. It was also alleged in the complaint, adopted as part of the said cross-complaint, and proved at the trial, that the notices both of attachment and of execution were directed to the San Francisco Stock and Exchange Board, although served upon A. B. Ruggles as its president. Appellant advanced the proposition (and reserved the point by timely demurrer, objections to evidence, and specifications of alleged error) that there had never been any proper and valid levy upon the trustee, and that, therefore, the fund was available for payment to her when notice of the assignment to her from her son was served. To this argument two answers are made. One is that appellant is in no position to attack the judgment, even under her own theory, because at the date of the assignment of his interest by her son to her the board held no moneys of J. B. Hill, and at the date of the service of said assignment on the board the money here sought was held, according to her views, not by that organization, but by the trustee A. B. Ruggles. The other answer is that the levies were effective because, although Ruggles was nominally the trustee, he was such merely ex officio as president of the board and was in reality the agent and servant of that association; the money in his hands being in effect in the custody of the board. The returns upon the writs of attachment and of execution showed that the levy in each instance was upon all moneys, etc., belonging to defendants mentioned in the writ or either of them "in possession or under control of the San Francisco Stock and Exchange Board." Respondent submits that the money was under control of the board, and that service of notice upon said board through Ruggles as president was sufficient to fix her lien upon the fund. An inspection of article 13 of the constitution of the Stock and Exchange Board convinces us that respondent's position in this regard is correct. Under that article of the board's organic law the seat of the delinquent member "shall revert to the board and be appropriated to satisfy his creditors in the board." And, while in such matters the president is made trustee for the indebted member and his creditors, he is only made so ex officio. It is true that for the purposes of disposing of them the president is vested with all of the rights and privileges formerly held by the delinquent member, but this investiture is only by virtue of his standing as president. In no event would his trusteeship for the purpose of sale of a membership and payment of creditors from the proceeds thereof survive his office. On his removal or resignation from the presidency it would be his duty at once to account for the funds in his hands, not to his successor (for perhaps none would have been selected immediately upon the happening of a vacancy in the office), but to the Stock and Exchange Board to which the title to the deposed member's seat had reverted. Clearly, though designated as a trustee for the delinquent debtor and the latter's creditors, the president was merely an agent of the board, under its control, and was but a custodian of the funds in question. If he had embezzled the money, he would have been answerable to the board, because under the above-quoted provisions of the said board's constitution the property in the seat of the deposed member had reverted to that association, and the proceeds of the sale

thereof belonged to the board, because at no place in the constitution is provision made for transfer of the title to the seat from the board to the trustee. He is made trustee for the creditors and for their debtor, but not for the board, except to make the sale and to distribute the proceeds. The title to the seat would pass to the purchaser, not from the president as trustee, but from the board as owner. It follows that whether we consider the service of notice on the board, through its officer, or upon the trustee as one under the board's control, the levy was sufficient.

In any view of this litigation, appellant is without standing in her demand for the money derived from the sale of Hill's seat. If her theory is correct and the money was available, not as the property of the Stock and Exchange Board, but as a fund in the hands of a trustee, her assignment was subject to the same infirmity as were the attempted levies of the writs of attachment and execution, because it referred to "money in the hands of the Stock and Exchange Board." If that association never had in its possession any money due to Hill, then the attempted transfer of title to such a fund never became effective.

The judgment and order are affirmed.

We concur: LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

162 Cal. 559

In re SPRECKELS' ESTATE.

(S. F. 5,678–5,683.)

(Supreme Court of California. April 10, 1912. Rehearing Denied May 9, 1912.)

1. Wills (§ 11*)—Disposition of Property—Community Estate.

Under the direct provisions of Civ. Code, § 1402, only one half of the community estate is subject to testamentary disposition by the husband; the other half going to the surviving wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 26–31; Dec. Dig. § 11.*]

2. Wills (§ 439*)—Construction—Intention of Testator.

Under Civ. Code, § 1317, providing that a will is to be construed according to the intent of the testator, the primary purpose of construction is to ascertain his intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

3. Wills (§ 441*)—Construction—Surrounding Circumstances.

Under Civ. Code, § 1318, resort may be had, in case of uncertainty of a will, to the circumstances of its execution; but, where the intent is plain, it should be declared, regardless of the surroundings of its execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. § 441.*]

4. Wills (§ 448*)—Construction—Voidness of Intestacy.

Under the direct provisions of Civ. Code, § 1326, that construction of a will which will avoid intestacy is to be preferred over one which causes intestacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 448.*]

5. Wills (§ 688*)—Construction—Validity of Devise.

A direct devise is not invalidated because the testator, contrary to Civ. Code, § 857, attempted to pass title through trustees for that purpose; the devise and method of transfer of title being separable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1574; Dec. Dig. § 688.*]

6. Wills (§ 688*)—Construction.

A testator devised all of his real property to trustees to pay the net income to his wife during life, and upon her death to divide the estate into three equal parts, two to be assigned, transferred, and set over to two sons, and to become theirs absolutely and forever, the trustees to pay the annual income derived from the remaining part to his daughter, and upon her death to pay over the principal, with all accumulations, to her children then living; the same to become his or hers absolutely and forever. The will also provided that, in case of the death of the testator's sons, all legacies and devises given to them should go to their issue, and should become theirs absolutely and forever. *Held* that, while the expression, "shall be assigned, transferred, set over, and delivered by my trustees," used with reference to the shares of the sons, calls for a conveyance by the trustees of the real estate, the other portions of the will show that the testator intended to make absolute devises to those to whom the trustees were directed to transfer the property, so that the beneficiaries of the trust take directly as devisees, despite Civ. Code, § 863, providing that the beneficiaries of express trusts take no estate in the property, but may only enforce performance; and consequently the interest of the devisees is not affected by the invalidity of the trust as one merely to convey, which is not within Civ. Code, § 857, specifying the only purposes for which a trust can be created.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1574; Dec. Dig. § 688.*]

7. Wills (§ 688*)—Construction—Trusts—"Divide"—"Equal."

By his will, a testator devised and bequeathed unto his trustees all his estate, including real property, to pay the income to his wife during her natural life, and upon her death to divide the estate into three equal parts, and to assign one part to each of two sons, and hold the remainder in trust to pay the income to his daughter during her life. Civ. Code, § 847, forbids trusts of real property, save those specified; and section 857 provides that express trusts in real property may be created to sell, mortgage, or lease, to receive the rents and profits and pay them to the use of any person, and to accumulate the rents and profits. *Held* that, as the word "equal," used in the direction to divide the estate into three equal parts, implies parts equal in all respects—in quantity, character, and value—and as the term "divide" does not, of itself, import a physical segregation in distinct shares, the directions to the trustees were not to make an actual physical division, it apparently being the intention of the testator to devise his property to his children as tenants in common; and hence the trustees did not take absolute title, but took only sufficient title to support their duty of apportioning the share of the daughter and paying over the income, and so the absolute devises to the children were not invalid, because based on trusts to physically divide, which were invalid.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1644–1649; Dec. Dig. § 688.*

For other definitions, see Words and Phrases, vol. 3, pp. 2142–2143, 2419.]

8. TRUSTS (§ 134*)—TITLE OF TRUSTEES.

Trustees take only such estate as is commensurate with the necessities of their office; and hence, where the only duty of a trustee is to pay the income to one for her life, the trustee does not take a fee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 177; Dec. Dig. § 134.*]

9. TRUSTS (§ 134*)—TITLE OF TRUSTEES.

Where trustees are given discretionary power of investment and reinvestment, such power does not make it necessary that they be invested with the fee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 177; Dec. Dig. § 134.*]

10. PERPETUITIES (§ 6*) — SUSPENSION OF POWER OF ALIENATION—DEVISES.

Direct devises which vest at the death of one entitled to a life estate in the income of the property are not void because of undue suspension of the power of alienation, because among the takers there may be a child en ventre sa mère.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4–56; Dec. Dig. § 6.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. V. Coffey, Judge.

Petition for partial distribution by Claus A. and Rudolph Spreckels, as trustees under the will of Claus Spreckels. From an order sustaining the demurrers of John D. and Adolph B. Spreckels, Claus A. and Rudolph Spreckels appeal, both individually and as executors and trustees. Judgment reversed.

Cushing & Cushing and Charles S. Wheeler (Nathan Moran, J. F. Bowie, and Wm. H. Gorrill, of counsel), for appellants. Morrison, Cope & Brobeck, Peter F. Dunne, Samuel M. Shortridge, and W. N. Hohfeld, for respondents.

SLOSS, J. Claus Spreckels died testate on the 26th day of December, 1908, leaving as his surviving heirs his widow, Anna Christina Spreckels, four sons, John D., Adolph B., Claus A., and Rudolph Spreckels, and a daughter, Emma C. Ferris. His will was admitted to probate in the superior court of the city and county of San Francisco on the 9th day of January, 1909, and letters testamentary were duly issued to the executors named, who were his sons Claus A. and Rudolph. As will appear, the will undertook to make devises and bequests to these two sons, as trustees, upon certain declared trusts. After the lapse of four months from the issuance of letters testamentary, Claus A. and Rudolph Spreckels, as trustees of the trusts created by the will, petitioned the court for partial distribution to them of a large portion of the real and personal property left by the testator. They subsequently filed an amended petition to the same end. To this last petition, demurrers were interposed by John D. and Adolph B. Spreckels, and the court, after hearing the respective parties, made its order sustaining the demurrers, and denying the petition for partial distribution. It appears, and the fact is recited in the order, that the testator's widow died three days prior to the signing of the order.

From the order or judgment so made, six appeals are taken, one (No. 5,678) by Claus A. Spreckels individually, one (No. 5,679) by Rudolph individually, one (No. 5,680) by Claus A. and Rudolph as trustees of the trusts created by the will, one (No. 5,681) by Claus A. and Rudolph as trustees of the trusts created for the benefit of Emma C. Ferris, one (No. 5,681) by Claus A. and Rudolph as trustees of the trusts created for the benefit of Anna C. Spreckels, and finally one (No. 5,682) by Claus A. and Rudolph Spreckels as executors of the will of Anna C. Spreckels, deceased.

Involved in the first four of these appeals is a single main question, i. e., the validity, as a whole, of the trust scheme contained in the will. The other two appeals, No. 5,681 and No. 5,682, present narrower issues, turning upon the provision for the widow and the extent, if any, to which the petitioners' right to a partial distribution is affected by her death pending the proceeding. The conclusions which we have reached make it convenient and proper to consider all six appeals in one opinion.

As a preliminary to the statement and consideration of the positions taken by the respective parties, it will be necessary to set forth the terms of the will, and to give an outline of the amount and character of the estate left by the decedent.

Omitting the attestation clause and the signature thereto, the entire will reads as follows:

"I, Claus Spreckels, a citizen of the state of California, and a resident of the city of San Francisco in said state, now present in the city, county and state of New York, being of sound and disposing mind, and not under restraint or undue influence, do make, publish and declare this to be my last will and testament, hereby revoking all other wills by me made.

"First: I declare that all the estate, whereof I may die possessed, is the community property of my wife, Anna Christina Spreckels, and myself.

"Second: I hereby give, devise and bequeath unto my trustees hereinafter named, all my estate, real, personal and mixed, of every nature, kind and description, wherever situate and however held, which is or may be subject to my testamentary disposition at the time of my death, to have and to hold the same, in trust, nevertheless, for the uses and purposes, with the powers and in the manner hereinafter mentioned, namely, to-wit:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"(a) To pay over the net annual income thereof to my wife during the term of her natural life.

"(b) Upon the death of my said wife, or upon my death if she be not then surviving, to divide said estate into three equal parts, when one of said parts shall be forthwith assigned, transferred, set over and delivered by my said trustees to my son Claus A. Spreckels, and the same shall be and become his absolutely and forever, and another of said equal third parts shall be forthwith assigned, transferred, set over and delivered by my said trustees to my son Rudolph Spreckels, and the same shall be and become his absolutely and forever.

"(c) To pay over the net annual income derived from the remaining equal third part of my estate to my daughter Emma C. Ferris of Kingswood, England, wife of John Ferris, during her natural life, upon her receipt without anticipation, and the same shall not be liable for her debts.

"Upon the death of my said daughter Emma, to pay over the principal of said one-third part of my estate, with all accumulations of the income therefrom, to her children then living, and so that each child shall receive an equal share thereof, and the same shall become his or hers absolutely and forever.

"Children of her deceased children shall, however, take the share which the parent would have taken had he or she survived my said daughter, and the same shall be divided between said children share and share alike. Upon the death of my said daughter without child, children or grandchildren her surviving, the trustees shall pay over the principal of said one-third part of my estate, with all accumulations of income therefrom, to my said sons Claus A. Spreckels and Rudolph Spreckels, share and share alike, and the same shall become theirs absolutely and forever.

"Third: If my said son Claus A. Spreckels shall not be living at the time of my death or surviving me be not living at the time of my wife's death, then all the legacies and devises given to him by this will shall go to his issue, to him in lawful wedlock born, share and share alike, and the same shall be and become theirs absolutely and forever. If my said son Rudolph Spreckels shall not be living at the time of my death, or surviving me be not living at the time of my wife's death; then all the legacies and devises given to him by this will shall go to his issue, to him in lawful wedlock born, share and share alike, and the same shall be and become theirs absolutely and forever.

"Fourth: I make no provision in this will for my sons John D. Spreckels and Adolph B. Spreckels for the reason that I have already given to them a large part of my estate.

"Fifth: I hereby authorize and empower my trustees hereinafter named, to invest and re-invest the trust funds hereinbefore provided for in any securities which are approved by my said wife and by them during her lifetime, in case she survive me, and after her death, in any securities which said trustees deem best, whether the same are or are not investments to which executors and trustees are by law limited in making investments, and to change or vary investments from time to time as they may deem best. I authorize and empower my executors and trustees hereinafter named, to hold and continue in their discretion, any security in which any of my property may be found invested at the time of my death, my intent being that they shall be absolved and discharged from the absolute legal duty of converting my estate into money, and that they shall not be liable for any shrinkage in value by reason of the exercise of the discretion hereby reposed in them.

"Sixth: I authorize and empower my executors and trustees hereinafter named in their discretion to sell and dispose of any and all of my property, real or personal, wherever situate and however held, either at public or private sale, and at such time or times and upon such terms as may seem to them meet and advisable, and to give to the purchaser or purchasers of any of my said property all deeds, bills of sale and other muniments of title which may be expedient or necessary.

"Seventh: I nominate, constitute and appoint my sons Claus A. Spreckels and Rudolph Spreckels as executors of this my last will and testament, and as trustees of any and all trusts herein created, and I direct and request that no bond or other security be required of them as such executors or trustees, or in any capacity in which they may act under this will."

[1] It will be observed that the testator declares, in paragraph "First" that his entire estate is community property, and that, by the express terms of paragraph "Second," he undertakes to dispose of only such portion of the estate as is subject to his testamentary disposition. The amended petition for partial distribution, too, alleges that all the property owned by the testator at the time of his death was the community property of himself and his wife. Since she survived him, an undivided half of said property was all that he could, as it was all that he attempted to, pass by means of his testamentary disposition. The other half vested at once in his widow. Civ. Code, § 1402.

The estate in the hands of the executors, at the time of the filing of the amended petition, consisted of real property, of the value of over $5,700,000, and of personal property worth in excess of $3,600,000. The amended petition describes some 19 tracts of real estate in the city and county of San Francisco, of the value of $5,358,460.60, and certain money, stocks, and bonds, of the value of $2,809,880, and asks for distribution of the real and personal property so described.

There is no question of the formal sufficiency of the petition to make out a case for partial distribution. The only doubt is whether the will gives to the trustees any estate which they may take under the laws of this state; or, in other words, whether any of the trusts sought to be created are valid. The respondents concede here, as they did below, that the trust to pay the income to the widow, during her life, is good; and it is not claimed that this trust may not be regarded as separable from the further provisions of the will in such manner that it should be given effect, without regard to the alleged void character of the other provisions. But, inasmuch as Mrs. Spreckels died before the decision on the demurrer to the petition for partial distribution, it is urged that the validity or invalidity of the life trust is immaterial. With this position, the appellants in S. F. Nos. 5,681 and 5,682 take issue; their claim being that, in any event, the trustees are entitled to the income accruing before the death of Mrs. Spreckels, and that an affirmance of the order here appealed from will operate as a bar to a future assertion of their right to such income. We shall not stop to consider this contention, as we have reached the conclusion that the order must be reversed for other reasons. In the discussion which is to follow, we shall confine ourselves to a consideration of the provisions of the will which assume to dispose of the estate after the death of the widow.

With reference to these provisions, the argument of the respondents may be divided into three main heads: First. It is claimed that the will devises the entire estate to the trustees in fee upon trusts to partition the same into three shares or portions of equal value, and, upon the completion of such partition, to convey two of said parts to Claus A. and Rudolph, respectively, to hold the third for the life of Emma C. Ferris, and to convey the principal of such third share to her issue, or, in default of issue, to Claus A. and Rudolph. So far as such trusts affect real property, they are, it is claimed, in contravention of the terms of sections 847 and 857 of the Civil Code, and must fall, in accordance with the rule declared in Estate of Fair, 132 Cal. 523, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70. Second. It is urged that the real and the personal property are so bound up in a single testamentary scheme that, if the provision cannot be given effect with respect to realty, the trust of the personalty must fail as well. Third. The respondents contend that the trusts to be performed after the death of the widow are void, with respect to both real and personal property, because they involve a suspension of the absolute power of alienation beyond lives in being. Civ. Code, §§ 715, 716.

[2, 3] Prerequisite to an examination of the soundness of these contentions is a construction of the will—a determination of the intention of the testator. The rules of construction to be applied in cases of this character are well settled in this court. The primary purpose of all such rules is to ascertain the testator's intention (Civ. Code, § 1317)—not some undeclared purpose which may be imagined to have been in his mind, but the intention disclosed by the words he has used. Estate of Young, 123 Cal. 337, 344, 55 Pac. 1011. As an aid to the interpretation, resort may be had "in cases of uncertainty" to the circumstances under which the instrument was executed. Civ. Code, § 1318; Estate of Marti, 132 Cal. 666, 61 Pac. 964, 64 Pac. 1071; Kauffman v. Gries, 141 Cal. 295, 74 Pac. 846. Where the intent is plain, the duty of the court is to declare that intent, without regard to the consequences. If the plan adopted by the testator for the disposition of his property cannot be given effect, because it violates the rules of law, the court is not authorized to substitute for the illegal provision some other which it may suppose would have been adopted by him, if he had known that the directions actually given could not be carried out. Estate of Young, supra. In other words, the court cannot, under the guise of construction, make a will for the testator in place of the one he has made.

[4] Side by side with these principles, however, goes the rule, frequently enunciated and applied in our decisions, that, where a will may reasonably be interpreted in two ways, one of which results in intestacy, while the other leads to an effective testamentary disposition, the interpretation which will prevent intestacy is to be preferred. Civ. Code, § 1326. "It is only," said the court in Estate of Heywood, 148 Cal. 191, 82 Pac. 758, "when the language actually used by the testator will admit of no other reasonable construction than that it declares an invalid trust that a court will declare this to be its effect." So, in Estate of Dunphy, 147 Cal. 99, 81 Pac. 317, it is declared to be "a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction, and that it will not be held to contain a void trust, unless the invalidity of the trust be beyond question." See, also, Estate of Heberle, 153 Cal. 275, 95 Pac. 41; Estate of Peabody, 154 Cal. 173, 97 Pac. 184.

[5, 6] Applying these rules, is the will in question to be so construed as to subject its provisions to the destructive effect of the doctrine declared in Estate of Fair and similar cases? Estate of Sanford, 136 Cal. 97, 68 Pac. 494; Estate of Pichoir, 139 Cal. 682, 73 Pac. 606; McCurdy v. Otto, 140 Cal. 48, 73 Pac. 748; Hofsas v. Cummings, 141 Cal. 525, 75 Pac. 110; Estate of Dixon, 143 Cal. 511, 77 Pac. 412; Sacramento Bank v.

Montgomery, 146 Cal. 745, 81 Pac. 138; Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 92 Pac. 184. The substance of the decision in the Fair Case was that our Civil Code prohibits all express trusts in real property, except those specified in the four subdivisions of section 857; that a trust to convey real property is not included in any of such subdivisions; and that therefore a devise to trustees in trust, to convey to persons named, is void, where the instrument discloses an intent that the ultimate beneficiaries shall take only through a conveyance by the trustees, and that no estate or interest, other than a right to enforce the performance of the trust (Civ. Code, § 863), is given to them. In that case, as the court held, the language of the will was such as to compel the conclusion the the only direct gift was to the trustees, and that the only mode provided for the passing of any interest to the beneficiaries was by means of the conveyances directed to be made by the trustees. There were no words, other than the direction to convey, which indicated that such beneficiaries were to have the property at all. Their right had its birth and its sole claim to existence in the gift in trust to convey to them. If that gift fell, as embodying a void trust, there was nothing left in the will to operate as a devise of the property. And the situation was the same in each of the above-cited cases in which the Fair Case was applied and followed. In none of these cases was the trust to convey accompanied or supplemented by words which could be construed as constituting a direct devise of a legal estate to the person or persons to whom the trustees were directed to convey.

But wherever the court has been called upon to consider a will which contained, in addition to words which, standing alone, would be deemed to create a trust to convey, some expression which might be operative to pass the title directly from the testator to the beneficiary, the ruling has been that the will was to be construed as making a direct devise, and such devise has been given effect, in disregard of the words importing an invalid trust. And it is not too much to say that, in examining wills to ascertain whether they contained direct devises, the court has been keen to search for words which might save the testamentary attempt from failure.

Estate of Dunphy, 147 Cal. 95, 81 Pac. 315, was the first of the cases illustrating this tendency. We shall not take the space required to give even a summary of the somewhat extended provisions of the will there under consideration. It will suffice, for the present purpose, to say that there were provisions, as to two-fifths of the estate, that property devised to trustees should be "transferred and distributed" as directed by a beneficiary of the income for life, and, as to another fifth, that it should be "paid" as so directed. In each instance, the will declared that, in default of such direction by the beneficiary, the property should "go to" certain persons. The court held that no trust to convey was created; the reasoning being that the phrase "go to" amounted to "clear words of direct devise," and that the prior expressions, "shall be transferred and distributed," or "shall be paid," did not "necessarily mean that the title to the property could pass only by the trustees' conveyance." Estate of Heywood, 148 Cal. 184, 82 Pac. 755, followed shortly after the Dunphy Case. It furnishes another illustration of the desire of the court to so construe a will as to avoid the necessity of holding that the testator had attempted to create a trust which would be void. There the residue was given to trustees, in trust to apply the income as directed during the life of the testator's wife. Upon the death of his wife, one half of the residue was to "vest absolutely" in his daughter, and the other half was to "vest absolutely" in certain proportions in the testator's brothers, sister, nephew, and niece. It was then provided that if the daughter should die before the wife, without child or children, "then the whole of said residue shall be divided among my said brothers and sister and niece and nephew in the proportions named in the last preceding subdivision." The court construed the clause just quoted, taken in connection with the rest of the will, as directly devising the share otherwise going to the daughter to the other relatives, in the event of her death. "It is true," says the court, "that the testator might have used more apt words to disclose his intention to directly devise his estate to the other beneficiaries, should his daughter die; but a declaration that it 'shall be divided' among them is by no means indicative of a different intention. If these words were used in a will free from trust provisions, they would undoubtedly be treated as words of devise."

More directly in point, and very persuasive authorities against the application of the doctrine of the Fair Case to the Spreckels will, so far as the point of a "trust to convey" is concerned, are Estate of Heberle, 153 Cal. 275, 95 Pac. 41, and Estate of Peabody, 154 Cal. 174, 97 Pac. 184.

In the first of these cases, the decedent had, in the seventh paragraph of his will, devised certain property situated on Spring street, in the city of Los Angeles, to trustees, to be held by them for the term of five years, "and then the same by said trustees to be conveyed to the children of my deceased brother Martin Heberle * * * share and share alike." By the fourteenth paragraph, the testator empowered his trustees to convert real estate into money by sale. The seventeenth paragraph read as follows: "That the power to sell my real estate, as set forth in the fourteenth subdivision, shall not affect my said Spring street property, which is not to be sold, but which is to be kept and distributed to the children of my deceased brother Martin." The following quotations from the opinion will show the view which the court took of these provisions: "The trust created by paragraph 7 being void in its creation, no estate as to the Spring street property passed to the trustees. If in the will there are no other apt words disposing of the property on the failure of this trust, intestacy as to it must be the result. The trial court found those words in the seventeenth subdivision of the will, above quoted; and, in view of the fact that a construction which favors testacy is always preferred to one resulting in intestacy (Dunphy's Estate, 147 Cal. 96 [81 Pac. 315]), it may not be said that the interpretation is not a permissible one. The seventeenth paragraph contains a direction for the 'distribution' of the Spring street property to the children and grandchildren. While it may be argued that the word has reference to distribution by the trustees under the trust, yet it is not a word aptly used for such a purpose; while it is apt in its application to a direct devise. It is equally open to the construction, therefore, that the distribution to the children is to be at the hands of the court. * * * The paramount idea in the testator's mind was, not that the property should descend to his beneficiaries through a trust, but that, with or without a trust, they should with certainty receive property to that value from his estate." The court accordingly sustained the holding of the trial court to the effect that the decedent had not died intestate as to this portion of his estate.

In Estate of Peabody, the clause in question read as follows: "Secondly, I do now give, devise and bequeath all my real estate [describing both real and personal property] to my executors to be transferred by them to the Women's Occidental Board of Missions * * * with the executive committee of the Women's Presbyterian Missionary Society of the Los Angeles Presbytery as trustees and managers thereof."

It was contended, as obviously it could be with great plausibility, that the will disclosed an intention to create an estate in the executors, upon the trust that it was to be by them conveyed to the Board of Missions, and that such trust was void under the rule in the Fair Case. The court, however, held that this was not the necessary construction of the will; that the word "transfer," at least when used by one not skilled in the use of technical legal terms, was not synonymous with the word "convey," and that the testatrix, in disposing of her property, "meant nothing more than that the executors, in their representative capacity, should take possession and control of the property for administration under the laws of this state. and in due course of administration should transfer it by final decree of distribution to the trustees in whom she desired that the title should vest, to be applied to the charitable uses she describes." "Thus," says the court, "the will is harmonious, no trust to convey is created, and her intended disposition is valid. * * *"

In the light of these decisions, let us consider the terms of the will before us. We pass for the moment the direction in subdivision b of paragraph "Second," "to divide said estate into three equal parts," and concern ourselves here and now only with the question whether the three separate parts which, according to the contention of the respondents, are to be created by such division are directly devised by the will to the beneficiaries, or are to pass to them only by and through a conveyance to be executed by the trustees. A reading of the second and third paragraphs shows that the will abounds in expressions which, under the prior decisions of this court, must be held to import a direct devise of legal estates.

In subdivision b of paragraph "Second," after providing for the division of the estate, the will declares that one of said parts shall be forthwith assigned, transferred, set over, and delivered by my said trustees to my son Claus A. Spreckels, and *the same shall be and become his absolutely and forever.* It will not be questioned that the words in italics are apt and proper words to vest an estate by direct gift from the testator. They are identical in purport with the phrase "shall go to," which, as we have seen, is declared in the Dunphy Case to show an intent to make a direct devise.

Incidentally, something may be said regarding the phrase "shall be forthwith assigned, transferred, set over and delivered," upon which the respondents found their contention that a trust to convey was sought to be created. The only one of these words which can be deemed applicable to the passing of title of real property is the word "transferred," concerning which this court has said, in Estate of Dunphy, supra, that it does not "necessarily mean a passing of the title to land by a trustees' conveyance, and it would not have that meaning even if there had been a direction to the trustees to transfer." But, notwithstanding these expressions and what is said of the word "transferred" in Estate of Peabody, we do not doubt that the phrase "shall be forthwith assigned, transferred, set over and delivered by my said trustees," is, in and of itself, open to the construction that it calls for a conveyance by the trustees of real estate, and for such mode of passing title to personalty as may be appropriate to the particular property involved. Unlike the will in the Peabody Case, the one before us was not the work of an unskilled hand; and, giving all due weight to the intimations in former decisions that the word "transfer" is less significant than the word "convey" of an intent to have the title to real estate pass by deed, we may concede that, if nothing appeared in the will but a devise to trustees in trust to "transfer" the property to certain persons, it could hardly be said that the provision was in any substantial degree different from that contained in Fair's will.

But, when words which, by themselves, import an unlawful trust to convey are joined with other words which are sufficient to operate as a direct devise of the interest, the direct devise is not destroyed by the fact that the testator may have attempted to provide in addition for an unlawful method of passing title through trustees. In such case, the provision for a conveyance is to be regarded in the manner indicated by the following quotation from the opinion of the majority of the court in Estate of Fair: "The case would have been different if there had been an independent devise followed by a direction to the trustees to convey to the devisees; in that case, the words of devise would create an estate, and the conveyance would have been unnecessary, except, perhaps, as convenient and additional evidence of title." It can, we think, make no material difference that the direction for transfer is followed, instead of preceded, by words indicating an intent to make a direct devise. No such distinction seems to have been in the mind of the writer of the opinion in which the passage just quoted is found; for in the sentence just preceding he says that the direction to transfer and convey cannot be treated as calling for mere evidence of a title passing otherwise, because "the words do not precede or follow, and are not merely additional or supplemental to, any other words which, by themselves, and without the aid of the words 'to convey,' would devise any estate whatever to the asserted remaindermen." It would, we think, require some refinement of construction to say that the phrase, "when one of said parts shall be forthwith assigned, transferred, set over and delivered by my said trustees to my son Claus A. Spreckels, and the same shall be and become his absolutely and forever," conveys to either the professional or the lay mind a very different meaning from "when one of said parts shall be and become the property of my son Claus A. Spreckels absolutely and forever, and the same shall be forthwith assigned, transferred, set over and delivered by my said trustees to him."

It will be observed, further, that the testator is not content with saying in the one instance "and the same shall be and become his absolutely forever," but the same form of words is applied to the provision for Rudolph. With an unimportant variation, it is used again in subdivision c of paragraph "Second" in the provision for the disposition of the principal of the third part upon the death of the daughter, Emma. Again, the same expression is found in the provision made for the disposition of the third part, in the event of the death of the daughter without child, children, or grandchildren surviving. And so, again, it is repeated in paragraph "Third" with reference to the disposition of the shares of Claus A. Spreckels and Rudolph Spreckels, in the event that they, respectively, shall not be living at the time of the testator's death, or at the time of his wife's death.

But this is not all. The argument that the testator intended to make direct devises to the various beneficiaries named in the will is much strengthened by other phrases used by him. Thus, in subdivision c of paragraph "Second," the provision for the daughter, Emma, and her issue, or those who may be substituted for them, not only contains the words of direct devise which we have already quoted, but it is marked by an entire absence of those words ("assigned," "transferred," etc.) which are found in the earlier part of the will, and which might be deemed to indicate an intent that the title to the property should pass by conveyance from the trustees. The provision is that upon the death of Emma the trustees are "to pay over the principal of said one-third part of my estate * * * to her children then living," and similarly they are directed, in the event of her death without issue living, to "pay over the principal of said one-third part of my estate * * * to my said sons. * * *" Here we find no words which might be held to import a direction that the legal title to real estate should be conveyed by trustees. The word "pay" is not properly applicable to the conveyance of real property; and a direction to pay over such property in itself imports a direct devise to the party or parties who are, according to the testator's intent, to receive the property. Estate of Dunphy, 147 Cal. 101, 81 Pac. 315.

The same may be said of the provision in subdivision c that upon the death of Emma the children of her deceased children "shall take" the share which the parent would have taken, if surviving, "and the same shall be divided between said children share and share alike." Here is no provision for a conveyance to the children of children. Whatever may be said of a direction to trustees to divide property among certain persons or members of a class (a point to which we shall revert hereafter), Estate of Heywood, supra, is a clear authority in support of the proposition that a mere provision that property shall be divided, or shall be divided equally, among certain persons amounts to a direct devise to those persons as tenants in common. And it is equally beyond doubt that the expression "shall take" is appropriate and sufficient to constitute a direct devise.

A further argument in support of the contention that the beneficiaries take by direct devise is afforded by paragraph "Third" of the will. Here the testator provides that, if his son Claus A. shall not survive the testator or his wife, "then all the legacies and devises given to him by this will shall go to his issue. * * *" A similar provision is found with respect to Rudolph. Here the testator, in referring to each of his sons, speaks of the "legacies and devises given to him by this will." On the contention of the respondents, no legacies or devises are given to either of the sons by the will. Omitting any consideration of personal property, the only devise, as they construe the will, is one in fee to the trustees; and the sons Claus A. and Rudolph take (Civ. Code, § 863) no estate or interest in the property, but only a right to enforce the performance of the trust. To such a right, the term "devise" is inapplicable. The testator, in referring to the legacies and devises given to these sons, undoubtedly believed he had given them legacies and devises; and, the question being purely one of intent, his language must, if possible, be given the effect which he understood that it would have. Furthermore, it is provided by the subdivision last quoted that the legacies and devises given to each of these sons by the will "shall go" to his issue. Here, again, are words of direct devise. So that we find running through the entire will a succession of varying phrases, each of which, when used in a will, has been repeatedly held to operate as a direct devise of a legal estate. The testator speaks of property which "shall be and become his absolutely and forever." He directs the trustees "to pay over the principal" of one-third part of the estate. He provides that in a certain event such part "shall be divided" between children, and that children of deceased children "shall take" the share which the parent "would have taken." He speaks of "legacies and devises" given to his sons "by this will," and provides that such legacies and devises shall "go to" certain persons. Certainly there is far more reason for saying that this will indicates an intent to make direct devises of legal estates to the beneficiaries than could be found in such cases as Estate of Heberle and Estate of Peabody, supra.

We do not overlook the argument of the respondents to the effect that the provisions of paragraph "Third" of the will are substitutionary merely, and that they give to the issue, in certain contingencies, nothing more than the parent would have had under the provision originally made for him. The parent taking nothing because, as is contended, his only claim is under a void trust to transfer, the issue occupy no better position. The argument would have considerable weight if it were perfectly clear, without regard to the terms of paragraph "Third," that no direct devise to Claus A. or to Rudolph was intended. But, as we have shown, paragraph "Second" itself contains several expressions which indicate an intent to pass the property directly from the testator to the beneficiaries, without the intervention of a conveyance by trustees. The meaning of the original provision for the two sons being at least doubtful, the subsequent clauses, even though they be substitutionary, may be looked to for the purpose of ascertaining the intent of the testator, as disclosed by a comparison of all the provisions of his will. If, on the face of the preceding paragraph, it is open to question whether the testator designed that his sons should take an estate independently of any action by the trustees, we may be helped to a solution of the doubt by an examination of the language in which he has cast his provision for benefits to the issue of his children. The testator, it may be assumed, intended to provide a consistent scheme for the distribution of his property. It is hardly probable that he intended that a son, surviving his mother, should receive his share only through a conveyance by trustees, and that at the same time he gave direct devises to the issue of such son, if he should predecease his mother. The substitutionary clauses, therefore, containing, as they do, language which is clearly that of direct devise, throw light upon the testamentary plan as a whole, and support the view that direct devises are given by the preceding clauses.

[7] We conclude, therefore, that the will, on its proper construction, purports to give to Claus A., to Rudolph, and to the issue of Emma, direct devises. There still remains, however, the question of what is devised to them. We are thus brought to a consideration of the various questions arising out of the direction to the trustees to "divide said estate into three equal parts," etc. Section 857 of the Civil Code, in its enumeration of the purposes for which a trust of real property may be created, does not include the division or partition of such property. If, then, the meaning of this direction is that the trustees are either to physically subdivide the various parcels of realty owned by the testator, or, as the respondents claim, appraise the entire estate, real and personal, and allot various parts of it, so as to make three shares of substantially equal value, and if, as they further claim, no interest is given to either Claus A., Rudolph, or the issue of Emma until the share of each has been ascertained by such appraisal, segregation, and allotment, it follows, say the respondents, that any direct devise is of an interest which is to be ascertained and brought into being only as the result of the exercise of a prohibited trust, and that it cannot be effective. The prohibited trust to divide is, as is argued, the very foundation and basis of the right of the beneficiaries. Even if there be a direct devise of the segregated portions (which is, of course, denied by the respondents), such devise is effective only after the completion of the division ("to divide said estate into three equal parts, *when* one of said parts shall," etc.),

and is, both as to identity of subject-matter and time of vesting, absolutely dependent upon the void trust.

On the other hand, the position of the appellants is, first, that the direction to divide calls for nothing more than a mere theoretical or imaginary separation into equal interests in every item of the property, creating, in effect, a tenancy in common, in which view the direction would impose upon the trustees no powers, other than the law would imply; and, second, that if an appraisement and allotment is called for the direction to make it, whether a trust or a mere power, and whether invalid or valid, does not prevent the property passing to the ultimate beneficiaries by virtue of implied devises to them of undivided interests in remainder.

At the outset of this inquiry, it becomes important to recall the circumstances under which the testator executed his will. As disclosed by the instrument itself, he was not in the complete ownership of any item of the property, real or personal, which was to and did pass into the possession and control of his executors. It was all community property, in which his interest was only an undivided half; and he undertook to dispose of this half, and no more. A physical partition of each parcel of land would not, therefore, have been feasible, and cannot be supposed to have been in the contemplation of the testator. Yet such subdivision, if any, would seem to be necessary, if we are to give full and literal significance to the word "equal." The estate is to be divided into three "equal" parts. The parts will not be equal, unless they are equal in all respects—in quantity, in character, and in value. See Richardson v. Morey, 18 Pick. (Mass.) 181, 188. The respondents, however, limit the requirement to that of equality in value, and contend that the trustees are to appraise the entire estate, and divide the whole into three separate portions, which may be composed of entirely different constituents, subject only to the condition that the value of each part, according to their appraisement, shall be substantially the same. But this, if a permissible interpretation of the language, is by no means a necessary one. And, since the result of adopting it would be to destroy the testamentary effort, we must pass it by, if we can find a different meaning, which, while fair and reasonable, will allow validity to the will. In the first place, the word "divide," in and of itself, does not import an actual physical segregation into distinct shares. It is, when used in such phrases as "to be divided between," or "divided in equal shares among," or the like, very commonly used to express an intention to give interests to persons as tenants in common. It will suffice to cite a few of the many authorities that might be referred to in support of this statement: Walker v. Dewing, 8 Pick. (Mass.) 520; Emerson v. Cutler, 14 Pick. (Mass.) 108; Griswold v. Johnson, 5 Conn. 363; Weir v. Tate, 39 N. C. 264; Freem. Cot. & P. (2d Ed.) § 23, and cases, cited. It is likewise well settled that such phrases as "equal parts," or "equal third parts," or "third parts," are entirely appropriate to indicate a tenancy in common. Arthur v. Nelson, 1 Dem. Sur. (N. Y.) 337; Andrews v. Boyd, 5 Me. 199.

There is, to be sure, a difference between a mere provision that property is "to be divided" between certain persons (as in the cases heretofore cited), and a direction that trustees shall so divide it. The respondents cite cases which, as they claim, support their contention that the words used in the Spreckels will impose upon the trustees the active duty of separating the entire estate into three distinct portions of equal appraised value, and to allot one of these shares to Claus A., one to Rudolph, and the other to themselves, as trustees for Emma and those who are to take upon her death. But we think these authorities, when examined, will be found to deal, in each instance, with a form of expression substantially different from that employed in the Spreckels will. In Hawley v. James, 16 Wend. (N. Y.) 61, the will directed the trustees, at a certain time, "to proceed to divide" the residue, "as nearly as may be, into twelve equal parts," and to "allot and distribute the same." There were, besides the words "as nearly as may be" and the direction to "allot and distribute," various other expressions showing that an actual segregation of shares was contemplated. De Kay v. Irving, 5 Denio (N. Y.) 646, specifically directed that all the property "shall be valued in one united valuation, to be made by appraisers * * * and the aggregate amount of such valuation shall be divided into five equal parts, and so much of the said aggregate estate as shall be equal in value to one of said five parts shall go to each of my children," etc. It was further directed that specific property should be included in certain portions. Certainly there could be no doubt of what the testator meant by these elaborate provisions. Cooke v. Platt, 98 N. Y. 36, is somewhat closer to the case at bar; but even there the language pointed more clearly to a physical partition than that here found. The will gave property to trustees, in trust "to divide and distribute my estate, or its proceeds, * * * to and among my four children [naming them] in equal proportions." Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012, is strongly relied on by respondents in support of their position that the entire fee was intended to be vested in the trustees, and was necessary to enable them to make the division. But there the will plainly declared an intent that an actual segregation of the estate into separate parts should be made; for it provided that upon the death of one of the life tenants her share of the income should go to her heirs "until one-half of the principal of my estate, as it shall then be, can be made over to them, the said trustees taking such time as they shall think best for the interest of all concerned in making division of said principal." The will considered in Story v. Palmer, 46 N. J. Eq. 1, 18 Atl. 363, in addition to provisions like those in the will before us, expressly gave power to the executors to "make all divisions and partitions of my real and personal estate, or the proceeds thereof." Fischer v. Butz, 224 Ill. 379, 79 N. E. 659, 115 Am. St. Rep. 160, involved a will which empowered the executors to "sell, convey, mortgage or partition any part or all of my estate for the purpose of settlement thereof," a form of words, which, in connection with the rest of the will, excluded the idea that tenancies in common were intended. Guilbert v. Guilbert, 68 Misc. Rep. 405, 124 N. Y. Supp. 564, was a case in which the devise was upon trust to set apart one-half of the residuary estate, "as nearly as the same, in the judgment of my executors, can be set apart or apportioned." This clearly gave a discretionary power to segregate specific property as one-half of the residue. In Potter v. Eames, 70 Misc. Rep. 147, 126 N. Y. Supp. 787, we again find the phrase "as nearly as may be" in connection with a direction to trustees to "divide into two equal separate parts or portions," and the court lays stress upon these words in announcing its conclusion. Manice v. Manice, 43 N. Y. 303, is a case strongly relied on by both parties, more particularly with reference to the question of devise by implication. For our present purpose, it will suffice to say that the testator provided an elaborate scheme for appraisal, and a division into 12 equal parts, of "the aggregate amount of such personal and real estate." One other case cited by respondents may be noted. It is Boston S. D. & T. Co. v. Mixter, 146 Mass. 100, 15 N. E. 141. The testator, by his codicil, gave one-fourth of his estate to a trust company, the income to be paid to his daughter, and "at her death I direct that said estate so left in trust shall be divided among her children, share and share alike, giving to each child * * * one share." It was held that because a division was to be made the entire estate was in the trustee. It will be observed that the will does not provide that the trustee is to make the division; and it would seem, accordingly, that, under the great weight of authority, including one case in our own state, the direction that the property should be divided might well have been held to be a direct grant of tenancies in common. Estate of Heywood, supra; Potter v. Eames, supra.

None of these cases, then, is authority for the proposition that a mere direction to divide an estate into three equal parts imports a physical partition of the property, or a valuation and apportionment into heterogeneous shares of equal appraised value.

It may be remarked that many New York cases use expressions concerning "division" or "severance" of trust funds or estates in a sense that might be misunderstood, if due regard were not had to the New York statute limiting restraints on alienation. The statute of that state prohibits the creation of a future estate which may suspend the absolute power of alienation for a longer period than during the continuance of not more than two lives in being at the creation of the estate. Where, therefore, an estate is devised for the benefit of several persons during their lives, it is often essential to the validity of the disposition that the interest of each be severed from the rest, so that, through considering such interest by itself, the suspension of the power of alienation shall not exceed the duration of two lives. But it is not necessary to this end that there should be any physical division. "All that is requisite is that the intent to have the estate contemplated as theoretically divided into separate parcels or portions should appear." Chaplin, Susp. of Power of Alienation, § 217. Instances of such supposed separation are found in many cases in which there was no direction to divide, but merely a provision for enjoyment "in equal shares," or other words indicating tenancies in common. Tucker v. Bishop, 16 N. Y. 402; Savage v. Burnham, 17 N. Y. 561; Everitt v. Everitt, 29 N. Y. 39; Hoppock v. Tucker, 59 N. Y. 202; Matter of Verplanck, 91 N. Y. 439. The Court of Appeals had no difficulty in reaching the same result, where the will expressly provided for a setting apart of an "*undivided* one-fourth part" of the residue. Vanderpoel v. Loew, 112 N. Y. 167, 19 N. E. 481. On the other hand, where a will devised an estate to trustees, in trust "to divide my estate into three equal shares, one to be held in trust for each of my children during life, and after death to be disposed of as follows," etc., the court treats the language as similar in effect to that used in such cases as Tucker v. Bishop, supra, Savage v. Burnham, supra, and Hoppock v. Tucker, supra, citing these cases in support of the statement that "the authorities abundantly sustain devises and bequests in this form." Moore v. Hegeman, 72 N. Y. 376. In the case last cited, the form of words was substantially the same as the part of the Spreckels will now under consideration. If such words called for a physical segregation of the estate, whether by partition or by appraisement and allotment of shares of equal value, the severability of the trusts would have been apparent; and the validity of the disposition could have been sustained on even clearer ground than that applied to cases where the will directed a mere theoretical segregation into undivided interests. Yet it did not, apparently, occur to the court that a simple direction to "divide into three equal shares" meant anything different from a direction to hold for beneficiaries "in equal shares."

Of the many cases cited by learned counsel in their exhaustive briefs, we may briefly notice one or two in addition to those already discussed. Thompson v. Hart, 58 App. Div. 439, 69 N. Y. Supp. 223, is strongly relied on by respondents. But the decision, when examined as a whole, seems to bear more strongly against their position than in its favor. There the devise was to trustees, "first, in trust to divide the same into five equal parts or shares, and to allot to my children * * * each one of said five parts or shares; second, as to each of such parts or shares, to continue seised of the same for and during the life of the child to whom such part or share is allotted, upon the trust * * * to apply the net income. * * * If such child leave no lawful issue then surviving, then to divide, distribute and pay over the said capital and accumulations in equal portions to and among the children then living of any surviving brothers or sisters." The provision (first) to divide and allot was given a construction similar to that for which the respondents contend here. But of the later provision (second) for the disposition of the property upon the death of a child ("to divide, distribute and pay over in equal shares"), a provision not unlike the direction to divide in the Spreckels will, the court says that it must be treated as a devise of remainders over to grandchildren, and that it "gave them estates in fee as tenants in common."

How v. Waldron, 98 Mass. 281, involved the construction of a will which devised property to trustees, and provided that the property at a certain time should be conveyed to testator's children; the same to be equally divided among them. The will did not, in terms, provide that the division was to be made by the trustees, although the language was fairly open to the construction that this was the intent. It was held that the duty of making partition was not imposed on the trustees, but that a conveyance to the children in common, in equal proportions, would answer the intent of the testator. Farrow v. Farrow, 12 S. C. 168, deals with a will which is somewhat similar, and declares a like conclusion. The following passage from the opinion is significant: "It seems to be thought, however, that the division of the property, after the death of John, is a part of the trust. The language of the will does not sustain such a view; but, if it did, then the testator has himself done the work by saying 'to be equally divided,' and has thus left nothing for the trustee to do." It might well be conceded that a devise to trustees, in trust to divide the property into three equal parts, when one of said parts shall be transferred by said trustees to A., another to B., and the third to C., is, in and of itself, open to the construction that a partition of the property into separate individual holdings is contemplated. This may, indeed, be the more obvious construction. But when, as here, the interest of the testator is only an undivided one-half, and a segregation of such interest into estates in severalty is impossible without the concurrence, either voluntarily or as the result of a bill for partition, of the owner or owners of the other undivided one-half, it becomes clear that this could not have been the intent. Accordingly, as we have already suggested, we find the respondents contending that the provision calls, not for a partition in kind, but for an appraisement of the corpus of the entire estate, real and personal, and for an allotment of properties, selected by the trustees, to the beneficiaries, with no restraint on the discretion of the trustees with respect to the kind, character, or amount of property that shall compose the respective shares, other than that the value of each shall be the same. But this is importing into the will, and that for the purpose of destroying it, language which the testator did not use. He directed his trustees to divide his estate into three equal parts—not to divide it "as nearly as may be, into twelve equal parts," and "to allot and distribute the same" (Hawley v. James, supra), nor that the trustees should make over "one-half of my estate, as it shall then be, taking such time as they shall think best for making the division" (Lord v. Comstock, supra), nor that the property "shall be valued in one united valuation * * * by appraisers, and the aggregate amount of such valuation shall be divided." De Kay v. Irving, supra.

Furthermore, the will does not stop with a mere direction that the trustees shall divide the estate into three equal parts, when one of said parts shall be transferred to A., another to B., and the third to C. After providing for the passing of "one of said parts" to Claus A., the testator, in disposing of the rest of the property, abandons the simple phrase "one of said parts," and declares that another of said *equal third* parts shall be transferred to Rudolph, and "the remaining equal third part" shall be retained for Emma. The term "one of said parts" would be entirely apt to signify a segregated portion, representing in value a third of the appraised value of the whole. But an "equal one-third part" means, according to the usual understanding, an undivided interest. There would have been no occasion for the testator to recur to this form of words if he had understood that Rudolph and the trustees for Emma were to have parts or shares which resulted from a segregation. Such parts or shares would not, strictly speaking, be equal one-third parts.

The respondents suggest the supposed absurdity involved in saying that a direction that the trustees are to "divide" means that the process is to result in the interests being "undivided." But the same criticism could be made of every case in which a provision that property shall be divided has been held to create tenancies in common. Where there is a tenancy in common, the interests of the respective owners, while attaching to the entire property, are separate and distinct from one another. Chaplin, Susp. of Alien. § 180. In that sense, the ownership of the property is divided, while the physical property itself is not.

There are further reasons against the construction that the trustees were to appraise the entire estate, separate the same into distinct shares of equal value, and allot such shares to or for the respective beneficiaries. In any case, such a valuation and separation would require some time; and where, as here, a vast and complex estate was involved, a considerable time would necessarily be consumed. Now, on the contention that during this period the entire fee was in the trustees, and that until the completion of the valuation, segregation, and allotment (or, as the respondents assert, until a conveyance) nothing would vest in the beneficiaries, some very peculiar results would follow. In the first place, the substitutionary provisions contained in paragraph "Third" take effect in the event of the death of Claus A. or Rudolph, respectively, before the death of the testator's widow. There is no provision for the issue of either, if he dies after his mother and before the completion of the separation into shares. In case of such death, the will would, therefore, on respondent's construction, fail to dispose of the one-third which would have gone to the son so dying. His estate does not take, because no interest has vested in him. His issue do not take, because the contingency upon which they were to take has not occurred. So there would be an intestacy as to this portion of the estate—a result which is to be avoided, if possible. Again, on this construction, there is no provision for the payment of income to the testator's daughter, pending the appraisal and division into shares—a result which can hardly be supposed to have been in accordance with the testator's intent.

It seems probable, therefore, that the testator contemplated that the division of his estate, the receipt of two-thirds thereof by his sons Claus A. and Rudolph, and the commencement of his daughter's receipt of the income of one-third, should all coincide at one moment of time—that of the death of his wife. This could occur only if the direction for a division into three equal parts were intended to accomplish merely a creation of equal one-third interests in the entire estate and every part thereof; that is to say, tenancies in common.

[8, 9] On this interpretation, which appears to us, in view of the scope of the entire will, to be, at the least, as consistent with the language used as is the interpretation of respondents, there can be no objection, under sections 847 and 857 of the Civil Code, to the validity of the dispositions made. The estate is devised to trustees, in trust to pay the income to the wife for life (Civ. Code, § 857, subd. 3); upon her death, one-third of the estate is devised to Claus A., or, if he be not then living, to his issue; another third to Rudolph or his issue; the remaining third rests with the trustees upon the valid trust to pay the income to Mrs. Ferris during her life, and upon her death, this third goes, by virtue of the terms of the will itself, to her children and grandchildren, or to Claus A. and Rudolph. The trustees, under the familiar rule, take only such estate as is "commensurate with the necessities" of their office. Morffew v. S. F. & S. R. R. Co., 107 Cal. 587, 40 Pac. 810. A fee in them was not required for the performance of the duties imposed upon them by the provisions which we have considered. All that they required was an estate in the entire property for the life of Mrs. Spreckels, and a further estate in one-third for the life of Mrs. Ferris. The powers of investment and reinvestment given by the fifth paragraph of the will, and the power of sale given to the executors and trustees by the sixth paragraph, being purely discretionary, do not make it necessary that the trustees should be invested with the fee. Morffew v. Railroad Co., supra.

If these views be correct, the direction to the trustees to divide the estate (i. e., into interests held in common) and to assign, transfer, set over, and deliver imposed upon them merely the obligation which would rest upon any trustee, at the termination of his trust, with respect to property which then passed in undivided interests to two or more persons. It would be his duty to deliver such property to the parties entitled (Estate of Dunphy, supra), and to that end to make such division as is involved in the act of turning over an undivided share. Such duties being implied, they may be conferred by the testator without violation of the provisions of sections 847 and 857 of the Civil Code. Estate of Heywood, supra.

It is of no consequence, in this inquiry, whether the interest given to the issue of Mrs. Ferris is, prior to her death, vested or contingent. Nor need we undertake to define, in technical terms, the nature of the interest of any beneficiary. It is sufficient to say that all such interests are directly devised by the terms of the will; and that such of them as did not vest at the death of the testator have vested at the widow's death, or will necessarily vest at the death of the daughter.

The construction which we have put upon the will makes it unnecessary to consider the soundness of appellants' contention that, even if the direction to divide be construed as respondents would have it, the will nevertheless contains direct devises by implication to the persons intended by the testator to be his ultimate beneficiaries.

Having reached the conclusion that valid dispositions of the realty are made, there is no occasion to examine the point that the supposed invalidity of the trust with respect to the realty carries with it, as a part of a single scheme, the failure of the provisions, in so far as they affect personal property.

[10] Nor need we give extended consideration to the contention that the power of alienation is suspended beyond permissible limits. The argument is based on the construction that the estate is, after the death of the widow, vested in the trustees for the purposes of division and transfer during a term not measured by lives in being. No further answer is required than to repeat that, as we read and understand the will, it does not give the estate to the trustees during any such term. Of course, if direct devises, vesting at the death of Mrs. Spreckels, or of Mrs. Ferris, are given to all of the ultimate beneficiaries, the fact that among the takers there may be a child en ventre sa mère does not, as the respondents concede, effect an undue suspension of the power of alienation.

It follows that the will created valid estates in the trustees, and that the demurrers to their amended petition should have been overruled.

The judgment appealed from is reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

162 Cal. 340

McKENNA et al. v. McKENNA et al.

(S. F. 5,770.)

(Supreme Court of California. March 18, 1912. On Rehearing, April 16, 1912.)

GIFTS (§ 45*)—INTER VIVOS—UNDUE INFLUENCE—PLEADING.

In an action to set aside a gift of a deposit, the complaint alleged that the deceased made the gift to defendant by assigning her bank book; that at that time the deceased was 74 years of age, greatly enfeebled in mind, and unable at times to talk or to knowingly understand the ordinary affairs of life; that she was living with defendant; that plaintiffs were her next of kin, and were upon terms of friendly relationship; that defendant, for the purpose of inducing the deceased to make such assignment, falsely represented to her that plaintiffs willfully neglected her, and induced deceased to make her cross to the assignment by way of affixing her signature thereto; and that deceased did not know the significance of her act, which, save for the influence exercised by defendant, she would not have done. *Held* that, while undue influence to invalidate a transaction must amount to force or coercion, destroying the free agency, the complaint was, on general demurrer, a sufficient charge of undue influence.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 80; Dec. Dig. § 45.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Patrick McKenna and others against Mary McKenna and others. From a judgment for defendants, plaintiffs appeal. Reversed and remanded, with directions.

Costello & Costello, for appellants. Breen & Kelly, for respondents.

HENSHAW, J. A general demurrer to the second amended complaint was sustained; plaintiffs, declining to amend, suffered judgment, and from that judgment prosecute this appeal.

The action was to avoid a gift or assignment of $2,800 on deposit in the Hibernia Savings & Loan Society, the property of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Catherine Styles or Catherine McKenna, which moneys, shortly before her death, she gave to defendant Mary McKenna through the medium of an assignment of her bank book. It is alleged that Catherine Styles was at the time 74 years of age, and so greatly enfeebled in mind as to have become "childish, and unable at times to talk or to knowingly understand the ordinary affairs of life, or to understand or to transact business"; that she was living with Mary McKenna; that plaintiffs were relatives and next of kin of Catherine Styles, and had been upon terms of friendly relationship with her; that Mary McKenna, for the purpose of inducing the deceased, Catherine Styles, to make this assignment, falsely and fraudulently represented to her that the plaintiffs willfully neglected her, and were without natural affection for her; and that their only object in maintaining friendly relations with her was for the purpose of sharing in the disposition of her property. The known falsity of these statements is charged against Mary McKenna. It is further alleged that Catherine McKenna, besides being infirm of mind and body, was without education, could not read or write, and while thus enfeebled was induced by Mary McKenna to make her cross to the assignment by way of affixing her signature thereto; that Catherine McKenna, when she so made her cross as a subscription to the assignment, did not know or understand the contents of the instrument, and did not know or understand the significance of the act which she was induced to perform; and finally that, save for this influence so exercised by Mary McKenna over this debilitated mind, she would not have executed the purported assignment.

In support of the judgment thus obtained, respondents cite a list of authorities from this state, with the declaration that they show that in pleading undue influence it is not sufficient merely to state the nature of the undue influence, but the facts should be alleged with certainty and expressly connected with the transaction sought to be invalidated; allegations that influence was overpowering, or that a party was unable to resist, without an allegation of the facts supporting such conclusions, are not sufficient. It is further declared that these authorities show that undue influence, to invalidate a transaction, must amount to force or coercion destroying the free agency as to such transaction; and that the exercise of such undue influence upon the very transaction must be shown. All this is quite true. Still we think that the complaint states sufficient facts to pass a general demurrer. In Estate of McDevitt, 95 Cal. 17, 30 Pac. 101, it is said: "I think the concluding sentence, 'that at said date, and while in said condition, and unable to resist the importunities of said Andrew, deceased made his mark to said pretended will,' sufficiently connects the alleged undue influence with the testamentary act." In Estate of Motz, 136 Cal. 558, 69 Pac. 294, there will be found a discussion of the ease with which an aged person of impaired physical and mental powers may be coerced by the "secret machinations and importunities of designing persons who, in the guise of love and friendship, have surrounded him and administered to his wants as life and reason have gradually ebbed away." In Estate of Sheppard, 149 Cal. 219, 85 Pac. 312, relied upon by respondents, the allegation was that Mrs. Reed, "when the mind of said Joseph Sheppard was weak and enfeebled from the infirmities of age and disease, continued to repeat and continued to prejudice and unduly influence the said Joseph Sheppard against your petitioner." There was in that case no allegation of any facts as to the nature, character, or form of the undue influence, or the charges or accusations against the petitioner, which were assumed to have coerced the testator's mind. In the pleading before us, there are the infirmities of the mind and body of the deceased alleged, the false representations are specifically set forth, and the successful accomplishment of a fraud growing out of this alleged undue influence in inducing Catherine McKenna to execute a gift and assignment, without an understanding of her act.

The judgment appealed from is therefore reversed, with directions to the trial court to overrule the general demurrer.

We concur: MELVIN, J.; LORIGAN, J.

On Rehearing.

PER CURIAM. The petition for a rehearing is denied. The judgment heretofore entered is modified to read as follows: "The judgment appealed from is therefore reversed, with directions to the trial court to overrule the demurrer, with leave to the defendants to answer within such time as may to the said court seem advisable."

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18 Cal. App. 400

QUARTAROLI et al. v. CITY OF SONOMA et al. (Civ. 889.)

(District Court of Appeal, Third District, California. Feb. 29, 1912. Rehearing Denied by Supreme Court April 29, 1912.)

1. MUNICIPAL CORPORATIONS (§ 375*)—ABANDONMENT OF CONTRACT—RIGHT TO MATERIALS.

Under Code Civ. Proc. § 1200, which provides that, if a contractor abandons the work, the contract price applicable to the liens of others than the contractor shall be fixed by taking from the value of the work done and materials furnished and on the ground, which shall thereupon belong to the owner, the payments then due and actually paid, materials left on the ground on abandonment of a building contract with a city belong to the city, where there were no lien claimants, and persons claiming such materials under a bill of sale from the contractor have no rights therein.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 375.*]

2. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—ERROR FAVORABLE TO APPELLANT.

An award to plaintiffs, who claimed under a bill of sale from the contractor, materials left on the ground on the abandonment of a building contract could not be complained of by them on an appeal from a judgment for the defendants.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052–4062; Dec. Dig. § 1033.*]

Appeal from Superior Court, Sonoma County; Thomas Denny, Judge.

Action by L. Quartaroli and others against the City of Sonoma and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Jas. C. Sims and Jas. W. Oates, for appellants. A. B. Ware, R. A. Poppe, and W. F. Cowan, for respondents.

CHIPMAN, P. J. Plaintiffs bring the action to recover the possession of certain personal property or the value thereof, in case delivery cannot be had, alleged to be $3,590.85. They claim ownership by virtue of a bill of sale from one John T. MacQuiddy, of date September 13, 1906. MacQuiddy had entered into a written contract with defendant, the city of Sonoma, to construct a municipal building for that city, agreeing to furnish all materials and labor therefor at the agreed price of $15,475. This contract was duly authorized and legally entered into and was duly recorded. No question arises as to full compliance with the provisions of the statute relating to the making and recording of such contracts. At the same time MacQuiddy executed a bond with said city, "in the sum of $4,000.00," on which plaintiffs, including defendant Heggie's intestate, were sureties, which recited the making of said contract and was conditional upon its faithful performance by MacQuiddy and that he "shall make full payment to all persons supplying him labor or materials in the prosecution of the work provided for in said contract." This bond was also recorded at the same time and with the contract. MacQuiddy entered upon the work and prosecuted it up to September 8, 1906, on which day, as found by the court, "work ceased upon said building or the construction thereof and was wholly abandoned and the said John T. MacQuiddy ceased to do any work upon said building from the 8th day of September, 1906, and said cessation from work and the finishing of said construction and the abandonment of said work and said contract by said MacQuiddy on said unfinished building continued for more than 40 days after said cessation of work by said contract or MacQuiddy, and that at the time of the abandonment of said contract by said contractor MacQuiddy the articles of personal property and the materials mentioned in the answer of said city of Sonoma, which were materials necessary for the construction of said building, were then actually delivered and on the ground where said building was to be constructed, and that the same and all thereof were necessary materials for the construction of said building and were actually delivered and on the ground where the same were to be used in the construction of said building, and that all of the aforesaid personal property was used and placed in the said building by defendant Newman at the instance of the said city of Sonoma long prior to the commencement of this action."

It appeared, and was so found by the court, that after MacQuiddy ceased work the city called upon him to resume work which he neglected and refused to do, and on September 13, 1906, he made the bill of sale to plaintiffs on which they rely. The court found further as follows: "That said John T. MacQuiddy entirely failed to complete said contract or to perform the conditions and covenants and agreements therein set forth, and that by reason of said default and failure to carry out said contract, said defendant city of Sonoma was compelled to and did, after proceedings had to that end, let to the highest bidder, to wit, to defendant James B. Newman, and entered into a written contract with him for the completion of said building in all respects as it was to be completed under the original contract to and with the said MacQuiddy, and the said James B. Newman and the said city of Sonoma entered into a contract for the completion of said building in and at the price of $14,200." And that prior to the entering into said contract with said Newman and subsequent to the failure and abandonment of the said MacQuiddy to perform his said contract, the said materials and articles of personal property, being then and there actually delivered and were upon the ground where said building was to be constructed, the said city of Sonoma caused to be estimated, inventoried, and listed, the said articles of personal property as nearly as possible by the standard of the whole contract price entered into by the said MacQuiddy with said city, and that the said materials and all thereof were delivered to the said James B. Newman by the said city of Sonoma for the completion and construction of said building and the carrying out of the said contract with the said Newman, and that said James B. Newman was furnished the said materials set forth in the separate answer of the said city of Sonoma by the said city, and that the same were placed in and used by him in the construction and completion of said municipal building." The court also found: "That the said city of Sonoma has paid out and expended the sum of $15,200 in cash for the carrying out and completion of the building entered into by the said MacQuiddy and abandoned by him and for the carrying out and completion of the contract as entered into by the said defendant James B. Newman for the completion of the building which was completed in all respects in accordance with the original contract, and that all of the materials and articles of personal property in controversy herein and herein sued for was actually used and necessarily used in the completion of the said municipal building, and that its value is hereby fixed at the sum of $3,590.85, and that if the city of Sonoma is or should be compelled to pay therefor the said sum of $3,590.85 to the plaintiffs, then and in that case the said city of Sonoma would lose and be damaged in the sum of the value thereof, to wit, $3,590.85, and that no part of the said sum has been paid to the said city of Sonoma, and that the bondsmen who executed the bond herein referred to and who are the plaintiffs in this action (with the exception of the said C. Aguillon, whose administrator is a plaintiff herein), would be liable to the said city for the said sum. That the said bond is a valid and legal bond and indemnified to the extent of $4,000 the said City of Sonoma from all damages which the defendant city of Sonoma should sustain by reason of the failure or abandonment of the said MacQuiddy to perform his said contract. That there is in the treasury in the city of Sonoma the sum of $275 properly applicable to the payment of the plaintiffs' claim for damages or from any cause arising out of the use of the said property by the said city and the said materials and articles of personal property which were used in the construction and completion of said building, and that there is no other money or funds applicable to the payment of the claim or demand of the plaintiffs herein sued upon, and that there will not be in the treasury of the said city any greater or other amount than the said sum of $275 in the general fund of the said city properly applicable to the payment of the said claim. That the plaintiffs are bound by their bond for any loss occasioned to the city of Sonoma by reason of the said abandonment of the said contract, and the said contract entered into by the said city with the said MacQuiddy to the extent of $4,000, and that the building was only completed at and for the sum of $15,200 after using all of the said materials and personal property involved in this action in the construction and completion of said building, and that the plaintiffs are estopped from recovering any other or further amount than the said sum of $275."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It appears that defendant Newman's contract gave him the right to use the materials in question "free of cost to him and to be used in the construction of said building." Upon the alleged sale to plaintiffs the court found as follows: "That on September 13, 1906, and while the said materials were upon the said plaza and grounds upon which the said municipal building was to be erected, and was thereafter erected, the said John T. MacQuiddy made a bill of sale to the said Quartaroli, Dal Poggetto, J. Fochetti, and C. Aguillon, and that said bill of sale was given to them to secure them as the bondsmen of the said John T. MacQuiddy in the said sum of $4,000, and to secure them on account of other obligations that they had entered into for and on behalf of the said John T. MacQuiddy. That at the time of making the bill of sale, the said parties to whom the same was made placed a man in charge of the materials and covered it with a canvas to protect it from the elements. That the defendant city of Sonoma made an inventory and estimate of the material before it was used in the construction of the said building and knew of the claim of the said parties to whom the said bill of sale was made. That defendant Newman completed the contract, and the building was accepted by the city, and he received $14,200 from the city. That while John T. MacQuiddy was working upon the said building he received from the city for material and labor on said building the sum of $1,000." The evidence was that MacQuiddy, on September 13th, pointed out to plaintiffs the material in question, and they put a canvas over part of it, and for a couple of days a man had charge of it. But it was not moved from the plaza nor taken possession of otherwise by plaintiffs. The court further found: That "at no time prior to the commencement of this action or at any time did plaintiffs demand" of either of the defendants "the possession or return of said property"; that, prior to the commencement of this action, plaintiffs had knowledge of the letting of said contract to Newman and that all of said materials had been used in the completion of said building as originally contracted for by said MacQuiddy, "and the said defendant Newman in submitting his bid and in entering into said contract for the completion of said building did so upon the consideration and express understanding that the said materials described in the answer of said defendant city were to be used by him in the completion of said building and without cost or expense to the said Newman, all of which was well known by the plaintiffs herein and their predecessors in interest, and the said plaintiffs did not at any time notify said defendant Newman that they claimed the said property or were the owners of said property, or that the same had been assigned to them by said MacQuiddy until after the completion of said building, but on the contrary the said plaintiffs and their predecessors in interest, having full knowledge that the city of Sonoma claimed the said personal property as its own, and that the said Newman intended to use the same in the completion of the building, permitted the said Newman to expend large sums of money in using the said property in the said building without objection and without any claim or notice that the said plaintiffs were the owners of the said personal property by assignment from said MacQuiddy, or otherwise, and by reason thereof the said plaintiffs are estopped from recovering from the said Newman for the value of any of said property." As conclusions of law the court found that plaintiffs are entitled to judgment "against the city of Sonoma only for the sum of $275, and that they are not entitled to their costs, nor is the city of Sonoma entitled to its costs," and, as to the defendant Newman, that plaintiffs are entitled to recover nothing, and that defendant Newman recover his costs. Judgment passed accordingly, from which and from the order denying their motion for a new trial plaintiffs appeal.

The findings indicate the character of the answer, which is quite lengthy and need not be set out. It denied plaintiffs' ownership or right of possession; set up MacQuiddy's contract and bond and breach thereof; that the city was compelled to complete the building and make the contract to that end referred to in the findings; that plaintiffs were estopped by their conduct; that defendants were entitled to set off or counterclaim plaintiffs' demand by reason of their bond given to the city and generally pleaded the issues to which the findings respond.

Respondents urge the point that the bond given by the contractor on which the plaintiffs here were sureties is in itself a complete answer to the claim of plaintiffs, as it exceeded in amount their claim; that this bond falls under the rule in Union Sheet Metal Works v. Dodge, 129 Cal. 393, 62 Pac. 41, and other cases, because it was a voluntary obligation and not entered into pursuant to section 1203, Code of Civil Procedure, and therefore was not void, as was held in cases such as Shaughnessy v. Am. Sur. Co., 138 Cal. 533, 69 Pac. 250, 71 Pac. 701, and Montague, etc., v. Furness, 145 Cal. 205, 78 Pac. 640, where it appeared affirmatively that the bond was given under the command of section 1203.

It is also strongly urged that plaintiffs are estopped to recover because they knew, at the time he attempted to convey the property to them, that MacQuiddy had abandoned his contract and quit work, leaving the material in question in plaintiffs' possession, where it had been delivered to be used in the construction of the building; that they knew the city had advertised for new bidders and that this property was to be considered in the bids as subject to be used by the successful bidder, and with this knowledge and the further knowledge that it was so used, they made no demand for its delivery to them and made no objection to its use in the building or forbade its use.

Respondents also claim that the entire building fund, with the exception of $275, was exhausted in the payments made to defendant Newman, under his contract, and that there are no longer any funds in the treasury out of which plaintiffs' claim could be paid.

Respondents also claim that the evidence showed that the transfer by MacQuiddy of his interest in the property was by way of security and was not consummated by delivery and was ineffectual as a sale.

[1] In some of these contentions there is much force, but we do not find it necessary to enter upon their discussion or decide the questions thus presented. It seems to us that section 1200, Code of Civil Procedure, conclusively establishes the right of the city, on the abandonment of the contract by MacQuiddy, to treat as its own the materials formerly belonging to him which were then on the ground in the city's possession, delivered there for the purpose of being used and which were used in the construction of the building, and that he had no right to defeat such ownership of the city or its right to use the materials for the purposes for which they were intended, by the attempted transfer to his creditors either absolutely or as security. The section is as follows: "In case the contractor shall fail to perform his contract in full, or shall abandon the same before completion, the portion of the contract price applicable to the liens of other persons than the contractor shall be fixed as follows: From the value of the work and materials already done and furnished at the time of such failure or abandonment, including materials then actually delivered or on the ground, which shall thereupon belong to the owner, estimated as near as may be by the standard of the whole contract price, shall be deducted the payments then due and actually paid, according to the terms of the contract and the provisions of sections one thousand one hundred and eighty-three and one thousand one hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens." The section has received construction many times where the contractor had abandoned his contract and the rights of materialmen were involved. McDonald v. Hayes, 132 Cal. 490, 495, 64 Pac. 850; Hoffman-Marks Co. v. Spires, 154 Cal. 111, 114, 79 Pac. 152; McCue v. Jackman, 7 Cal. App. 703, 95 Pac. 673; Duffy Lumber Company v. Stanton, 9 Cal. App. 38, 98 Pac. 38. We find no case in our reports where the precise question here involved has arisen. It is this: When a contractor abandons his contract and quits work on the building leaving materials on the premises in possession of the owner of the building which the contractor has pur-

chased and placed there to be used in the construction of the building, can he sell these materials or transfer them to creditors as security for his indebtedness to them, thus defeating the owner of all right thereto?

It is urged by appellants that, inasmuch as under the decisions (Mayrhofer v. Board of Education, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451, and others) the building could not be made the subject of a lien, the section has no just application here. Also, by its terms it concerns only the persons who may claim liens and does not concern the owner except as to such liens. It is true it protects persons entitled to liens in certain cases, but it specifically provides that, upon the abandonment of the work by the contractor, the "materials then actually delivered or on the ground, *which shall belong to the owner*," shall be deducted, etc.

An examination of the statute shows that the work and materials already done and furnished, including the materials then actually delivered and on the ground, shall, upon the abandonment of the work, belong to the owner, subject to such rights as are given to laborers and materialmen. The materials on hand are declared to belong to the owner, who may use them in the completion of the building, at their value, ascertained by the rule prescribed in the statute. The materials here were purchased by the contractor and were delivered on the ground to be placed in the building pursuant to his contract, and remained in the owner's possession after the contractor abandoned his contract and prior to any attempted transfer thereof. His abandonment was as much the abandonment of the materials delivered and on the ground as of the materials which had gone into the building. By the same token, all the materials referred to in the statute are treated alike.

It is true that, where there are liens of materialmen capable of enforcement, the statute gives them certain rights, after the owner is fully protected; but whether there are enforceable liens or not the fact does not take from the owner the rights given him. He finds himself with an uncompleted contract and with certain materials left on his hands by the defaulting contractor. His right to complete the building at the cost of the contractor is undoubted, and he certainly should have the right to lessen the cost to himself by using the materials which the statute says belong to him. Otherwise, the statute has little meaning for him.

In the case of White v. Miller, 18 Pa. 52, the controversy arose between an execution creditor who had sold on an execution against the contractor certain lumber after it was delivered on the ground on which the house was being erected and before it was worked into the house. In sustaining the lien as against the owner, the court took the view that the delivery of the lumber was on the credit of the building and not of the contractor; that the title to it was vested, by the delivery, not in him, but in the proprietor of the building "subject only to the revendication of the seller." "The ownership of it," said Gibson, C. J., who delivered the opinion, "between the time of delivery and of working it into the building, could not be in the contractor, because it was delivered to him, not on his own credit, but on the credit of the building to which it was destined. It was sold for the building and, consequently, to the owner of it." What the statute was in Pennsylvania at that time does not appear. It is to be inferred from the opinion that the principle on which the decision rests was invoked for the protection of materialmen and as "not only a just but a convenient one." Here, however, we have a statute making the owner of the building the owner of the materials delivered and on the ground at the time the contractor has abandoned his contract. There are no lien claimants; the question is one solely between the owner and the contractor. Every consideration of justice and fair dealing would seem to support the view we have taken of the statute. Appellants' contention apparently is that the bond is void and, in effect, that the owner is powerless to protect himself by a bond; that the contractor had the right to abandon his contract and turn over the materials delivered and on hand to whom he pleased, casting upon the owner the burden of completing the building at his own cost, which the contractor, confessedly, is unable to do and who may be insolvent. If the controversy were between the contractor and the owner for the value of this property, used, as it was, in the completion of the building and in the carrying out of the contractor's obligations, no court would entertain the contractor's claim, and we cannot see that his assignees should be accorded any stronger position.

The case of Steiger v. City of Sonoma, 9 Cal. App. 698, 100 Pac. 714, relied on by appellants, is not in point. There no delivery of the property had been made to the contractor and title had not passed to him, and for that reason it was held not to come within the provisions of section 1200, Code of Civil Procedure, but there, as in other cases, it was held that this section furnishes the rule for the disposition of materials belonging to the contractor, when he abandons his contract, which have been delivered and are on the ground where the building is to be erected.

It is only upon the theory that the contractor has abandoned all right to the materials, and that the ownership thereafter is in the owner of the building, that any claim of lien is given the mechanic and materialman. There is no reason why this relation of the owner to the property should change because there are no lienors or because the building happens not to be subject to a lien.

It will be observed that the owner of the building is given the right to deduct all payments "then due and actually paid, according to the terms of the contract," from the value of the work and materials that have gone into the building, "including materials then actually delivered or on the ground," and the remainder "shall be deemed the portion of the contract price applicable to such liens." In other words, the owner of the building is chargeable with the abandoned materials in an adjustment of the liens. Why, then, should the contractor have the right to do as he pleases with these materials when the statute deals with them as belonging to the owner of the building?

In the case of Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152, it was held that where a valid contract in writing for the erection of a building has been executed and filed, and the work thereunder has been abandoned by the contractor before completion, the amount of the contract price applicable to liens of persons other than the contractor is to be determined by section 1200, Code of Civil Procedure. Also, that if the payments made by the owner pursuant to the contract amounted, at the time of the abandonment, to more than the value of the work and materials then done and furnished, estimated by the standard of the whole contract price, no part of the contract price is applicable to the payment of liens, and lien claimants must look to their personal claim against the contractor, and this extends as well to the final reserved payment of the contract price. It was also held that in determining the value of work done and the materials furnished up to the time of abandonment, under section 1200, it is proper to consider not only the value of the work done and materials furnished at the time of the abandonment, but also of the work left undone and the materials yet to be furnished, i. e., the necessary cost of the completion of the contract. We can see no way by which this view of the statute can be realized except upon the assumption that not only the work and materials that have gone into the building, but also the materials delivered and on hand for that purpose, shall belong to the owner of the building.

[2] Whether the court was justified in awarding plaintiffs the $275 to the credit of this fund after the completion of the building is a matter of which appellants cannot complain.

It may be that some of the findings of the court on other defenses than the one we have considered are not supported. Still, if we are correct in our view of section 1200, the finding on the defense is sufficient to support the judgment, disregarding all others.

We discover no prejudicial error in the record, and hence the judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

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18 Cal. App. 505

CARPENTER v. GROGAN. (Civ. 1,053.)

(District Court of Appeal, Second District, California. March 11, 1912. Rehearing Denied by Supreme Court May 8, 1912.)

1. SALES (§ 273*) — CONTRACTS — CONSTRUCTION.

A contract for the purchase of a crop of olives growing and about maturing, which fixes the price at $110 per ton on cars, less $55 per ton on four tons agreed on as oil olives, and which provides that the olives are to be picked in a careful manner for ripe pickling olives, does not import a warranty that the olives other than the four tons shall be suitable for pickling purposes, but the buyer is liable for all olives delivered at $110 per ton, except the four tons.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 772–776; Dec. Dig. § 273.*]

2. APPEAL AND ERROR (§ 1011*)—FINDINGS —CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by D. J. Carpenter against C. P. Grogan. From a judgment for plaintiff, defendant appeals. Affirmed.

Powers & Holland, for appellant. Geo. P. Adams and Curtis & McNabb, for respondent.

JAMES, J. Appeal from a judgment entered in favor of plaintiff, and from an order denying defendant's motion for a new trial. On the 19th of August, 1909, the following contract was entered into between plaintiff and defendant: "This agreement made and entered into by and between D. J. Carpenter, and Chas. P. Grogan of Los Angeles, both parties of the state of California, is to the effect that Chas. P. Grogan agrees to purchase of said D. J. Carpenter his crop of olives now growing on the trees at Del Rosa at the following prices: One hundred & ten dollars per ton on cars at Del Rosa—less $55.00 per ton on four tons agreed on as oil olives. Olives to be picked in a careful manner for ripe pickling olives. Payment to be made within 30 days from date of shipment. I hereby acknowledge receipt of $1.00 as first payment on the olives. C. P. Grogan. D. J. Carpenter." At the time this contract was executed plaintiff was the owner of an olive orchard upon which the fruit which was made the subject of the contract was then growing. At that time the olives had about matured, but were not in the state of ripeness desired by the vendee. Shipment of the crop commenced in the latter part of October and continued from time to time until the 17th of February. Certain payments were made on account of the purchase price agreed to be paid by the vendee, but at the time shipment of the crop was concluded defendant contended that only a balance of $290.35 was due, while the plaintiff insisted that the amount was $1,666.17.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] This dispute arose on account of the fact that a portion of the olives before delivery to the transportation company had become damaged by frost and other action of the elements. It was the contention of the defendant that his contract should be so construed as to require the plaintiff to accept for all olives delivered which were not suitable for pickling a price which would equal the reasonable value of such olives if purchased to be used for manufacturing oil. It was admitted that all of the olives delivered could be manufactured into oil, but that for pickling purposes a special standard of size, firmness, and ripeness was required. Defendant in his answer alleged that as to the damaged olives plaintiff had agreed subsequent to the making of the contract set out above that he should receive only the reasonable market price therefor. The trial court, however, found against the contention of the defendant as to the making of this subsequent agreement, and found, further, that all of the olives were picked in a careful manner, and that under the terms of the contract there was due a balance of $1,537.75 to the plaintiff, for which amount judgment was entered. In the findings of the court it was further recited that some of the olives had been damaged by frost or wind. It appeared by the testimony that the olives were all merchantable for the purpose of being manufactured into oil. The trial court determined that defendant was liable to plaintiff under the contract for all olives delivered at the rate of $110 per ton, except for four tons, for which it was recited in the contract payment was to be made at the rate of $55 per ton. All of the questions argued depend for their solution upon what construction should be given to the contract. If the defendant may be said to have reserved for his benefit a condition to be implied from the written contract of sale that the olives to be delivered, except the four tons agreed upon as oil olives, should be suitable for pickling purposes, otherwise that they should not be paid for at the rate of $110 per ton, then the various objections made would appear to be of substantial merit.

However, we agree wholly with the trial court in its construction of the contract of sale. The crop of olives was then growing upon the trees, and was about matured when the defendant made his contract of purchase; that contract contains no terms from which there can be construed any warranty of quality that should be possessed by the fruit contracted for; on the contrary, it was expressly recited that it had been agreed that four tons only of the olives were to be paid for at $55 per ton as "oil olives." The crop was purchased as a crop then in existence, and not one to be grown in the future: that crop was not destroyed, but was delivered to the defendant by the plaintiff. If the defendant expected to insist upon a certain standard of size, ripeness, or other quality, to be possessed by the fruit at the time it was delivered, then that matter should have been expressed in the written agreement of sale; otherwise the vendor could not be bound by it. This court recently had occasion to construe a similar contract in the case of Kenney v. Grogan, 120 Pac. 433; and questions almost identical with those presented here were there fully considered and determined adversely to this defendant's present contentions. The decision rendered in that case and the authorities therein cited are applicable here.

[2] The questions of fact determined by the findings of the trial judge rest in the main upon evidence of a conflicting nature, and therefore those findings are not subject to review.

Upon the whole case as presented on the record submitted to us, in our opinion, there is no error shown.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 499

McDERMOTT v. CHATFIELD et al.

(Civ. 930.)

(District Court of Appeal, First District, California. March 11, 1912.)

1. VENDOR AND PURCHASER (§ 339*)—ACTION TO RECOVER PURCHASE MONEY—CONDITION PRECEDENT—NOTICE.

A purchaser made a deposit on the price, he to have 20 days in which to examine the title and complete the sale, and, if the title was defective, the vendor to have 30 days after notice to perfect it, in default of which the deposit should be returned, and 2 days thereafter the records were destroyed, making it impossible for the vendor to convey a merchantable title within the time contemplated. *Held*, that the purchaser, after notice of cancellation and demand for the return of the money, might recover the deposit without giving notice of defective title; and that the purchaser's right to a recovery would not be defeated by the giving of a defective notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994–1002; Dec. Dig. § 339.*]

2. VENDOR AND PURCHASER (§ 112*)—PURCHASER'S RIGHT TO RESCISSION—DEFECT IN TITLE.

The purchaser of land under an agreement that he should have 20 days in which to examine title and complete the sale, the vendor to be allowed 30 days after notice thereof to perfect it, on the destruction of records, making it impossible for the vendor to convey a perfect title within the time allowed, was entitled to disaffirm the contract.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 199, 200; Dec. Dig. § 112.*]

3. Vendor and Purchaser (§ 338*)—Right of Action—Purchase Price of Land.

A purchaser, who pays a deposit upon the purchase price of land and disaffirms the contract after the destruction of records, making it impossible for the vendor to convey a perfect title within the time agreed on, may sue for the deposit in an action for money had and received.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 991–993; Dec. Dig. § 338.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by William P. McDermott against Thomas F. Chatfield and another, copartners, etc. Judgment for plaintiff, and motion for new trial denied, and defendants appeal. Appeal dismissed, and order denying new trial affirmed.

Dorn & Dorn & Savage, for appellants. Breen & Kelly, for respondent.

KERRIGAN, J. [1] This is an action for money had and received to recover $500, a deposit paid upon the purchase price of a parcel of real estate.

On or about the 16th day of April, 1906, plaintiff agreed, in writing, to purchase a certain described piece of real estate in the city and county of San Francisco; and he paid to the defendants on account of the price thereof the sum of $500. The agreement in effect provided that he should have 20 days in which to examine the title and consummate the sale. If the title was found to be defective, the seller was to be allowed 30 days after notice thereof to perfect the same, in default of which the deposit was to be returned.

At the trial, it was admitted by the parties that on the 18th day of April, 1906, the records in the office of the county recorder of the city and county of San Francisco were destroyed by fire, so that after said conflagration there existed no record title to said property.

No notice of defective title was given by plaintiff; but on June 15, 1906, he caused notice of cancellation to be served on the defendants, based upon what may be conceded to have been untenable grounds. Accompanying this notice of rescission was a demand upon defendants for the return to plaintiff of the $500 deposit.

Judgment for plaintiff was entered as prayed, from which defendants appeal, as also from an order denying their motion for a new trial.

The record having been destroyed, it was impossible for the defendants to convey to plaintiff a merchantable title within the time contemplated by the contract. Consequently notice of defective title mentioned in the contract was not necessary, in order to entitle the plaintiff to maintain this action. Such notice would have been an idle and useless act, which the law never requires. Title Document Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 356, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; Hooe v. O'Callaghan, 10 Cal. App. 567, 103 Pac. 175; McCroskey v. Ladd (Sup.) 28 Pac. 216; Cabrera v. Payne, 10 Cal. App. 675, 103 Pac. 176; Read v. Walker, 18 Ala. 323; Pate v. McConnell, 106 Ala. 449, 18 South. 98. As, under the circumstances of this case, no notice was required, it cannot be held that a defective notice would disentitle the plaintiff to the return of his deposit.

[2, 3] It is asserted that the evidence in the case does not show that there was an abandonment or mutual rescission of the contract; and therefore, so it is argued, this action, being one for money had and received, cannot be maintained. As the evidence shows that the title was defective, and that it was impossible for the owner, within the time prescribed by the contract, to remedy the defect and convey a perfect title, the plaintiff was at liberty to disaffirm the contract, and entitled to sue for the deposit in this form of action. 2 Ency. of Pl. & Pr. 1018, 1019, and note on page 1019; Daly v. Bernstein, 6 N. M. 380, 28 Pac. 764; Demesmey v. Gravelin, 56 Ill. 93.

The appeal from the judgment was not taken in time, and is hereby ordered dismissed. The order denying a new trial is affirmed.

We concur: LENNON, P. J.; HALL, J.

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18 Cal. App. 468

TOGNAZZINI v. FREEMAN et al.

(Civ. 927.)

(District Court of Appeal, First District, California. March 8, 1912.)

1. Highways (§ 184*)—Collisions Between Automobiles—Pleadings—Willfulness.

A complaint, in an action for injuries in a collision between automobiles, which alleges that, just prior to the collision, plaintiff was driving his automobile on a public highway, that defendant was driving an automobile in the wake of plaintiff on the same highway and in the same direction, that when within a short distance of plaintiff defendant negligently lost control of his automobile, that plaintiff turned his automobile to the right of the highway, and thereby gave defendant ample room, had he so desired, to pass without damage to either party, that, instead of so passing, defendant, with the intent of stopping his automobile, willfully and deliberately ran it on and against the automobile of plaintiff, states a cause of action for a willful and deliberate wrongful act of defendant, and not for mere negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471–474; Dec. Dig. § 184.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Negligence (§ 119*)—Issues, Proof, and Variance.

A complaint, alleging that plaintiff's damage complained of was the proximate result of defendant's willful and deliberate wrongful act specified, is not supported by proof of mere negligence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200–216; Dec. Dig. § 119.*]

3. Trial (§ 203*)—Instructions—Necessity.

A complaint must be founded on a theory, and plaintiff is entitled to instructions on the law applicable to such theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. § 203.*]

4. Trial (§ 251*)—Instructions—Issues.

Where the complaint stated a cause of action founded on a willful and deliberate wrongful act of defendant, an instruction submitting the issue of negligence merely was erroneous, as limiting the jury to the determination of a question not an issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587–595; Dec. Dig. § 251.*]

5. Trial (§ 296*)—Errors in Instructions Cured by Other Instructions.

The error in an instruction submitting the issue of mere negligence of defendant, while the complaint stated a cause of action for a willful and deliberate wrongful act of defendant, was not cured by an instruction that one committing a willful wrongful act must respond in damages, and that, if defendant willfully and deliberately committed the wrongful act complained of, the verdict must be for plaintiff, since it could not be determined which of the two conflicting theories the jury followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. § 296.*]

6. Trial (§ 243*)—Conflicting Instructions—"Negligence"—"Willful Negligence."

The conflict in instructions submitting the issue of negligence of defendant and the issue of a willful wrongful act cannot be harmonized on the theory that the term "negligence," as used in the first instruction, covers willful acts, since "negligence" signifies the absence of care and implies a failure of duty and excludes an idea of intentional wrong, while "willful negligence" implies an intentional failure to perform a manifest duty.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564, 565; Dec. Dig. § 243.*

For other definitions, see Words and Phrases, vol. 5, pp. 4743–4763; vol. 8, pp. 7483–7484, 7729–7731.]

7. Appeal and Error (§ 883*)—Theory of Case in Trial Court—Review.

Where a cause of action founded on a willful and deliberate wrongful act committed by defendant is, by the acquiescence of both parties, tried on the theory of liability of defendant for negligence only, plaintiff may not, on appeal, complain of an instruction submitting negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

8. Appeal and Error (§ 883*)—Theory of Case in Trial Court—Review.

Where, in an action founded on a willful and deliberate wrongful act committed by defendant, the evidence, as disclosed by the bill of exceptions, sustained the charge, and plaintiff requested instructions on the theory that the act complained of was willful and deliberate, plaintiff did not acquiesce in the submission of the case on simple negligence, though the charge expressly declared that plaintiff claimed damages because of the negligence of defendant, and he could complain on appeal of instructions submitting the issue of negligence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3611; Dec. Dig. § 883.*]

9. Negligence (§ 100*)—Willfulness—Contributory Negligence.

The doctrine of contributory negligence does not apply to a case founded on the willful and deliberate wrongful act of defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 85; Dec. Dig. § 100.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by T. C. Tognazzini against Isaac Freeman and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Henry C. & Oliver Dibble, for appellant.
Samuel M. Shortridge, for respondents.

LENNON, P. J. This action is for damages, alleged to have occurred as the result of a collision between two automobiles, one driven by the plaintiff and the other by the defendants. The cause of action pleaded in the plaintiff's complaint was based primarily upon the claim that the defendants intentionally and willfully ran their automobile upon and against the automobile of plaintiff. On the other hand, the defendants in their answer, after specifically denying all the allegations of the complaint, save and except the happening of the collision, pleaded that the injuries, if any, sustained by the plaintiff as the result of the collision were proximately caused by the negligence and carelessness of the plaintiff, and then counterclaimed against the plaintiff for personal injuries and damage to their automobile, which, it was claimed, were caused by the alleged carelessness and negligence of the plaintiff.

The case was tried by the court with a jury, and resulted in a verdict for the defendants and against the plaintiff upon the latter's cause of action, and in favor of the plaintiff and against the defendants on their counterclaim. Judgment was entered in accordance with the verdict, from which the plaintiff has appealed. Plaintiff has also appealed from an order denying his motion for a new trial, and the case is here upon the judgment roll and a duly authenticated bill of exceptions.

[1] The only point urged for a reversal of the judgment is that the trial court misconceived and ignored the theory of the plaintiff's case as pleaded in the complaint, and in its instructions confused and misled the jury as to what was the real and only issue upon which the plaintiff relied for a verdict.

In substance and effect, the plaintiff's complaint alleged that, just prior to the collision, he was driving his automobile upon a public highway in Marin county, and that the defendants also were driving an automobile in the wake of plaintiff's upon the same highway and in the same direction; that when within a short distance of plaintiff the defendants carelessly and negligently lost control of the speed of their automobile, whereupon plaintiff turned his automobile to the right of the highway, and thereby gave defendants ample room, had they so desired, to pass without damage to either party; but that, instead of so passing, as they might have done, the defendants, with the intent and purpose of stopping their automobile, willfully and deliberately turned and ran it upon and against the automobile of plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The bill of exceptions in the case does not purport to detail in narrative form or otherwise the evidence offered upon the whole case. It does show, however, "that evidence was duly offered by plaintiff and admitted sufficient to sustain the allegations of plaintiff's complaint, and sufficient to sustain the allegations of plaintiff's answer to defendants' cross-complaint," and also that "evidence was offered by defendants and admitted sufficient to sustain the allegations of defendants' answer, and sufficient to sustain the allegations of defendants' cross-complaint."

The instruction most complained of was this: "The plaintiff in this action alleges in his complaint that the alleged injuries to his automobile were caused solely by reason of the carelessness and negligence of the defendants. The court therefore instructs you that the burden of proof rests upon the plaintiff to prove his allegations; that is to say, the burden is on the plaintiff to prove that the alleged damages to his automobile were solely caused by the carelessness and negligence of the defendants. Unless you are satisfied from the evidence that the alleged injuries to plaintiff's automobile were solely caused by the carelessness and negligence of the defendants, the plaintiff cannot recover; and it is your duty to find a verdict in favor of the defendants."

The vice of this instruction is that it assumes that plaintiff's pleaded cause of action was for damages caused solely by the carelessness and negligence of the defendants; whereas it is readily apparent from the first reading of the plaintiff's complaint that the defendants' alleged negligence in the first instance, although it resulted in their losing control of the speed of their automobile, was not claimed by the plaintiff to be the cause, proximate or otherwise, of the collision. Plainly the plaintiff's cause of action was stated and founded solely upon a willful and deliberate wrongful act of the defendants. By no process of reasoning is the complaint susceptible of the construction that the plaintiff was seeking to recover upon the theory that the damage alleged resulted, either immediately or at all, from the negligence of the defendants in losing control of the speed of their automobile. It is equally clear from a reading of the complaint that under the circumstances therein narrated this negligence, in and of itself, would not have resulted in any damage to the plaintiff; and it follows that if the plaintiff was entitled to recover at all it must have been upon the theory, supported by proof, that the damage complained of was the proximate result of the willful and deliberate act of the defendants, which, although exerted in an effort to save themselves from disaster, was nevertheless wrongful and actionable.

[2] In brief, under the facts stated in the plaintiff's complaint, no recovery could have been had for mere negligence; and if the evidence offered upon the trial in support of plaintiff's case showed negligence only, there would have been a fatal variance between the material allegations of plaintiff's complaint and the proof. Louisville & Nashville R. R. Co. v. Johnston, 79 Ala. 436; Birmingham, etc., R. R. Co. v. Jacobs, 92 Ala. 187, 9 South. 320, 12 L. R. A. 830; S. & N. R. R. Co. v. Schaufler, 75 Ala. 136; Highland Ave., etc., R. R. Co. v. Winn, 93 Ala. 309, 9 South. 509; 1 Shearman & Red. Neg. § 7, p. 6.

[3] The complaint in every action should be founded upon a theory; and the plaintiff is entitled to have the jury instructed by the trial court upon the law applicable to the theory upon which the cause of action is founded. Buena Vista, etc., Co. v. Tuohy, 107 Cal. 243, 40 Pac. 386; Renton Holmes Co. v. Monnier, 77 Cal. 455, 19 Pac. 820; Buckley v. Silverberg, 113 Cal. 673, 45 Pac. 804.

[4] There is no escape from the conclusion that the trial court, in the instruction complained of, not only ignored the real theory of plaintiff's complaint, but erroneously limited the jury in its deliberations to the determination of a single question of fact which, under the pleadings, was not a material issue in the case, and which, if it had been submitted to the jury in the form of a special issue, would not have supported a verdict for or against the plaintiff.

[5] It cannot be said that the error of this instruction was rendered harmless by anything which the court may have said elsewhere in its charge to the jury. True the court, in a preceding instruction, did tell the jury that a person committing a willful wrongful act must respond in damages; and that if they found from the evidence that the defendants willfully and deliberately caused the collision in question the verdict must be for plaintiff. This theory of the case, however, was so absolutely opposed to the subsequent instruction, which limited the plaintiff's cause of action solely to the defendants' negligence, as to make it impossible for us to determine which of the two conflicting theories was followed by the jury; and therefore the erroneous instruction must be deemed to have been prejudicial. Lemas-

ters v. S. P. Co., 131 Cal. 105, 63 Pac. 128; Rathbun v. White, 157 Cal. 248, 107 Pac. 309.

[6] The evident conflict in the trial court's presentation of the vital issue in the case to the jury cannot be reconciled, or the charge of the court as a whole harmonized, upon the theory that the term "negligence," as used by the court in the instruction complained of, was broad enough in its legal signification to cover both the careless and the willful acts of the defendants. Ordinarily, and likewise in the law, there is a decided and well-defined distinction between mere "negligence" and "willfulness." Negligence is opposed to diligence, and signifies the absence of care. It is negative in its nature, implying a failure of duty, and excluding the idea of intentional wrong; and it follows that the moment a person wills to do an injury he ceases to be negligent. Stephenson v. S. P. Co., 102 Cal. 148, 34 Pac. 618, 36 Pac. 407; Smith v. Whittier, 95 Cal. 279, 30 Pac. 529; Bent on Cont. Neg. 62; Gardner v. Heartt, 3 Denio (N. Y.) 232; Cleveland, C., C. & St. L. Ry. Co. v. Tartt, 64 Fed. 823, 12 C. C. A. 618; Raming v. Metropolitan St. Ry. Co., 157 Mo. 477, 57 S. W. 268; Holwerson v. St. Louis, etc., Co., 157 Mo. 216, 57 S. W. 774, 50 L. R. A. 850; Linton Coal M. Co. v. Persons, 15 Ind. App. 69, 43 N. E. 651; Dull v. Cleveland, 21 Ind. App. 571, 52 N. E. 1013; Brooks v. Pittsburg, 158 Ind. 62, 62 N. E. 694.

Notwithstanding the confused and indiscriminate use at times of the terms "negligence" and "willfulness" by judges and textwriters, it is certain that the weight of authority supports the view that those terms have a distinct and well-defined meaning, which is clearly pointed out in Holwerson v. St. Louis, etc., Co., supra, where it is said: "By 'negligence' is meant ordinary negligence—a term the significance of which is reasonably well fixed. By gross negligence is meant exceeding negligence—that which is mere inadvertence in a superlative degree. * * * By 'willful negligence' is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence, and whenever there is an exercise of will in a particular direction there is an end of inadvertence, but rather an intentional failure to perform a manifest duty, which is important to the person injured, in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another. Such conduct is not negligence in any proper sense, and the term 'willful negligence,' if these words are to be interpreted with scientific accuracy, is a misnomer."

[7, 8] The defendants in a measure confess the conflict between the pleadings and the instruction complained of, but endeavor to justify it upon the ground that the cause was tried by the lower court, with the acquiescence and approval of the parties to the action, upon the theory that the liability of the defendants, if any, was for damages arising from the negligence, rather than the willful act, of the defendants. In other words, it is the claim of the defendants that the cause was tried as if the plaintiff's complaint and the defendants' answer had specifically put in issue the defendants' negligence to the exclusion of the claim that the collision resulted from the deliberate and wrongful act of the defendants. If this were so, the plaintiff would not now be heard to complain for the first time that the negligence of the defendants in the first place, and without regard to their alleged subsequent willful and wrongful act, was not an issue in the case; but the record before us fails to show affirmatively or by fair inference that the cause was tried in the court below upon any issue other than that originally framed by the pleadings in the case. Nothing that is contained in plaintiff's requested instructions warrants the claim of defendants' counsel that the case was tried solely upon the theory that the defendants were guilty of negligence, and not guilty of a willful and deliberate act. On the contrary, the record shows that the instructions requested by plaintiff were expressly framed upon the theory that the negligence of the defendants in permitting their automobile to run away was not, in and of itself, sufficient to warrant a verdict for plaintiff; and that a verdict for plaintiff could not have been rightfully rendered, unless it was first found from the evidence that the defendants willfully and deliberately caused the collision.

During the course of its charge to the jury, the trial court made use of this language: "As counsel have informed you, the plaintiff claims damages because he alleges that he was negligently run into by the defendants." This language, it is claimed, verifies defendants' contention that the action was tried and determined solely upon the supposed issue of negligence. It will be observed, however, that it does not appear from the quoted statement of the trial court which of the counsel was referred to; but, in any event, for us to hold that a mere general statement of the trial court in its charge to the jury, over which counsel for either party had no control, is conclusive or any evidence of the fact that counsel for plaintiff waived the issues raised by the pleadings, and consented that the case be tried upon a wholly different theory, would be carrying the "theory of the case" doctrine to greater lengths than the ends of justice require or permit. If in fact the case had been, by acquiescence of the court and the parties to the action, tried upon an issue which was foreign to the pleadings, that fact could easily have been shown by a direct statement in the bill of exceptions, or by a transcription of the record of the proceedings had upon the trial from which the theory upon which the case was tried might be shown or fairly inferred.

The defendants further contend that, because the jury were instructed upon the law of inevitable accident, it must be assumed that they heeded such instruction, and based their verdict upon the finding that the collision was the result of inevitable accident. This contention is untenable. The bill of exceptions certifies to the fact that the evidence upon the whole case was sufficient to sustain the allegations of the pleadings of the respective parties. Presumably, in that situation, the evidence was conflicting; and, as the verdict was general in its nature, it is impossible for us, in the face of conflicting evidence and contradictory instructions, to determine upon which of the several phases of the case the verdict was founded.

[9] In view of what has been said, it will not be necessary for us to follow counsel in their discussion of the trial court's charge upon the law of contributory negligence, further than to say that, the plaintiff's cause of action having been stated solely upon the willful wrongful act of the defendants, the doctrine of contributory negligence has no application to any phase of the case; and the fact that the trial court deemed it necessary to charge at all upon that subject emphasizes the contention that the cause of action stated in the plaintiff's complaint was misunderstood and erroneously stated to the jury. 1 Thompson on Cont. Neg. § 383; Shearman & Redfield on Neg. § 64; Esrey v. Southern Pac. Co., 103 Cal. 545, 37 Pac. 500; Harrington v. L. A. Ry. Co., 140 Cal. 523, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85.

The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: HALL, J.; KERRIGAN, J.

18 Cal. App. 488

REDDING GOLD & COPPER MINING CO. et al. v. NATIONAL SURETY CO.

(Civ. 895.)

(District Court of Appeal, First District, California. March 9, 1912. Additional Opinion March 12, 1912.)

1. APPEAL AND ERROR (§ 957*) — DEFAULT JUDGMENT — VACATION — DISCRETION OF COURT.

The setting aside of a default judgment will not be disturbed, unless there has been a plain abuse of the discretion of the lower court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

2. JUDGMENT (§ 143*)—DEFAULT JUDGMENT —VACATION—GROUNDS.

Under Code Civ. Proc. § 473, the court may not set aside a default judgment, regularly entered, except on a showing of mistake, inadvertence, surprise, or excusable neglect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. § 143.*]

3. JUDGMENT (§ 143*)—DEFAULT JUDGMENT —VACATION—GROUNDS.

A demurrer to the complaint was properly overruled, with leave to answer within 10 days. Notice thereof was regularly served on defendant's attorney; but the time to answer expired without defendant taking any steps to protect his rights, and a default judgment was rendered. Nothing occurred after the service of the notice which could prevent defendant from answering. *Held*, that the judgment was not taken against defendant through mistake, inadvertence, surprise, or excusable neglect, within Code Civ. Proc. § 473; and a setting aside of the judgment was an abuse of discretion.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. § 143.*]

4. CORPORATIONS (§ 672*)—FOREIGN CORPORATIONS—RIGHT TO SUE—DEMURRER.

Under Code Civ. Proc. § 430, authorizing a demurrer to the complaint on the ground that plaintiff has no capacity to sue, a complaint, in an action by a foreign corporation, which does not show on its face that the corporation has not complied with Civ. Code, § 405, and hence is without legal capacity to sue under section 406, is not demurrable on the ground of want of capacity to sue.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645–2649; Dec. Dig. § 672.*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Redding Gold & Copper Mining Company and another against the National Surety Company. From an order setting aside a default and vacating a judgment entered thereon, plaintiffs appeal. Reversed.

Henry H. Davis, for appellants. A. H. Jarman and Nat Schmulowitz (Clarence Coonan, of counsel), for respondent.

HALL, J. This is an appeal from an order setting aside a default and vacating the judgment entered against defendant upon such default.

[1] The matter of setting aside defaults and vacating judgments entered thereon is very largely a matter of discretion, to be liberally exercised by the trial court in furtherance of justice; and, where the action of the trial court will result in a trial upon the merits, the appellate courts are very reluctant to interfere with the exercise of such discretion, and will only do so when it clearly appears that there has been a plain abuse of discretion. O'Brien v. Leach, 139 Cal. 220, 72 Pac. 1004, 96 Am. St. Rep. 105. Nevertheless cases do occur where the appellate court is obliged to say that the action of the trial court involves a plain abuse of discretion; and in such case it is the duty of the appellate court to reverse the action of the trial court. Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; Bailey v. Taaffe, 29 Cal. 423; People v. O'Connell, 23 Cal. 282. We think the case at bar is such a case.

Plaintiffs commenced this action upon an injunction bond, given by defendant as the surety thereon, in an action wherein one Rasmussen was plaintiff and plaintiffs herein were defendants. A demurrer to the first complaint was sustained. Plaintiffs filed an amended complaint, to which defendant filed a demurrer. Subsequently defendant filed an amended demurrer. This demurrer came on regularly for hearing upon the 4th day of February, 1910, and, no one appearing for defendant, it was by the court overruled, and defendant allowed 10 days to answer to the complaint. Written notice of the overruling of the demurrer, and that defendant was allowed 10 days to answer to the complaint, was served upon the attorney for the defendant personally upon the 5th day of February, 1910, and his written admission of service indorsed on such notice. On the 16th day of February, 1910, the time allowed defendant to answer having expired, and no extensions of time having been granted, either by the court or counsel, and no answer having been filed, the default of defendant was duly entered, and judgment entered against defendant as prayed for in said complaint. Subsequently defendant, upon affidavits, procured an order from the court, requiring plaintiffs to show cause why such default and judgment should not be set aside and vacated. A hearing was had upon this order, which resulted in the granting of the order appealed from.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2, 3] Where, as in this case, a default and judgment have been duly and regularly entered against a litigant, such default and judgment cannot be set aside and vacated, except upon a showing that they were taken against him through his mistake, inadvertence, surprise, or excusable neglect. Section 473, Code Civ. Proc.; Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863; Bailey v. Taaffe, 29 Cal. 423; People v. O'Connell, 23 Cal. 282. In the case at bar, there is no dispute that the notice of the overruling of the demurrer and of the allowance to defendant of 10 days to answer, was served upon the attorney for defendant personally upon the 5th day of February, 1910. Neither defendant nor his attorney took any action, either to answer, or in any way to further defend against the complaint, until after the judgment had been duly and regularly entered. There is neither in the affidavit filed by the attorney for defendant, nor elsewhere, any claim or pretense that anything was said or done at the time of the serving of the notice of the overruling of the demurrer or afterwards to relieve such service from having its usual customary and legal effect. Neither is it pretended, either in the affidavit of said attorney or elsewhere, that anything whatever occurred after the serving of said notice which could or did prevent defendant from answering to the complaint. The bald facts are undisputed that such service was duly and regularly made upon the attorney for defendant and that he took no further steps in relation to the action until after judgment had been duly and regularly entered against his client.

[4] His affidavit does show that the hearing upon his demurrer had been continued several times, that upon several occasions the attorney for plaintiffs was not present at the calling of the demurrer, and that he (the affiant) had allowed the hearing to go over because of the absence of the attorney for plaintiffs, and that he had, prior to the overruling of his demurrer, extended other courtesies to the attorney for plaintiffs. And in his affidavit in support of the application for the order appealed from he states: "When deponent learned that plaintiffs claimed to have taken the default of the defendant, he was very much surprised, in the first place, because of deponent's liberal practice toward Mr. Davis (plaintiffs' attorney), in not having taken, or attempting to take, his (said Davis') default upon the numerous occasions hereinabove mentioned, when neither the said Davis nor any of his representatives had been in court," and also because a representative of the affiant had, at some time before the overruling of the demurrer, stated to the attorney for plaintiffs that he considered the demurrer well taken. As a matter of law, the demurrer was not well taken. According to the affidavit of the attorney for plaintiffs, "the point of the amended demurrer is that, since the complaint does not contain any allegation of compliance by the plaintiff, a South Dakota corporation, with section 405 of the Civil Code, it has not the legal capacity to maintain this action under section 406 of the Civil Code." There was no merit at all in the demurrer. It does not appear upon the face of the complaint that said plaintiff has not complied with such section. The want of capacity to sue can only be raised by demurrer when such want of capacity appears upon the face of the complaint. Section 430, Code Civ. Proc.; Los Angeles Ry. Co. v. Davis et al., 146 Cal. 179, 79 Pac. 865, 106 Am. St. Rep. 20.

The cases referred to by the attorney for defendant (Wood v. Ball, 190 N. Y. 217, 83 N. E. 21, and American De Forrest Wireless Telegraph Co. v. Superior Court, 153 Cal. 533, 96 Pac. 15) give no support whatever to the claim of defendant's attorney as to the merits of his demurrer. The New York case, when read in its entirety, is distinctly against him; and the case in 153 Cal. 533, 96 Pac. 15, is not in point as to the question presented by the demurrer.

The court therefore did not err in overruling defendant's demurrer, and the order vacating the judgment cannot be sustained upon any contention that might be made to the effect that the court erred in overruling such demurrer.

We are thus forced to look to the record to find facts sufficient to support a claim that the default and judgment were taken against defendant through his mistake, inadvertence, surprise, or excusable neglect. We find nothing in the record to support any such claim. When the attorney for defendant was served with notice of the overruling of the demurrer, he had notice that the time within which defendant could answer was running. The simple fact that he had been liberal and courteous in his treatment of counsel upon the other side did not justify him in ignoring the effect of the service of such notice. In failing to take any action towards either answering or getting more time to answer, he was guilty of inexcusable neglect.

Neither can he claim that the judgment was taken against his client through surprise in any legal sense. The very purpose of giving the notice of the overruling of the demurrer and the allowance of time to answer was to put defendant upon notice that default might be entered upon expiration of the time allowed. Nothing was said or done to cause defendant or its attorney to believe that if no answer was filed judgment would not be taken in due course.

Quite as good, if not a better, showing for vacating a judgment entered upon a default was made both in Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863, and in Bailey v. Taaffe, 29 Cal. 423, and yet the Supreme Court was in each case constrained to hold that the trial court had erred in granting the relief, and reversed the order. See, also, People v. O'Connell, 23 Cal. 282.

The order is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

Additional Opinion.

PER CURIAM. As a matter of justice to the attorneys who represented the defendant and respondent before this court in the above entitled matter, it is proper to say, as an addition to the facts stated in the opinion filed in said matter March 9, 1912, that said attorneys did not represent said defendant in the proceedings in the court below that resulted in the entry of default and judgment against said defendant.

(18 Cal. App. 493)

BURKI v. PLEASANTON SCHOOL DIST. OF ALAMEDA COUNTY et al.

(Civ. 892.)

(District Court of Appeal, First District, California. March 11, 1912.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 81*)—CONTRACTS—CONDITION PRECEDENT—BONDS—STATUTORY PROVISIONS.

Under St. 1871–72, p. 925, which provides that a board authorized to erect any public building shall advertise for plans and specifications, and state therein the amount authorized by law to be expended in the erection of the building and the premium to be awarded to the contractor whose plans may be adopted, and that on adoption of plans the board, before any award of premium, must require the architect to execute a bond, to be approved by it, and conditioned that within 60 days from its date he will, upon presentation to him, enter into a contract containing the provisions required by such board, the execution of such bond is a condition precedent to the completion of the contract and the award of a premium.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 195, 196, 340; Dec. Dig. § 81.*]

2. PLEADING (§ 193*) — DEMURRER — CONDITION PRECEDENT.

In an action upon an alleged building contract, plaintiff's failure to give the statutory bond required as a condition precedent thereto can be taken advantage of by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428–435, 437–443; Dec. Dig. § 193.*]

3. PLEADING (§ 225*)—DEMURRER—RIGHT TO AMEND.

Where it is apparent upon the face of the complaint that the facts do not and cannot be made to state a cause of action, plaintiff, on the sustaining of demurrer thereto, may be denied leave to amend.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–583; Dec. Dig. § 225.*]

Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by F. W. Burki against the Pleasanton School District of Alameda County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Langan & Mendenhall and Emil Pohli, for appellant. Wm. H. Donohue and Walter J. Burpee, for respondents.

LENNON, P. J. This is an action upon an alleged contract which it is claimed the defendants made with the plaintiff for personal services as a supervising architect, and for plans and specifications of a proposed new school building in Pleasanton school district. A general demurrer, grounded upon the insufficiency of the facts stated in plaintiff's complaint to constitute a cause of action, was sustained, without leave to amend. Thereupon judgment was ordered and entered, denying plaintiff any relief and awarding costs to the defendants, from which the plaintiff has appealed upon the judgment roll.

The complaint, in substance and effect, alleges that the defendants, as the board of school trustees for Pleasanton school district, in accordance with the requirements of an act to regulate the erection of public buildings and structures (Stats. 1871–72, p. 925), invited architects generally to submit plans and specifications for the erection of a proposed new school building. In the published notice inviting the competition of architects, it was specified that the defendants, as the board of trustees, were authorized to expend $26,000 in the construction of the building, and that a premium of 3½ per cent. of the contract price would be allowed to the successful architect upon the adoption of his plans and specifications, and that the architect whose plans and specifications were finally adopted would be required to superintend the erection of the building, for which he would be paid, in addition to the original premium, a fee of 1½ per cent. of the contract price. It was further specified in said notice "that prior to awarding any premium for said plans and specifications said board would require said architect to give a good and sufficient bond * * * in the penal sum of five thousand dollars, to be approved by the board of trustees, and conditioned that within sixty days from the date of said bond the said architect will, on presentation to him, enter into a contract containing such conditions and provisions as may be required of him by such board of trustees."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Within the time required by the notice, plaintiff prepared and submitted to the defendants plans and specifications for the proposed building, and thereafter, it is alleged, the defendants accepted and adopted the same, and employed the plaintiff as the architect of the proposed building, and directed that he give a bond in the sum of $5,000 in accordance with the requirements of its published notice and the act hereinbefore referred to.

Subsequently, on September 14, 1909, the plaintiff prepared and delivered to the defendants a bond in the specified amount, dated August 19, 1909, and conditioned, among other things, that, within 60 days from the date of the bond, the plaintiff would, "upon presentation to him, enter into a contract containing such provisions and conditions as may be required by the school district and board of trustees thereof," etc. The defendants refused to approve this bond, for the reason, affirmatively alleged in the complaint, that they "had received some information that the proposed school building could not be constructed for $26,000, and that said building would be unsafe and unfit for occupancy as a school building if built according to the plaintiff's plans and specifications, and for the further reason that said bond was dated August 19, 1909, instead of the day of delivery." Immediately following the rejection of the bond, the defendants, by resolution, rescinded the previous action of the board in the matter, and advertised for other plans and specifications, and notified plaintiff of its action.

It is not alleged in the complaint that the defendants presented any contract to the plaintiff for execution, or that his plans and specifications were ever used by the defendants, or that the proposed building was ever erected.

In support of the judgment, the defendants rely mainly upon the contention that the plaintiff's complaint does not and cannot be made to state a cause of action, because it affirmatively appears from the facts pleaded that the contract sued on was never legally consummated, in this: That the bond furnished by the plaintiff was not conditioned and approved as required by the law and the notice calling for the submission of plans.

The act of April, 1872, under which the proceedings for the erection of a school building were inaugurated, provides in effect that when, by any statute of this state, power is given to any board to erect any public building it shall be the duty of said board to advertise for plans and specifications, and to state in the advertisement the amount authorized by law to be expended in the erection of the building and the premium awarded to the contractor whose plans and specifications may be adopted; and that "whenever the plans and specifications of any architect shall be adopted" the board must, "before any premium shall be awarded for such plans and specifications, require such architect to execute and file with the * * * board of trustees * * * a good and sufficient bond * * * in the penal sum of five thousand dollars, to be approved by the * * * board of trustees * * * and conditioned that, within sixty days from the date of said bond, he will, upon presentment to him, enter into a contract containing such provisions and conditions as may be required by such board of trustees, * * * and also conditioned that he will give such further bond to secure the faithful performance of such contract * * * in the event that such board should within said sixty days" require said architect to enter into a contract to erect the building at the price specified in the published notice. The concluding clause of the act provides that all contracts entered into in violation of the act shall be null and void.

It is the plaintiff's theory that the allegations of his complaint show a completed contract, not only for his plans and specifications, but for his individual services as well, as superintendent of the proposed building; and, having, as he claims, performed all the conditions required of him by the law and the published notice of the defendants, they must respond in damages for the alleged breach of the contract.

[1] Plaintiff construes the statute in question to mean that the approval of the board is not a condition precedent to the payment of the premium to the architect whose plans have been adopted, and that the only purpose of the bond is to insure the proper performance of any subsequent contract which the board may make with the architect. In order to sustain this construction of the statute, it would be necessary to first read out of it the clause which provides that "whenever the plans and specifications of any architect shall be adopted such board of trustees * * * shall, before any premium shall be awarded for such plans and specifications, require such architect" to execute a bond, to be approved by the board,

and conditioned that "within 60 days from the date of said bond, he will, upon presentment to him, enter into a contract," etc. A fair construction of the act in question compels the conclusion, it seems to us, that it empowers the defendants to accept the plaintiff's plans and specifications only upon the condition of the execution and approval of the required bond; and that therefore two things must happen before a contract with an architect can be legally consummated and a premium awarded, namely, delivery and adoption of the plans and specifications, and the execution and approval of the required bond. Tilley v. County of Cook, 103 U. S. 155, 26 L. Ed. 374; Mann et al. v. Town of Rochester, 29 Ind. App. 12, 63 N. E. 874; Walsh v. St. Louis Exposition, 101 Mo. 534, 14 S. W. 722; Smithmeyer v. United States, 147 U. S. 342, 13 Sup. Ct. 321, 37 L. Ed. 196.

In the case at bar, but one of the enumerated essentials of the statutory contract is pleaded as having been performed, namely, the presentment and adoption of the plans and specifications. The other essential —the giving and approval of the required bond—it affirmatively appears from the allegations of the plaintiff's complaint, has never been complied with. True a bond was presented for the approval of the defendants; but, as appears from the complaint, the condition of the bond in the material matter of time was radically different from the condition prescribed by the statute; and, if, as we think, the adoption of plans and specifications was, in obedience to the requirements of the statute, conditional upon the execution and approval of the required bond, then, in the absence of such a bond, duly approved, no valid contract could be entered into by defendants with the author of such plans and specifications. If we are correct in this conclusion, it follows that the complaint does not and cannot be made to state a cause of action.

[2, 3] It was suggested in the plaintiff's brief that, even if it be conceded that plaintiff failed to give the statutory bond, this was a matter which should be pleaded as a defense; and that it cannot be taken advantage of by demurrer. This contention is untenable. The plaintiff undertook to plead all of the circumstances of the transaction, apparently in anticipation of any defense which might be available to the defendant. He is bound by the facts pleaded in his complaint; and, as it is apparent upon the face of the complaint that those facts do not and cannot be made to state a cause of action upon a completed and valid contract, the demurrer was correctly sustained, without leave to amend.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; HALL, J.

(18 Cal. App. 467)

CREDIT CLEARANCE BUREAU v. WEARY & ALFORD CO. (Civ. 949.)

(District Court of Appeal, First District, California. March 7, 1912.)

Appeal and Error (§ 612*)—Transcript—Authentication—Sufficiency.

An appeal from an order vacating a default judgment, being one from an order heard and determined on affidavits, can be perfected only under the method prescribed by Code Civ. Proc. §§ 953a, 953b, 953c, or that by Supreme Court rule 29 (144 Cal. lii, 78 Pac. xii), both of which methods require the trial judge to examine and authenticate the record, and so an appeal, not perfected in that manner, but merely upon a transcript furnished by the clerk, cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2701; Dec. Dig. § 612.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by the Credit Clearance Bureau against the Weary & Alford Company. From an order vacating and setting aside a default judgment, plaintiff appeals. Order affirmed.

L. S. Melsted, for appellant. Stratton & Kaufman, for respondent.

KERRIGAN, J. This is an appeal from an order vacating and setting aside a default judgment.

The defendant objects to the hearing of the appeal, on the ground that no properly authenticated record has been filed in this court.

The clerk of the trial court prepared what purports to be a transcript for the use of this court upon the appeal, certifying that it contained a full, true, and correct copy of the judgment roll, notice of motion to set aside the default, and affidavits used on the hearing. It has been held, however, in several cases that this authentication is insufficient. Here the appeal is from an order heard and determined upon affidavits. To perfect such an appeal, it was necessary for the appellant to adopt either the method prescribed by sections 953a, 953b, and 953c of the Code of Civil Procedure, or that prescribed by rule 29 of the Supreme Court (144 Cal. lii, 78 Pac. xii). If either of such methods had been pursued, the record would have been examined and authenticated by the trial judge—the person who knew what papers were used upon the hearing of the motion. As was said in Walsh v. Hutchings, 60 Cal. 228, "it is not for the clerk to determine what papers or evidence the court acted upon."

The plaintiff having availed itself of neither method to perfect its appeal, it results that the appeal cannot be considered, and that we must affirm the order. Knox v. Schrag, 122 Pac. 969, decided February 12, 1912; Harrison v. Cousins, 16 Cal. App. 515, 117 Pac. 564; Hibernia Sav. & Loan Society

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. Doran, 118 Pac. 526; Hershey v. Bristol, 121 Pac. 371.

The order is affirmed.

We concur: LENNON, P. J.; HALL, J.

(18 Cal. App. 501)

McPIKE v. MEHRMANN et al. (Civ. 1,002.)

(District Court of Appeal, First District, California. March 11, 1912.)

1. Judgment (§ 712*)—Community Property—Proceedings by Surviving Spouse—Decree—Conclusiveness.

A decree, adjudging that property was community property and vested in the surviving husband, rendered in a proceeding instituted by him under Code Civ. Proc. § 1723, without personal notice to the executor of the deceased wife, and without his appearance, merely determines that, if the husband has any asserted right or title accruing on the death of the wife, the asserted right or title has accrued, and does not conclusively adjudge the ownership of the property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1233; Dec. Dig. § 712.*]

2. Judgment (§ 743*)—Community Property—Proceedings by Surviving Spouse—Decree—Conclusiveness.

A proceeding under Code Civ. Proc. § 1723, authorizing proceedings for the disposition of community property, is intended only as a proceeding to determine that a certain person is dead, on whose death the asserted right of another depends, and not one to have the validity of the right conclusively adjudicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1253, 1275–1277, 1284; Dec. Dig. § 743.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by H. H. Mc Pike against Allen Small, executor of Olive Coulson, deceased, and others, in which H. B. Mehrmann, administrator, was substituted in place of Allen Small, deceased. From a judgment for defendant, Mehrmann, plaintiff and certain defendants appeal. Affirmed.

John T. Thornton, for appellant McPike. H. W. Bradley, for appellants McMann and Donlon. Robert Edgar and Edward C. Harrison, for respondent Mehrmann.

KERRIGAN, J. This is an appeal by plaintiff from a judgment against him, and from an order denying his motion for a new trial, in an action for the partition of certain real property.

January 20, 1906, Olive Coulson died, leaving a last will and testament, which was duly admitted to probate, and Allen Small qualified as executor thereof. At the time of her death, the three parcels of real property, the subject of this controversy, stood of record in her name, and she left as her surviving spouse Robert Coulson. September 26, 1906, Robert Coulson filed a petition under the provisions of section 1723, Code of Civil Procedure; and after 10 days' notice by publication in a daily newspaper a hearing was had, and the court made its decree, adjudging that the property here involved was community property, and vested absolutely in Robert Coulson, as the surviving spouse of Olive Coulson, upon her death. The executor of the estate of Olive Coulson, deceased, although in possession of the property at the time, received no personal notice of said proceedings, and consequently did not appear therein.

September 6, 1906, Robert Coulson made and executed a deed to an undivided one-third of said real property to the plaintiff herein. Subsequently Robert Coulson died, leaving a will, and Frank McMann was appointed executor of his estate. November 8, 1906, this action was commenced against the estate of Olive Coulson and against the executor and devisees under the will of Robert Coulson; the plaintiff alleging the ownership of the property to be exclusively in himself and in the estate of Robert Coulson as tenants in common, and praying for a partition thereof.

All the defendants, except the executor of the estate of Olive Coulson, deceased, filed answers, admitting the allegations of the complaint. Said executor filed an answer, denying that the plaintiff was the owner or holder of any estate in said real property, and setting up that the estate of Olive Coulson, deceased, was the owner in fee simple and in possession thereof.

During the pendency of the cause, Allen Small, the said executor, died, and H. B. Mehrmann, being appointed administrator of the estate of Olive Coulson, deceased, was substituted in his place as defendant.

At the trial, the executor of the estate of Olive Coulson, deceased, introduced evidence tending to show that she, at the time of her death and prior thereto, was the owner in fee simple absolute of all of the real property described in the complaint. Plaintiff, on the other hand, depended entirely on the decree in the proceedings instituted by Robert Coulson, above referred to. The court by its decree adjudged that the real property in question belonged to the said estate of Olive Coulson, deceased, in fee simple, and quieted the title of said estate against the plaintiff and against the codefendants of said executor.

Section 1723, Code of Civil Procedure, provides that if any person shall die who was the owner of a life estate, or if such person, at the time of his death, was one of the spouses owning a homestead, or if such person was a married woman, who, at the time of her death, was the owner of community property which passed upon her death to a surviving husband, any person interested in the property may file a petition, setting forth the facts, "and thereupon, after such notice by publication or otherwise as the court may order, the court shall hear such petition and the evidence offered in support thereof; and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] The question in controversy here was recently squarely decided against the position of the appellants in the case of King v. Pauly, 159 Cal. 549, 115 Pac. 210. There, at the time of the death of one Cornelia Chase, there stood of record in her name certain real property which had been acquired while she was the wife of one Levi Chase. After her death, pursuant to proceedings instituted by said Chase under the terms of said section 1723, Code of Civil Procedure, the property was held to be community property, and consequently to vest absolutely in him as the surviving spouse of Cornelia. Subsequently the plaintiff, who derived title from said Cornelia, claiming that said property was her separate property, commenced an action to quiet his (said plaintiff's) title thereto. After declaring that, if all the persons interested in the estate of Cornelia Chase had actually appeared in the proceeding, or were regularly brought within the jurisdiction of the court by service of process, the proceeding would be treated as an ordinary action in equity, and the superior court would have jurisdiction to determine the title to the property, the court held (Mr. Justice Angelotti writing the opinion) that, as "neither any legal representative of the deceased, Cornelia Chase, nor all of her heirs, were shown to have appeared or to have been served with process," the court "was bound to consider the decree solely as one given in the special proceeding prescribed by section 1723 of the Code of Civil Procedure," and to give it such effect as a proper construction of that section warranted. So construing it, the court decided that the proceeding was only intended as a means "to have it determined that a certain person is dead, upon whose death the asserted right of another person depends, and not one to have the validity of the right conclusively adjudicated." Quoting from Hansen v. Union Savings Bank, 148 Cal. 160, 82 Pac. 769, the court further said: "The decree in the proceeding merely determines that, if the party petitioning has any asserted right or title accruing on the death of another person, such asserted right or title has accrued. * * * It is often convenient and important to those interested in or examining a title to have some record evidence of the death of a life tenant, a homestead claimant, or other person upon whose death some right or estate vests."

On the authority of that case and the cases there cited, the judgment and order appealed from are affirmed.

We concur: LENNON, P. J.; HALL, J.

(18 Cal. App. 477)

E. MARTIN & CO. v. BROSNAN. (Civ. 947.)

(District Court of Appeal, First District, California. March 8, 1912.)

1. TRIAL (§ 91*)—EVIDENCE — MOTIONS TO STRIKE—NECESSITY OF OBJECTIONS.

Improper testimony of a witness will not be stricken, where no valid objection was interposed during examination.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242–244, 252; Dec. Dig. § 91.*]

2. TRIAL (§ 105*)—RECEPTION OF EVIDENCE—EXCLUSION.

Where a question plainly calls for hearsay testimony, the court may, on its own motion, exclude the answer; no objection having been made by the adverse party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260–266; Dec. Dig. § 105.*]

3. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTIONS—PRESENTATION OF CLAIMS—SUFFICIENCY.

In an action against an administratrix for merchandise sold to her intestate, the admission of plaintiff's claim against the estate is not erroneous, because the claim does not, on its face, show that it was not barred by the statute of limitations.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. § 221.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—ACTIONS—PREVIOUS REJECTION OF CLAIMS—SUFFICIENCY.

In an action against an administratrix for merchandise sold to her intestate, where plaintiff's claim against the estate was generally rejected, and not for any special reason, it is admissible in evidence, despite formal defects, which are presumed to have been waived.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 901–903½, 1858, 1861–1863, 1865, 1866, 1871–1874, 1876; Dec. Dig. § 221.*]

5. EXECUTORS AND ADMINISTRATORS (§ 449*)—ACTIONS — PLEADING — MATTERS TO BE PROVED.

Where the answer of an administratrix admitted the presentation and rejection of plaintiff's claim, evidence thereof is not required; it being sufficient for the plaintiff to show that the action was founded on the claim which was presented for allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1850–1854; Dec. Dig. § 449.*]

6. NOVATION (§ 3*)—REQUISITES—CONSENT OF CREDITOR.

Under Civ. Code, § 1531, subd. 2, providing that novation is made by the substitution of a new debtor in place of the old one, with intent to release the latter, the intent of the creditor to release the original debtor is essential; and so, though a wife assumed the payment of her husband's debts, and the creditor applied payments made by her, no novation resulted, unless the creditor, in consideration of her agreement, agreed or intended to release the husband.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 3; Dec. Dig. § 3.*]

7. Appeal and Error (§ 1046*)—Harmless Error—Remarks of Court.

In an action on a debt, where the defense was that there had been a novation, a remark of the court that a feature of the case indicated that there was no novation was not prejudicial error, where he immediately corrected the remark, and cautioned the jury not to be influenced by it nor by his denial of defendant's motion for nonsuit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4128–4131, 4134; Dec. Dig. § 1046.*]

8. Trial (§ 260*)—Instructions—Refusal of Instructions.

The refusal of requested instructions was not error, where substantially covered by those given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by E. Martin & Co. against Mary Brosnan, as administratrix of Thomas Brosnan, deceased. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

F. J. Castelhun, for appellant. Rothchild, Golden & Rothchild, for respondent.

LENNON, P. J. This action was brought to recover the sum of $908 upon a claim against the estate of Thomas Brosnan, deceased, for merchandise sold to him during his lifetime by plaintiff. The trial was had with a jury, and resulted in a verdict and judgment for the plaintiff in the sum of $618. From the judgment and an order denying a new trial, an appeal has been taken upon the judgment roll and a bill of exceptions.

[1] It was not error for the trial court to refuse to strike out all of the testimony of the defendant, Mary Brosnan, who was called as a witness for the plaintiff. The motion to strike out was not made until the witness had concluded her testimony and left the witness stand. Ample opportunity was afforded counsel for the defendant, during the course of an extended direct and cross-examination of this witness, to object to her testimony, had he so desired; but he failed to avail himself of the opportunity. He will not now be heard to complain that the testimony of the witness was objectionable; and, as a motion to strike out evidence must be based upon a valid objection previously stated, the motion in the present case was properly denied. People v. Long, 43 Cal. 444; People v. Rolfe, 61 Cal. 542; People v. Samario, 84 Cal. 484, 24 Pac. 283; In re Wax, 106 Cal. 347, 39 Pac. 624.

[2] The trial court of its own motion refused to permit a witness for the plaintiff to reply to a question upon cross-examination which plainly called for hearsay testimony. The point is now made that, in the absence of an objection from plaintiff's counsel, it was error to exclude the answer. Ordinarily it is the better and safer practice for the trial court to defer action upon the admission or rejection of evidence until a proper objection is made by the party interested in having the evidence excluded; but the trial court nevertheless is not compelled to hear and determine a cause, either in whole or in part, upon improper evidence; and, in the exercise of its undoubted right to control and regulate the conduct of the trial, it may of its own motion rightfully refuse to receive evidence which is palpably incompetent. Parker v. Smith, 4 Cal. 105; People v. Wallace, 89 Cal. 166, 26 Pac. 650; Davey v. Southern Pac. Co., 116 Cal. 330, 48 Pac. 117.

[3, 4] There was no error in admitting in evidence, over the objection of the defendant, the plaintiff's claim against the estate of the decedent. It was not necessary that the claim should show upon its face that it was not barred by the statute of limitations; and, in so far as the objection was directed to the formal sufficiency of the claim, it will suffice to say that, inasmuch as the claim, in the first instance, was rejected generally, and not for any special reason, its formal defects, if any, must be deemed to have been waived. Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Aiken v. Coolidge, 12 Or. 244, 6 Pac. 713.

[5] Moreover, as the presentation and rejection of the claim were affirmatively admitted by the defendant's answer, evidence thereof was not required; and it was sufficient for the plaintiff to show that the action was founded upon the same claim which was presented to the defendant for allowance. McGowan v. McDonald, 111 Cal. 57, 43 Pac. 418, 52 Am. St. Rep. 149; 1 Ross' Probate Law, 534.

[6] It is the contention of the defendant that the verdict of the jury is not only not justified by the evidence, but that it is contrary thereto. This contention is based upon the claim that the evidence shows that the defendant, pursuant to an agreement with the plaintiff, assumed the indebtedness of her husband; and that she thereafter made payments to the plaintiff which were applied on said indebtedness. From this it is argued that the defendant was substituted in the place and stead of the original debtor, with the intent of releasing the latter, and that thereby a contract of novation was created.

Assuming that the evidence shows all that the defendant claims in this behalf, still it does not follow, as a matter of law, that the acts and agreements of the parties amounted to a novation, as defined by subdivision 2 of section 1531 of the Civil Code. It may be conceded that the evidence does show that the defendant promised to pay the debt of her deceased husband, and that certain payments which she made were applied by plaintiff to that indebtedness; but it must also be conceded that the evidence fails to show that the plaintiff, in consideration thereof, agreed or intended to release the estate of the decedent. The intent of the creditor to release the obligation of the original debtor is necessary to the creation of a contract of novation; and if it be lacking, as it apparently was in the present case, novation cannot be justly claimed. Civ. Code, subd. 2, § 1531; Pimental v. Marques, 109 Cal. 406, 42 Pac. 159; Dellapiazza v. Foley, 112 Cal. 380, 44 Pac. 727; Carpy v. Dowdell, 131 Cal. 495, 63 Pac. 778.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In our opinion, the evidence sufficiently supports the verdict; and this conclusion necessarily disposes of the defendant's further contention that the trial court erred in denying her motion for nonsuit. Obviously, if the evidence was sufficient to warrant the verdict for the plaintiff, it would have been error to grant a nonsuit.

[7] Upon the motion for a nonsuit being denied, the defendant rested, and the case went to the jury solely upon the testimony offered and received upon the behalf of the plaintiff. Immediately following the denial of the defendant's motion for a nonsuit, the trial court expressly stated to the jury that the ruling on that motion was not to be considered as an expression of opinion by the court as to the facts of the case. In addition, however, and, no doubt, inadvertently, the trial court did say, during the course of its remarks to the jury, that a certain feature of the case "would indicate that there was no novation." Clearly this was expressing the opinion of the court as to the effect of the evidence; and if it had been permitted to stand without correction there would have been no escape from the conclusion that it was tantamount to an instruction upon a question of fact. Counsel for the defendant, however, obviated this error by calling attention to the fact that the province of the jury had been invaded; whereupon the court promptly withdrew this statement, and clearly cautioned the jury not to be influenced in their deliberations by anything that the court might have said with reference to the denial of the motion for nonsuit. Presumably the jury heeded the caution, and consequently the incident cannot now be successfully assigned as prejudicial error.

It is claimed, however, that the trial court repeated the error of charging upon matters of fact in a subsequent instruction. That instruction in effect told the jury that if they found for the plaintiff the verdict might be for the sum sued for, or any less sum justified by the evidence; and, while the language employed was ambiguous and barely expressed the idea which the court endeavored to convey to the jury, nevertheless a liberal interpretation of the instruction does not compel the conclusion that the trial court expressed its opinion unequivocally or at all as to the weight and effect of the evidence.

[8] It was not disputed that the deceased, at the time of his death, was justly indebted to the plaintiff, and it was not claimed that the indebtedness had ever been fully paid. Under the defendant's theory of the case, novation and the application of payments were apparently the chief matters in dispute, and the court was requested to charge the jury upon the law relating to these subjects. The refusal of the court, however, to charge the jury in the exact language of the requested instructions was without prejudice to the defendant. While the court in its charge did not elaborate certain points of the case as fully as the defendant desired, still, as a whole, it fairly covered every phase of the case embodied in the requested instructions, and conformed generally to the theory upon which the defendant based her defense to the action. In so far as the requested instructions were correct in their statement of the law of the case, they were in substance incorporated in and made a part of the charge of the court; and that was all that the defendant was entitled to.

The remaining points presented in support of the appeal do not merit discussion; and it will suffice to say that we are satisfied from a perusal of the entire record that the trial of the cause was free from prejudicial error, and resulted in a judgment, supported by the evidence, which does substantial justice to the parties.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

18 Cal. App. 508

KASCH v. LABOR TEMPLE ASS'N.

(Civ. 924.)

(District Court of Appeal, First District, California. March 12, 1912.)

1. Sales (§ 156*)—Delivery—Acts Constituting.

On the sale of a laundry business, consisting of two routes, including the good will, where the driver of one of the routes was employed by the purchaser and took charge of that route for him; and the driver and purchaser went over the other route for two weeks and called on the customers, there was a sufficient delivery of the business, although a great many of the customers refused to patronize the purchaser.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 367–371; Dec. Dig. § 156.*]

2. Sales (§ 124*)—Rescission—Conditions Precedent — Restoration of Former Status.

Where, on the sale of a laundry business, the seller retired from business, and the purchaser took charge of the business and advertised that he had purchased it, but a good many of the customers refused to patronize him, and as a result the amount of business done materially decreased, the purchaser is not entitled to rescind for false representations as to the value of the good will, it being impossible to restore the status quo; and hence, in an action for the price, it is proper to allow a recovery with a set-off of the purchaser's damages from the false representations.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 303–312; Dec. Dig. § 124.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by J. A. Kasch against the Labor Temple Association. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Frank H. Benson, for appellant. Rogers, Bloomingdale & Free, for respondent.

HALL, J. This is an appeal from a judgment in favor of plaintiff and an order denying defendant's motion for a new trial.

Plaintiff and one Bloemer were copartners, and as such conducted a laundry business under the name of the Standard Electric Laundry, and, as is alleged in the complaint, on the 27th day of February, 1909, "entered into a contract in writing with the defendant, Labor Temple Association, whereby they agreed to sell to said defendant their aforesaid laundry business and the good will thereof, also two horses, four wagons, two sets of harness and two storm robes, for a consideration of six hundred (600) dollars, to be paid as follows, to wit: One hundred (100) dollars upon the signing of said agreement, and five hundred (500) dollars upon the delivery of said business, such delivery and payment to be made within two weeks after the making and execution of said contract as aforesaid." Plaintiff alleged full compliance with the conditions of the contract by the vendors, an assignment by Bloemer to plaintiff, and refusal to pay the balance of $500 by defendant.

By way of defense, defendant pleaded that the execution of said agreement was procured by certain false and fraudulent representations as to the amount of business being done by the vendors, made by plaintiff, and a rescission and offer in writing, made March 25, 1909, to return all property received under the agreement, conditioned on plaintiff's paying to defendant the $100 paid on the execution of the contract of sale, and also denied performance by the vendors, save as to the delivery of the chattels mentioned.

The court, among other things, found that the contract was procured through the false and fraudulent representations of plaintiff, as alleged in the answer; that immediately upon the execution of said contract plaintiff and his assignor retired from the laundry business, and within the time limited by the contract delivered to the defendant the horses, wagons, harnesses, and robes mentioned in the contract, and the business actually being done by the Standard Electric Laundry; that defendant has continued to carry on said business, using said personal property in connection therewith, but has disposed of one of the horses mentioned in said contract and delivered to defendant; that defendant offered to rescind said contract and to return said personal property and business, as alleged in the answer, but that defendant, when said offer was made, "was not, and is not now, able to restore said plaintiff and his assignor, or either of them, to the situation they were in with respect to said business at the time said contract was made and said property and business delivered to the defendant, as aforesaid, nor to place said plaintiff and his assignor, or either of them, in statu quo." The court further found that defendant had been damaged by the false representations and failure of plaintiff in the sum of $100, and therefore deducted this amount from the balance due under the contract, and gave judgment for plaintiff for the balance, to wit, $400.

The first point urged by appellant seems to be that the court erred in finding that the vendors delivered the business actually being done by them to defendant. The finding as made is supported by the evidence.

[1] The business of the vendors consisted of two routes. The driver of one of these routes was at once employed by defendant, and took charge of that route, and collected the work therefrom. Plaintiff went with the same driver for two weeks over the other route, and, according to his testimony, called on all of the customers on that route, save two, who by other evidence were shown to have moved into the other route. It is true the evidence of plaintiff shows that a goodly portion of the customers refused to patronize defendant, and in that sense he was unable to deliver such business. But the delivery which he did make was, we think, a substantial compliance with the contract, so far as delivery of the business was concerned.

[2] The court, however, found that the contract was procured through false representations as to the business being done by the vendors; and this finding must be accepted as correct. The representation was to the effect that the business of the vendors amounted to between $100 and $125 per week; and the court found that it was substantially less than $100 per week. This, of course, justified a rescission by defendant, if promptly made on discovery of the fraud, unless the situation of the parties had been so changed through the execution of the contract that the status quo could not be restored. The court found that at the time of the attempted rescission and at the trial defendant was not able to restore plaintiff and his assignor to the situation they were in

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with respect to said business when the business was delivered to defendant. It is urged that the evidence does not support this finding.

We think it does. The vendors immediately retired from the laundry business, as the court found that they had agreed to do. Defendant at once advertised that it had purchased the business of the vendors. A goodly portion of the customers refused to patronize defendant, and doubtless transferred their patronage to other laundries. The evidence shows that the business done by defendant on the routes transferred by plaintiff to defendant decreased 20 per cent. in the second week from the amount done in the first week. It is clear that the defendant could not return to the vendors the business that they had in fact delivered to defendant. It is highly probable that many of the customers would refuse to go back to the vendors, if they should return to the business, but would insist on giving their patronage to defendant. The status quo could not be restored.

The situation brings the case within the rule laid down in the ably considered case of Snow v. Allen, 144 Mass. 546, 11 N. E. 764, 59 Am. Rep. 119, where it is said: "A civil proceeding is not intended to inflict punishment upon any one, still less a punishment which shall inure to the advantage of another, who is sufficiently protected when he has received full indemnity for all the injury he has suffered."

Brockhaus v. Schilling, 52 Mo. App. 75, is a case which in its essential features is very similar to the case at bar. It was a case where a saloon business had been sold. The buyer brought an action to rescind, alleging fraud. The court held that because the seller could not be restored to his original position the action would not lie; that no right of rescission exists "where there has been such a change of circumstances, through lapse of time or otherwise, as disables the purchaser from putting the seller in statu quo."

Where, upon the sale of a business, it becomes impossible, as a result of the execution of the contract, to place the parties in statu quo, there can be no rescission of the contract. Bailey v. Fox, 78 Cal. 389, 20 Pac. 868.

In the case at bar, there was evidence to the effect that the chattels sold to and still used by defendant were of the value of $300 and more. This left but $300 as the supposed value of the good will of the business sold. Because of the misrepresentations as to the amount of business done, the court allowed damages to defendant in the sum of $100. The defendant is still in full possession of the chattels (save one horse, which it sold), and carrying on the business transferred to it, and has at all times been in receipt of the profits therefrom, and has never made any offer to account for such profits.

It was held in Marten v. Burns Wine Co., 99 Cal. 355, 33 Pac. 1107, that the failure to offer to restore a small amount of the dividends received from stock, which were the subject of a fraudulent sale, was fatal to the right to rescind.

On the whole case the judgment rendered by the learned trial judge seems to do justice, and we can see no reason for disturbing the action of the trial court.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

18 Cal. App. 517

KEARNEY v. PALMER et al. (Civ. 1,016.)

(District Court of Appeal, First District, California. March 15, 1912. Rehearing Denied by Supreme Court May 14, 1912.)

1. Appeal and Error (§ 957*)—Review—Matters of Discretion — Opening Default.

The granting or denial of a motion to open a default, being largely within the discretion of the trial court, his action will not be reversed, unless such discretion is abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

2. Judgment (§ 138*)—By Default—Opening—Grounds.

In an action to quiet title, where the failure of defendants' substituted attorneys to answer the complaint after a demurrer was overruled was due either to their own failure to examine the proper records and ascertain what disposition had been made of the demurrer, or to the misstatements of their clients that it had not been disposed of, and where it was not claimed that they had been misled by plaintiff or his attorney, the court did not abuse its discretion in denying a motion to open the default, especially where, although defendants in their proposed answer attacked plaintiff's title, they did not allege that they had any title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 249–251, 254; Dec. Dig. § 138.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Hattie M. Kearney against John Palmer and others, in which H. B. Mehrman, administrator, was substituted in place of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

John Palmer, deceased. From a judgment for plaintiff by default, defendants appeal. Affirmed.

N. Soderberg and P. M. Bruner, for appellants. E. K. Taylor, for respondent.

HALL, J. This is an appeal from a judgment entered against the appellants upon their failure to answer to the complaint within the time allowed by the court upon overruling their demurrer to plaintiff's complaint.

The default of appellants was regularly entered on the 23d day of March, 1910. Subsequently appellants made a motion for an order to open said default, and to permit them to answer to the complaint, which motion was, after hearing by the court, denied, and subsequently the judgment appealed from was entered.

The only question presented for determination upon this appeal is as to whether or not the court erred in denying the motion to open the default. The grounds of the motion were that default had been entered against appellants through their excusable neglect and inadvertence. Section 473, Code Civ. Proc.

[1] At the outset, it is hardly necessary to say that the granting or denial of a motion to set aside a default is largely a matter of discretion to be exercised by the trial court; and that its action, either in granting or refusing the application, will only be reversed, where a clear case of abuse of such discretion is shown by the appellant. Garner v. Erlanger, 86 Cal. 60, 24 Pac. 805; Coleman v. Rankin, 37 Cal. 249; Williamson v. Cummings, 95 Cal. 652, 30 Pac. 762; Cass v. Hutton, 155 Cal. 103, 99 Pac. 493; Ingrim v. Epperson, 137 Cal. 370, 70 Pac. 165.

[2] While the present appeal presents a case that appears to be near the border line, we are unable to say, after an examination of the entire record before us, that the trial court abused its discretion in denying appellants' motion.

The complaint is in the usual form for an action to quiet title. Appellants, by their attorney, Hiram Luttrell, filed a general demurrer to the complaint January 22, 1910, which was overruled by the court February 11, 1910, and 14 days allowed to appellants in which to answer to the complaint. Notice of this order was, in open court, waived by the attorney for appellants. The time to answer expired February 25, 1910.

Although Hiram Luttrell was the attorney of record for appellants, one Mr. Murphy was also acting with him for appellants. Appellants became dissatisfied with their attorneys, and on March 18, 1910, demanded and received from them all papers delivered to said attorneys in connection with said suit, and discharged said attorneys, and on the following day, March 19th, obtained from Mr. Luttrell a substitution of attorneys, signed in blank, which had been prepared by the present attorneys of appellants, and was certainly returned to them not later than March 21st. On this day Mr. Soderberg, one of the present attorneys for appellants, examined the files of the court in this action, and, of course, discovered that a demurrer had been filed. He made no other examination to discover what action, if any, had been taken upon the demurrer, but, as stated in his affidavit, "relied upon the statement of my clients that the demurrer was undisposed of." In this connection, it should be stated that there is in none of the affidavits any other reference to any such statement as having been made by said clients. There is, it is true, in the affidavit made by appellants a statement that said Murphy and Luttrell had stated to them "that said demurrer * * * would not come up in court before the 25th day of March, 1910." The truth of this statement, however, was denied by the affidavit of Mr. Murphy; and we must assume that the court accepted the statement of Mr. Murphy as correct. Indeed, there are several statements in the joint affidavit made by the appellants that are quite certainly shown to be untrue, which justified the court in distrusting all their statements.

Mr. Soderberg's failure to discover that the demurrer had been disposed of was thus clearly the result of his having been misled by the false statement of appellants, who should not be allowed to complain of the result of their own false statement. On the other hand, if Mr. Soderberg did not rely on such statement, or if no such statement was made to him, it is clear that he did not take the usual and proper means to ascertain the fate of the demurrer. This could have been readily ascertained by examining the register of actions or the minutes of the court. In no case do the files of the court show the disposition of a demurrer until the judgment roll is made up, which is not until entry of judgment.

We are the more readily inclined to affirm the action of the trial court because of other matters that appear in the record.

Appellants, with their motion, filed their proposed answer. While in this answer they deny, upon information and belief, the title of plaintiff, they clearly show that none of the appellants has or claims any title at all, save that they allege that each is in possession of some undescribed portion of the premises in suit, the title to all of which they allege to be in the state of California. It is quite clear from their tendered answer that they are simply "squatters," with no title or claim of title to the premises sued for.

It is not claimed that plaintiff or her attorney in any way misled appellants or their attorneys. The claim of appellants is that they were misled by their own original attorneys. In all the essential matters concerning the dealings between appellants and such attorneys, the record presents at least a case of conflict of evidence. We must assume that the court resolved all conflicts in the evidence as to the facts against appellants.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(18 Cal. App. 521)

KEARNEY v. PIERSON. (Civ. 1,017.)

(District Court of Appeal, First District, California. March 15, 1912. Rehearing Denied by Supreme Court May 14, 1912.)

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Hattie M. Kearney against J. W. Pierson. From a judgment for plaintiff by default, defendant appeals. Affirmed.

N. Soderberg and P. M. Bruner, for appellant. E. K. Taylor, for respondent.

HALL, J. This case is in all respects similar to the case of Hattie M. Kearney v. John Palmer et al., No. 1,016, 123 Pac. 611, this day decided, save that the action is one in ejectment and not to quiet title; and for the same reasons the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(18 Cal. App. 522)

PATTON v. LOS ANGELES-PACIFIC CO. (Civ. 1,081.)

(District Court of Appeal, Second District, California. March 19, 1912. Rehearing Denied by Supreme Court May 17, 1912.)

1. Master and Servant (§ 183*)—Injury to Employé—Liability of Master—"Railroad Train."

Under the rule that a statute will be liberally construed to effect the purposes of its enactment, Civ. Code, § 1970, as amended in 1907 (Laws 1907, p. 119), providing that an employer shall be liable for injury to an employé from the neglect of a coemployé engaged in another department or employed upon another machine, railroad train, switch signal point, locomotive engine, or other appliance, applies to employés on interurban cars, and this would be true though "railroad train" were the only descriptive term used.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 373; Dec. Dig. § 183.*]

2. Statutes (§ 189*)—Construction.

In construing statutes, courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 427–435, 437–448; Dec. Dig. § 189.*]

3. Constitutional Law (§ 245*) — Class Legislation—Privileges—Equal Protection of Laws—Liability of Master.

Civ. Code, § 1970, as amended in 1907 (Laws 1907, p. 119), providing that an employer need not indemnify his employé for losses suffered from the ordinary risks of the business, or from the negligence of a coemployé engaged in the same general business, unless the negligence was committed in the performance of a duty owed by the employer to the employé, but that the employer shall be liable for injury to an employé from the negligence of a coemployé engaged in another department or employed upon a different appliance, does not make an arbitrary classification, nor does it give certain citizens privileges not granted to others or deny to any the equal protection of the laws in violation of the state or federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 702; Dec. Dig. § 245.*]

Appeal from Superior Court, Los Angeles County; Benjamin F. Bledsoe, Judge.

Action by C. C. Patton against the Los Angeles-Pacific Company. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Gurney E. Newlin (Roy V. Reppy, of counsel), for appellant. E. B. Drake and Jones & Drake, for respondent.

JAMES, J. Plaintiff on April 2, 1908, was employed as a motorman on a passenger car of defendant which was engaged in making runs between the cities of Los Angeles and Santa Monica. On the day mentioned, the car upon which plaintiff was at work was proceeding west and had been given the "right of way." The conductor of another car of the same employer, which car was proceeding in the opposite direction, had been instructed by the train dispatcher to await orders at Gayland station. He disregarded these orders of the dispatcher and caused his car to proceed easterly along the track, and as a result it collided with the car upon which plaintiff was employed and caused plaintiff grave physical injuries. This action was brought to recover the sum of $25,950 as damages. By the answer of defendant it was admitted that the accident occurred because of the negligence of the conductor who disregarded the orders of the dispatcher; issue being taken by the answer only on plaintiff's allegations as to the character and extent of the injuries suffered and the amount of damages sustained. The jury returned a verdict in favor of plaintiff in the sum of $12,500, upon which judgment was entered. Defendant presented a motion for a new trial, which was denied, and an appeal was then taken from that order and also from the judgment.

[1] In support of this appeal, the first contention of defendant is that the negligence by which the accident was caused was that of a fellow servant with plaintiff, the risk of which negligence plaintiff assumed when he entered the employment of the defendant. Under the condition of the statute (section 1970, Civ. Code), as it stood prior to the year 1907, there is little room for doubt but that the relation existing between a motorman and conductor working upon different cars of the same employer and on the same line of railroad would have been such as to pre-

vent a recovery by one from the employer for damages caused by the negligence of the other. But the Legislature in 1907 (Laws 1907, p. 119) enacted an amendment to the Civil Code section by the provisions of which the responsibility of the employer was enlarged. That section as it was then changed and as it has since provided reads, in part, as follows: "An employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless the negligence causing the injury was committed in the performance of a duty the employer owes by law to the employé; * * * provided, nevertheless, that the employer shall be liable for such injury when the same results from the wrongful act, neglect or default of * * * a coemployé engaged in another department of labor from that of the employé injured, or employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employé is injured is employed. * * *"

Plaintiff, under the facts of the case as they were admitted by defendant, was allowed to recover judgment because of the provision contained in the section quoted from, which imposes liability upon an employer for injuries suffered by the employé through the negligence of a fellow servant, where the negligent servant is "employed upon a machine, railroad train, switch signal point, locomotive engine, or other appliance than that upon which the employé is injured is employed." Defendant demurred to the complaint of plaintiff on the ground that by the facts alleged a cause of action was not stated, and, the ruling of the court having been against defendant on that point, the same contention is raised here. More particularly stated, the objection urged is that single cars, like those upon which the plaintiff and the negligent conductor were employed, are not to be considered as machines, railroad trains, or to be comprehended within the term "other appliances" designated by the statute. To our minds, influenced by the consideration that the statute must be given a fair and reasonable meaning and be liberally construed to effect the purposes of its enactment (Judd v. Letts, 158 Cal. 359, 111 Pac. 12), this contention of appellant is without merit. From the phraseology of the provision quoted, it is evident that the Legislature intended to make the law broad in its scope and to preserve the liability of the employer for the employé's benefit in all cases generally where the mechanical device upon which the injured servant is employed is separate and different from that being operated by the negligent employé. By way of closer definition of the department of labor classification, the legislators undertook to and have said in effect that a person is not employed in the same department with another servant where he is at work with or upon a different machine, railroad train, et cetera, and in consonance with a rule of fair construction it would be proper to say, if the words "railroad train" were the only descriptive ones contained in that portion of the statute quoted, that that term, as applied to an interurban railway, is sufficient to include a single trolley car. Such cars combine in their construction both motors for propulsion and seats for the accommodation of passengers. Used in interurban traffic, they perform the same work over long distances as does the steam-propelled train. While a train usually consists of a motor vehicle and cars attached thereto, where these adjuncts are combined in one carriage and serve the same uses, there is no good reason why the one should be said to be a train, within the meaning of the statute, and the other not be so classed.

[2] In construing statutes, courts are not bound to an interpretation which shall give to words or phrases a literal, close dictionary definition.

[3] That the provision of the section gives certain citizens privileges not granted to others, or denies to any the equal protection of the laws, in violation of the provisions of the state or federal Constitution, we do not believe. There is a good reason why the persons who are employed upon the same machine should be denied right of an action for damages against their employer, where such damages are caused by the negligence of one of them, and that those employed upon different machines or trains should not be so restricted as to such remedy. Men working together on the same machine or car generally have an opportunity to view the actions of each other; under the eyes of each other they are easily and readily apprised of any negligent act which threatens injury to them and can better protect themselves. The classification made by the statute is not therefore arbitrary, but it comports with the rule that there must be a difference in the situation of the employé which justifies the special protection being extended to the one class and withheld from the other. Especially is this so as applied to operatives of a railroad working upon different trains or cars. Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787.

No other points are presented for consideration.

We are of opinion that the judgment and order should be affirmed; and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 527

RONNING v. WAY. (Civ. 1,035.)

(District Court of Appeal, Second District, California. March 19, 1912.)

1. Sheriffs and Constables (§ 114*)—Levy on Mortgaged Chattels—Failure to Record Mortgage—Effect.

Civ. Code, § 2959, requires that a chattel mortgage be recorded in the county where the mortgagor resides, and section 2957 provides that such a mortgage is void as against creditors and subsequent purchasers and incumbrancers in good faith and for value, unless it is recorded as grants of real property. *Held*, that an unrecorded chattel mortgage is not void as to an officer levying an execution on the mortgaged property.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 184; Dec. Dig. § 114.*]

2. Sheriffs and Constables (§ 114*)—Levy on Mortgaged Chattels—Want of Record—Actual Notice.

Civ. Code, §§ 2957, 2959, providing that a chattel mortgage not recorded in the county where the mortgagor resides shall be void as against creditors and subsequent purchasers and incumbrancers in good faith and for value, are qualified by section 2973 providing that chattel mortgages of property other than that mentioned in section 2955, and mortgages not in conformity with the article, are valid between the parties and persons who before parting with value have actual notice thereof, so that an unrecorded chattel mortgage was not invalid as against a constable levying on the mortgaged property who had actual notice of the existence of the mortgage prior to the levy.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 184; Dec. Dig. § 114.*]

3. Sheriffs and Constables (§ 114*)—Sale of Mortgaged Property—Bona Fide Purchaser—Execution Levy.

Civ. Code, § 2973, provides that mortgages of personal property not made in conformity with the provisions of the article which requires record in the county of the mortgagor's residence are nevertheless valid between the parties and person who before parting with value have actual notice thereof. *Held*, that where property covered by an unrecorded mortgage was levied on as the property of a purchaser from the mortgagor, but it was neither alleged nor proved that the purchaser purchased in good faith and for value, such purchase was no defense to an action for conversion against the constable on the theory that the mortgage was invalid as against the purchaser.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 184; Dec. Dig. § 114.*]

4. Sheriffs and Constables (§ 138*)—Conversion—Mortgaged Property—Notice of Mortgage—Evidence.

In an action by a chattel mortgagee against an officer levying on the mortgaged chattels for conversion, evidence *held* to warrant a finding that the officer had actual notice of the existence of the mortgage at the time of the levy.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. §§ 290–296; Dec. Dig. § 138.*]

5. Pleading (§ 126*)—Answer—Denial.

In a suit for conversion of mortgaged property, the complaint alleged that the property was of the value of $600, and the answer merely denied that the property was of that value. *Held*, that such denial was consistent with an alleged value of $599, and hence was not a sufficient denial to require evidence to warrant a finding that the value was as alleged in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261–263; Dec. Dig. § 126.*]

6. Sheriffs and Constables (§ 114*)—Wrongful Levy—Sale.

Where, in an action against a constable for wrongful levy on mortgaged chattels, it was shown that the chattels were seized by the officer, disposed of, and never redelivered to the mortgagee, it was not material whether the constable had made a sale of the property.

[Ed. Note.—For other cases, see Sheriffs and Constables, Cent. Dig. § 184; Dec. Dig. § 114.*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Oscar Ronning against R. B. Way. Judgment for plaintiff, and defendant appeals. Affirmed.

Moore & Evans and W. S. Knott, for appellant. Tipton & Cailor, for respondent.

SHAW, J. This is an action to recover damages against the defendant as constable for an alleged wrongful conversion of property mortgaged to plaintiff. The court gave judgment for plaintiff, from which, and an order denying his motion for a new trial, defendant prosecutes this appeal.

The complaint alleges the execution to plaintiff of a mortgage upon certain personal property, situated at Whittier, in Los Angeles county, by one George A. Gray, a resident of Riverside county; that the mortgage was recorded in Los Angeles county only; that defendant, on May 15, 1909, converted the mortgaged property by levying upon and selling the same without paying or tendering to plaintiff the amount of the debt due to plaintiff, payment of which was secured by said mortgage; that the value of the mortgaged property so converted by defendant was the sum of $600. It was further alleged "that prior to the sale and conversion of the personal property herein referred to the plaintiff informed the defendant of the existence of said chattel mortgage and the claim of the plaintiff thereunder."

[1] Appellant contends that the court erred in overruling a general demurrer interposed to the complaint. This contention is based upon the claim, first, that the property covered by the mortgage was other than that specified in section 2955, Civil Code, and therefore not subject to mortgage; and, second, that the complaint shows that at the time of the execution of the mortgage the mortgagor resided in Riverside county in this state, and that no record of the mortgage was made in said county as required by section 2959, Civil Code; that, by reason of such failure to so record the mortgage, it was void under the provisions of section 2957, Civil Code, which provides that, "A mortgage of personal property is void as against creditors of the mortgagor

and subsequent purchasers and incumbrancers of the property in good faith and for value, unless: * * * (2) It is acknowledged or proved, certified, and recorded in like manner as grants of real property." Under this provision, the failure to record the mortgage in Riverside county rendered it void as to two classes of persons only; that is, creditors of the mortgagor and subsequent incumbrancers and purchasers in good faith and for value. Since, however, it does not appear that defendant belonged to either of these enumerated classes, he is not in a position, without pleading the fact, to avail himself of the benefit thereof. Cardenas v. Miller, 108 Cal. 250, 39 Pac. 783, 41 Pac. 472, 49 Am. St. Rep. 84.

[2] Moreover, the provisions of all these sections relied upon by appellant are qualified by section 2973, Civil Code, adopted in 1905. Old Settlers' Investment Co. v. White, 158 Cal. 237, 110 Pac. 922. This section provides: "Mortgages of personal property, other than that mentioned in section twenty-nine hundred and fifty-five, and mortgages not made in conformity with the provisions of this article, are nevertheless valid between the parties, their heirs, legatees, and personal representatives, and persons who, before parting with value, have actual notice thereof." As it was alleged in the complaint that prior to the conversion of the property by defendant he had actual notice of the existence of the mortgage, it was, under the provisions of the section just quoted, as to him, a valid existing mortgage, notwithstanding the fact that it contained property other than that mentioned in section 2955, Civil Code, and failure to record the same in the county of the mortgagor's residence. The complaint was not obnoxious to the general demurrer interposed.

[3] In his answer defendant averred that at the time of the alleged conversion one E. Jennie Horton was the owner and in possession of the goods and chattels as a purchaser thereof from Gray, the mortgagor; that in an action wherein Horton was sued by a creditor in the justice's court of Los Nietos township, of which defendant was constable, a writ of attachment was issued to him as such officer, pursuant to which he levied upon the mortgaged property, and thereafter, under an execution issued upon a judgment rendered in said action, he, as constable, sold the property to satisfy the judgment so rendered against Horton, all of which was by the court found to be true. It is not shown that Horton, prior to the purchase, had actual notice of the mortgage, and, in the absence of such notice, appellant, upon the grounds alleged in support of his demurrer, insists that the mortgage was void as to Horton, she being a subsequent purchaser from the mortgagor; that, as her right to the property was unaffected by the mortgage, the creditor's right to enforce his debt against the same was not affected by notice given to the constable acting as his agent. Under the provisions of section 2957, Civil Code, to render the mortgage void as against Horton it must appear by allegation, proof, and finding, not only that she was a purchaser, all of which does appear, but that such purchase was made in good faith and for value, neither of which facts is alleged, proven, or found. In the absence of such showing, no basis exists by virtue of said section 2957 for the claim that the mortgage was void as against her. Her position with reference to the property was identical with that of her vendor. Bank v. Purdy, 130 Cal. 455, 62 Pac. 738; Bank v. Menke, 128 Cal. 103, 60 Pac. 675.

[4] The only material allegation in the complaint which is denied by the answer is that prior to the conversion defendant had actual notice of the existence of the mortgage. Upon this issue, the court found in favor of plaintiff. Appellant attacks this finding, claiming it is not supported by the evidence. The evidence of defendant is that, while he was posting notices of the levy of attachment, the wife of the plaintiff came to the building wherein the property was located and had some conversation with Mr. Moore, the attorney for the plaintiff in the action wherein the attachment was issued; that he did not hear her say anything with regard to an existing mortgage upon the property. With reference to the circumstance of this visit, Mrs. Ronning, the wife of plaintiff, testified that Mr. Moore, to whom she stated in the presence and hearing of the defendant that "we have a mortgage on the outfit," introduced her to defendant, saying, "Here is the woman that has a mortgage on the outfit"; that she replied, "I don't pretend to have it; we have it." Mr. Moore said, "How do you know the mortgage is good?" to which Mrs. Ronning replied, "We supposed it was good." Under this evidence, it cannot be said the finding complained of is lacking support in the evidence. Meherin v. Oaks, 67 Cal. 57, 7 Pac. 47.

[5] Appellant claims the finding of the court to the effect that the mortgaged property was of the value of $600, as alleged in the complaint, is without evidentiary support. The answer merely denied the property was of the value of $600. Such denial was wholly consistent with an alleged value of $599. Westbay v. Gray, 116 Cal. 660, 48 Pac. 800. Such denial, as said in Marsters v. Lash, 61 Cal. 623, is "evasive and in fact no denial at all." There being no actual denial of the allegation, no finding thereon was required; hence it is immaterial that no sufficient evidence was adduced in support thereof.

Appellant directs our attention to a number of other assignments of error predicated upon insufficiency of evidence to support findings, all of which, as he says, are based upon the invalidity of the mortgage. What we have said in discussing the court's ruling upon the general demurrer is a sufficient answer to appellant's contention in this regard.

[6] Appellant challenges the finding to the effect that defendant seized, took, and carried away the whole of said mortgaged property "and sold the greater and best portion thereof"; his contention being that the evidence fails to show a sale of the greater and best part thereof. Plaintiff's right to recover damages is based upon the conversion. The disposal of the converted property by the officer, since it was not shown to have been redelivered to the mortgagee, as done in Irwin v. McDowell, 91 Cal. 119, 27 Pac. 601, was wholly immaterial.

We find no merit in alleged errors due to rulings of the court upon admissions of evidence. In several instances of alleged error no objection was made by defendant to the ruling of the court, and hence appellant is not in a position to urge the same in this court.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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18 Cal. App. 513

J. F. HALL-MARTIN CO. v. HUGHES.

MARTIN v. SAME. (Civ. 1,075.)

(District Court of Appeal, Second District, California. March 14, 1912.)

1. Contracts (§ 74*)—Consideration—Benefit to Third Person.

Purchasers in a contract for the sale of real estate entered into possession, incurred expenses in an effort to subdivide the premises, and sell them. Deeds of trust to secure indebtedness on houses erected on the premises were foreclosed. Thereafter the purchaser agreed to reconvey the premises to the vendor, who agreed to pay the indebtedness incurred by the purchaser. *Held*, that the vendor by the agreement and reconveyance by the purchaser acquired the equity of redemption, which was a sufficient consideration to support the promises by him to pay the indebtedness.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 331-343; Dec. Dig. § 74.*]

2. Appeal and Error (§ 934*)—Record—Presumptions.

Where a deed of trust does not appear in the record, the court on appeal will assume that the only remedy thereon was by foreclosure, and that it was of the character warranting the trial court in entering a decree of foreclosure, through which decree and right of redemption exists.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. § 934.*]

3. Contracts (§ 187*) — Agreement for Benefit of Third Person—Enforcement.

Where, pursuant to an agreement to rescind a contract of sale of real estate, the vendor in consideration of a reconveyance by the purchaser of all claims in the premises agreed to pay the indebtedness due to a third person named incurred by the purchaser for "street improvements, $8,200, mortgage indebtedness on houses erected on said premises, $3,700, with interest on all of said claims," the amount of the indebtedness specified and controlled, and the payment of $8.200 to the third person was a part of the purchase money agreed to be paid in consideration of the reconveyance, and under Civ. Code, § 1559, providing that a contract made for the benefit of a third person may be enforced by him, the third person may recover the $8,200.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 798-807; Dec. Dig. § 187.*]

4. Evidence (§ 461*) — Varying Written Contracts—Admissibilty.

Where a contract in writing is susceptible of construction on its face, evidence to explain the intention of the parties is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2129-2133; Dec. Dig. § 461.*]

5. Action (§ 53*)—Splitting of Actions—Waiver.

Where a party entitled to bring a single action to recover a specified sum brought two actions therefor, and defendant made no objection thereto, and the judgments rendered in the two actions were correct in amount and within the limits of the liability of defendant, the judgments will not be disturbed.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Statutory actions by the J. F. Hall-Martin Company and by R. B. Martin against W. E. Hughes. From a judgment for plaintiffs in each action, defendant appeals. Affirmed.

Woodruff & McClure, for appellant. G. C. De Garmo, for respondents.

ALLEN, P. J. The facts disclosed by the record are these: During the year 1909 defendant entered into an agreement in writing with Daniel Stone and Paul H. Blades for the sale of certain real property in Los Angeles county. Stone and Blades entered into possession and formed a corporation known as the Central Square Company, which corporation was merely a corporate agency in and about the subdivision and improvement and sale of the property. Default being made by Stone and Blades as to certain payments, they entered into an agreement with defendant through which Stone and Blades and the corporation should reconvey all claim to the property so contracted to purchase, in consideration of which defendant agreed to pay certain indebtedness theretofore created by Stone and Blades and the corporation in an effort at subdivision and sale of the property. This agreement, in so far as material to a disposition of the questions presented upon this appeal, recited as follows: "(Hughes) promises and agrees to assume and pay all those debts of the Central Square Company, as follows: Martin and Hall for street improvements, eight thousand two hundred dollars ($8,200); mortgage indebtedness on houses erected on said premises, three thousand seven hundred dollars ($3,700); with interest on all of said claims." In this agreement were mentioned certain other debts not necessary to specify. Plaintiff had before this agreement performed the engineering work necessary in laying out the streets and platting the tract, through which an indebtedness of $532.75 arose. In addition, plaintiff had done the work of making and oiling the streets, which work, exclusive of the engineering work, was of the value of $5,957.55, in addition to which plaintiff had constructed three houses on certain lots of the tract, upon which there remained due to plaintiff the aggregate sum of $1,665.48. Before this last agreement with defendant was executed, mechanics' liens had been filed by plaintiff covering these items of indebtedness and actions thereon were pending. The lots upon which the houses had been constructed and covered by the liens had been conveyed to Stone and Blades, and what was denominated "mortgages" in the agreement were, in fact, deeds of trust. These deeds of trust had been foreclosed before the rescinding agreement was entered into. Plaintiff brought two suits, one for $7,627.09 for work done and materials furnished in the improvement of the real property described in the agreement, and the other for $532.75, as a part of the $8,200 agreed to be paid for the improvement of said property. It is shown by the record that as a matter of fact the cost of the street improvements proper was $5,957.55. This amount defendant paid and plaintiff received on account. Judgment was accordingly rendered in the first-mentioned suit for $1,669.44 and in the second for $532.75, the aggregate of which two judgments, together with the amount paid, was a little less than the $8,200 mentioned in the agreement. The court upon the trial found that Stone and Blades and the corporation had conveyed to defendant all of the premises described in the agreement, and that defendant was the owner and holder thereof. The court further found that the Martin mentioned in the agreement was plaintiff herein, and that the $8,200 specified in said agreement included the indebtedness for work done by plaintiff in the improvement of the property. Motions for new trial were made and denied; and from the judgments rendered, and from the order denying the motions, defendant appeals. The two causes were by stipulation consolidated upon the trial and heard together, and the appeal is presented upon a single record.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We find no merit in appellant's first contention, namely, that the finding that defendant by the conveyance of Blades and Stone and the corporation became the owner and holder of all of the three lots had no support from the evidence. The deeds of trust, denominated mortgages in the agreement, had been foreclosed, and defendant by the agreement and reconveyance by Stone and Blades acquired the equity of redemption. This was sufficient consideration to support the promise made in the agreement with reference thereto. Bay v. Williams, 112 Ill. 97, 1 N. E. 340, 54 Am. Rep. 209. No question is presented as to the effect of a sale under power given in a deed of trust.

[2] Such deeds of trust not appearing in the record, it must be assumed that the only remedy afforded thereby was by way of foreclosure, and that the same were of a character warranting the court in entering a decree of foreclosure, and through which decree of foreclosure a right of redemption existed.

[3] The controlling question involved relates to the construction which should be given the agreement assuming and agreeing to pay to plaintiff for street improvements the sum of $8,200. The trial court determined that the amount specified was the controlling factor, and not the specification of the matter to which the payment should be applied. We are of opinion that the court did not err in so construing the agreement. Section 1559 of the Civil Code provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." While such contract remains unrescinded, the relations of the parties are the same as though the promise had been made directly to the third party. The payment of $8,200 to plaintiff was clearly a part of the purchase money agreed to be paid in consideration of the quitclaim of those in possession and who had made the improvements. "It is not the business of the defendant to go upon a tour of investigation as to the merits of plaintiff's claim against its grantors after agreeing to pay it." Washer v. Independent M. & D. Co., 142 Cal. 708, 76 Pac. 654. Stone and Blades possessed the right, if conscious of an indebtedness to plaintiff approximating $8,200, to contract with defendant to pay for any single item an amount sufficient to cover all obligations. This they seem to have done in the agreement entered into with defendant, by which they directed the payment of the aggregate of such indebtedness upon one item. Defendant acquiesced in this and agreed to pay such gross sum, and accepted the conveyance and retains the benefits, and he should not now be heard to say that the item specified was less than the aggregate amount agreed to be paid as part of the purchase money; such aggregate amount representing a bona fide indebtedness of Stone and Blades to plaintiff at the time.

The views we have expressed render it unnecessary to consider the many specifications of error as to the action of the trial court in refusing to admit evidence tending to explain the intention of the parties.

[4] The contract being, in our opinion, susceptible of construction upon its face, evidence tending to explain the intention was not admissible.

[5] While, in our opinion, it was competent for plaintiff to have brought a single

action to recover the $8,200, yet, having elected to bring two actions and no objection being made thereto, and the judgments rendered in the two actions being correct in amount and within the limits of the liability of defendant to plaintiff, no reason suggests itself why such judgments should be disturbed.

The judgment and order in each case are therefore affirmed.

We concur: JAMES, J.; SHAW, J.

162 Cal. 602

BRADBURY v. HIGGINSON. (L. A. 2,885.)

(Supreme Court of California. April 30, 1912. Rehearing Denied May 29, 1912.)

1. Landlord and Tenant (§§ 195, 49*)—Repudiation of Lease by Lessee—Remedies of Lessor.

A lessee having repudiated the lease and abandoned the premises, the lessor may sue for installments of rent as they come due, or may sue for damages for breach.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 790–793, 117–119; Dec. Dig. §§ 195, 49.*]

2. Landlord and Tenant (§ 49*)—Repudiation of Lease by Lessee—Damages.

The measure of damages for repudiation of a lease and abandonment of the premises by the lessee is the difference between what the premises may be rented for and the rent reserved in the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 117–119; Dec. Dig. § 49.*]

3. Landlord and Tenant (§ 150*)—Leases—"Appurtenance."

A lease of a house "with the appurtenances," though giving the lessee the right to the use of water supplied to the house at the time of leasing from a water system owned by the lessor, does not obligate the lessor to keep the system in repair.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 536, 538, 544–548, 555, 556; Dec. Dig. § 150.*

For other definitions, see Words and Phrases, vol. 1, pp. 477, 487; vol. 8, p. 7580.]

4. Landlord and Tenant (§ 195*)—Repudiation of Lease by Lessee—Maturing Installments of Rent.

The repudiation by the lessee of a lease does not at once mature the installments of rent not yet due under the terms of the lease, so as to make them recoverable at once as rent.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 790–793; Dec. Dig. § 195.*]

5. Landlord and Tenant (§ 49*)—Breach of Lease—Damages—Pleading and Proof.

The lease not binding the lessor by any covenants which are conditional on the performance by the lessee of his obligations, the lessor seeking to hold the lessee for the damages from his repudiation of the lease, as for breach of the entire contract, the measure of which is the difference between the rent to accrue and the value of the remaining portion of the term, must allege and prove the amount of such damages; there being no presumption, requiring the lessee to show the contrary, that the damages are the full amount of the rent for such period.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 117–119; Dec. Dig. § 49.*]

6. LANDLORD AND TENANT (§ 49*) — BREACH OF LEASE—DAMAGES—COMPLAINT—PRAYER.

The complaint, merely alleging a lease by plaintiff to defendant at $100 per month, payable monthly in advance, and the repudiation of the lease by the lessee, when two months rent were due, and when the lease had four months longer to run, though asking judgment for $600, does not show damages of $600, or of any amount, at least where the complaint is drawn on the theory of the right to at once recover as rent the entire rent reserved as being matured by the repudiation; an allegation that plaintiff was damaged in the sum of $600 not being impliable, under such circumstances, from the prayer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 117–119; Dec. Dig. § 49.*]

7. EVIDENCE (§ 441*) — PAROL EVIDENCE — VARYING CONTRACT.

The affirmative duty of the lessor to keep the water system in repair not being included in the reasonable meaning of the word "appurtenances," in the lease of a house with appurtenances, though at the time of the lease water was being supplied to the house through a water system owned by the lessor, parol evidence of the lessor's agreement to supply the water through such system and keep it in repair is not in aid of interpretation of the lease, but is a violation of the parol evidence rule, as showing an oral agreement of the lessor to do something beyond the terms of the lease.

[Ed Note.—For other cases, see Evidence, Cent. Dig. §§ 1719–1845, 2030–2047; Dec. Dig. § 441.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Samuel E. Crow, Judge.

Action by Louise S. Bradbury against Augustus B. Higginson. Judgment for plaintiff. Defendant appeals. Reversed, with directions to dismiss.

B. F. Thomas, for appellant. Canfield & Starbuck, for respondent. Grant Jackson, amicus curiæ.

SLOSS, J. Upon an appeal from a judgment in favor of plaintiff, the District Court of Appeal for the Second Appellate District reversed the judgment. An opinion prepared by James, J., was filed, Shaw, J., concurring, and Allen, P. J., merely concurring in the judgment of reversal. Two main propositions were considered in the opinion; the conclusion of Mr. Justice James being favorable to the appellant on one of these, and in support of the respondent's contentions on the other. Both parties were dissatisfied, and each filed a petition to have the cause transferred to and heard in this court. An order of transfer was made. The opinion of Mr. Justice James reads as follows:

"Plaintiff brought this action to recover the sum of $600 from defendant. It is alleged in the complaint that defendant on December 13, 1904, leased from plaintiff the house and premises known as 'Eagle's Nest' at Montecito in Santa Barbara county, for the term of five years, at a monthly rental of $100, which was payable on the 1st day of each month in advance. It was alleged further that, pursuant to the terms of the lease, the defendant paid the rental as it became due for each month up to and including the month of June, 1909; that the rental which became due on July 1, 1909, and August 1, 1909, was not paid; that on August 17, 1909, the defendant repudiated the contract of lease and refused thereafter to be bound by the terms thereof. A prayer for judgment in the sum of $600 then followed. The complaint was filed on August 19, 1909. An amended answer was filed by defendant to which a demurrer was interposed by plaintiff. This demurrer was sustained without leave to amend, and judgment was entered in favor of plaintiff for the amount prayed for and costs of suit.

[1, 2] "Upon this appeal, taken by defendant, the ruling of the trial court in sustaining the demurrer to the amended answer and the sufficiency of the complaint to support the judgment are the questions to be considered. They will be taken up in inverse order. It will be noticed that the term of hiring of the real property in question extended for four months after the date of the commencement of plaintiff's action. There was contained in plaintiff's complaint no statement that the premises had been abandoned by her lessee or of how she had been damaged by the alleged repudiation of the contract by defendant, other than that the rental becoming due on July 1 and August 1, 1909, remained unpaid. It is claimed by plaintiff that, immediately upon the repudiation of the lease contract by defendant, a cause of action for damages arose in her favor, and she might at once sue for the full amount which would become due had the contract run its full term and recover it as damages. That a landlord may have an action for damages for breach of contract when a tenant abandons his lease is not questioned by any of the authorities. His damages, however, in that event, are to be ascertained in a particular way. Where a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease. Where he sues for damages, he cannot in advance recover the full price to be paid for the unexpired term, but the amount of his recovery is limited as just indicated. In re Bell, 85 Cal. 119, 24 Pac. 633; Respini v. Porta, 89 Cal. 464, 26 Pac. 967, 23 Am. St. Rep. 488; Massie v. State Nat. Bank, 11 Tex. Civ. App. 280, 32 S. W. 797; Jones on Landlord & Tenant, § 140. It is said by Mr. Gear, in his work on Landlord & Tenant: 'If the prem-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ises are abandoned without cause, the landlord may elect to leave them vacant and recover rent, or enter and determine the tenancy; but he cannot both enter and treat the contract as subsisting. * * * Under the Roman Civil Law and in Louisiana, the tenant who abandons during the term may be sued at once for the whole rent of the term.' From the decision in the case of Respini v. Porta, supra, we quote: 'But we cannot support him in his contention that because the defendant, against his (plaintiff's) wishes and without right, abandoned the property, he is entitled to recover the full amount provided for by the terms of the lease to defendant. Our Code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 3300. * * * In cases of this kind the landlord is not entitled to recover for *rent* of the premises after the abandonment of them by the defendant, but has compensation for the injury, and his measure of damage is the difference between the rent he was to receive and the rent actually received from the subsequent tenant, provided there has been good faith in the subsequent letting.' (Citing cases.)

"It is not claimed by respondent that the action should be viewed as one for the collection of installments of rent under the lease, but it is insisted that it should be considered as one for damages resting upon a claimed abandonment made by the lessee. Respondent's position is that the lease was terminated by the alleged act of appellant, her lessee, in repudiating the contract and refusing to be bound further thereunder. The complaint is lacking in essential allegations entitling the plaintiff to judgment in the superior court for such damages as she may have suffered, and does not therefore properly state a cause of action of which such court had any jurisdiction.

[3] "We have next to consider whether or not the amended answer filed on the part of defendant was sufficient as against the demurrer interposed to it. The lease under which the property was held was in the ordinary form and contained the statement that the plaintiff leased to defendant 'the house known as "Eagle's Nest" at Las Tunas in the Montecito in the county of Santa Barbara, state of California, together with the grounds immediately around said house *with the appurtenances*.' In the amended answer, the abandonment of the premises on the 17th day of August, 1909, was admitted, and as excuse and cause therefor defendant alleged that, included within the terms of the lease by way of oral agreement and mutual understanding of the parties at the time the contract was entered into, was the agreement of the plaintiff to supply the premises leased with water for domestic purposes from a water system and plant maintained by and under the control of plaintiff, and that the furnishing of such water was the principal consideration for the rental stipulated to be paid. It was then alleged that the water was so furnished, except that for the months of July and August plaintiff neglected and refused to furnish the same, although notified by defendant so to do, and that defendant vacated the premises and abandoned the lease because of the failure of plaintiff to fulfill her part of the contract in this respect. Nothing was stated in the lease indicating that there was any obligation on the part of plaintiff to supply the premises with water. It is the contention of defendant, however, that as the water was being supplied at the time of the hiring of the real property in question, he should be permitted to show the agreement of the parties in that particular, even though orally expressed. He contends that the furnishing of water was an appurtenance within the meaning of that term as used in the lease contract. Unless proof of the alleged oral agreement of the parties is permitted to be made by way of explaining what was appurtenant to the premises leased, such proof is not competent otherwise, because it would add to the conditions and obligations of the parties as expressed in their written contract. Section 662 of the Civil Code defines an 'appurtenance' as follows: 'A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another.' Under his lease contract defendant undoubtedly had the right to use those things, and continue to use them during the term of the hiring, which were necessary to or attached to the real property at the time the contract was made. If water was being supplied to the premises from a water system owned or maintained by the plaintiff, the right to the use of the water so supplied would be one which would naturally, and perhaps necessarily, appertain to the leasehold estate. This right, however, in the absence of an express term of the written contract further defining it, would be only to have the water drawn from the supply controlled by the plaintiff and to have it pass through the pipes in which it was customarily conducted to the premises. Under the term 'appurtenances' there could not be implied an agreement on the part of the plaintiff to keep in repair the water system or the pipes leading to the leased premises. Such an agreement would necessarily become an added term of the contract itself; for it would

guarantee something to the defendant which was not embraced within the general term 'appurtenances' as contained in the lease. It is not alleged in the amended answer that the plaintiff by any affirmative act prevented the water from flowing from her water system to and through the pipes leading to the leased premises. It is alleged that the plaintiff neglected to repair the pipes and water system when they became in disrepair. The appurtenant right to the water would give to the lessee authority to go upon the premises of the plaintiff, if need be, to make any repairs necessary to secure a continuation in the supply of water; but it would not cast upon the lessor the obligation to make such repairs or require of him that he see to it that the leased premises were kept supplied with water. Such an obligation cannot be imported into the terms of the written agreement through any proper or reasonable interpretation of the word 'appurtenances.' The amended answer, therefore, did not state facts sufficient to show a valid cause for abandoning the lease and vacating the premises, and the demurrer thereto was properly sustained. Plaintiff, however, has secured a judgment to which she is not entitled, because of the fact that her complaint is insufficient for the reasons first stated.

"The judgment is reversed."

We are content to adopt the foregoing opinion as a statement of our own views of the case. It may be well, however, to briefly add to it a notice of some contentions which have been more elaborately advanced since the transfer of the cause to this court.

[4] A reading of the complaint indicates that it was framed on the theory that the repudiation of the lease by the lessee operated at once to mature all the rent reserved in the lease and to enable the lessor to recover, not only the installments already accrued, but those to accrue in the future. This contention has been virtually abandoned by the counsel for respondent, although it appears to be still advanced by counsel appearing as amicus curiæ. But the proposition cannot be successfully maintained. It finds no support in the authorities with the exception of a few cases decided in Louisiana, a jurisdiction which is largely governed by the doctrines of the civil law. The general common-law rule is that rent, as such, is not payable until it falls due under the lease (1 Underhill, Landl. & Ten. § 333), and this rule is not altered by the fact that the tenant has abandoned the premises and notified the landlord that he will repudiate the lease (Nicholes v. Swift, 118 Ga. 922, 45 S. E. 708). Viewing the action as one for rent, it is not distinguishable, in principle, from Tatum v. Ackerman, 148 Cal. 357, 83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276, 7 Ann. Cas. 541.

[5] But it is argued that the plaintiff had the right to recover on the doctrine of "anticipatory breach." Alderson v. Houston, 154 Cal. 1, 96 Pac. 884. That is to say, that the defendant's repudiation of the obligations of his lease gave the plaintiff the right to treat the entire contract as broken, and to recover at once the damage sustained by such breach. But in an action to recover for such breach, the measure of damage would be, not the total rent reserved, but the difference between the rent to accrue and the value of the remaining portion of the term. See cases cited in the foregoing opinion of James, J. The complaint does not aver that plaintiff has sustained any damage by the defendant's repudiation, nor does it state any facts from which the amount of such damage may be inferred. It avers merely the nonpayment for two months, and the repudiation, and then asks judgment for $600. There is no allegation that the premises could not have been rented, during the rest of the term, for an amount equal to the rent agreed to be paid by the defendant. The respondent seeks to overcome the want of averments showing the extent of damage sustained by citing a passage in Alderson v. Houston, supra, where the court declared that the repudiation of a contract made out a prima facie case of liability on the part of the defendant for the entire sum which he had agreed to pay, and threw upon him the burden of showing that the plaintiff could have reduced the damage. Alderson v. Houston was a case of an agent wrongfully discharged and thus prevented from performing the contract on his part. The opinion expressly pointed out that the repudiation of a contract will not be deemed a prevention of performance where the obligations repudiated or unfulfilled by the defendant are not conditions precedent to performance by the plaintiff. The lease here in question did not bind the lessor by any covenants which were conditional upon the performance by the lessee of his obligations. If, therefore, the lessor sought to hold the lessee for the damage occasioned by an unauthorized repudiation of the lease, she was bound to allege and prove the amount of such damage.

[6] The respondent makes the further attempt to meet the want of an allegation of damage by referring to Riser v. Walton, 78 Cal. 490, 21 Pac. 362, where the court used language to the effect that, where a breach of an obligation is alleged, a prayer for damages in a certain sum may be treated as equivalent to an averment that plaintiff has suffered damage in that sum. But it appears that, in that case, the trial had proceeded upon the theory that the amount of damage was properly in issue, and the affirmance was rested, at least in part, on that ground. In the later case of Lehnhardt v. Jennings, 119 Cal. 192, 48 Pac. 56, 51 Pac 195, the court held adversely to the claim

that the prayer of the complaint was necessarily conclusive of the question of jurisdiction regardless of the averments on which such prayer was founded. However, even if we assume that Riser v. Walton decides that a prayer for judgment, in an action for damages, will supply the want of allegations showing the extent of the damage, the rule contended for could not be applied here. In Riser v. Walton the complaint showed upon its face that the sole cause of action relied upon was one for damages for deceit. In this case, as we have already suggested, the complaint was drawn in the belief that the facts alleged entitled the plaintiff to recover immediately the rent for the entire term, and the plaintiff undertook to set forth a demand for such rent. That this is the true interpretation of the pleading is confirmed by the language of the briefs first filed by the respective parties. There was nothing to indicate that damages for breach of an entire contract were claimed. In such a case, a court would not be warranted in saying that an allegation that plaintiff had suffered damage in the sum of $600 was to be implied from the mere fact that judgment in this amount had been asked.

[7] On the other point, that of the defense attempted to be set up by the answer, little need be added to the argument contained in the opinion above quoted. The averments of the answer show that the defendant does not claim a right to have water flow, unimpeded by any act of the plaintiff, but that he seeks to impose upon the plaintiff the affirmative burden of keeping the water system and conduits in repair. Such duty is not included within the reasonable interpretation of the word "appurtenances." Watkins v. Greene, 22 R. I. 34, 46 Atl. 38. The introduction of parol evidence in support of the allegations of the answer would not, therefore, be in aid of the interpretation of the lease. It would result in showing, in violation of the parol evidence rule, that there was, beyond the terms embodied in the lease, an antecedent oral agreement binding the lessor to do something more than she had in her lease agreed to do. Or, stating it in another way, it would, instead of showing what the "appurtenances" were, show that the lessor had undertaken to relieve the lessee of the burden, which (except to the extent of the provision of Civ. Code, § 1942) would rest upon him (Van Every v. Ogg, 59 Cal. 563; Gately v. Campbell, 124 Cal. 520, 57 Pac. 567), of keeping in repair the agencies requisite to the enjoyment of the appurtenances.

The judgment is reversed, with directions to the trial court to dismiss the action.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.

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162 Cal. 595

In re LOVELAND'S ESTATE.

BENJAMIN et al. v. BOGLIOLIO et al.

(Sac. 1,957.)

(Supreme Court of California. April 30, 1912.)

1. Wills (§ 55*)—Contest—Evidence—Sufficiency—Mental Incompetency.

Evidence in a will contest *held* to sustain a finding that the testator was mentally incompetent to make the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–161; Dec. Dig. § 55.*]

2. Wills (§ 53*)—Contest—Evidence—Testamentary Capacity.

An adjudication of mental incompetency, in a proceeding to secure the appointment of a guardian for the testator, was admissible in evidence in a subsequent contest of his will upon the issue of his testamentary capacity at the time of the adjudication; and where the evidence showed that his mental condition had not changed between the date of the adjudication and the date of the will, it was admissible upon the issue of his testamentary capacity at the time of making the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120–130; Dec. Dig. § 53.*]

3. Wills (§ 285*)—Contest—Amended Answer.

In a will contest, the trial court may refuse to permit an amended answer to be filed, where permission is not asked until after the case has been submitted and decided and no adequate excuse for the delay is offered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 646; Dec. Dig. § 285.*]

4. Appeal and Error (§ 1041*)—Harmless Error—Refusal to Permit Amended Answer.

After evidence had been admitted and a will contest tried and decided upon the theory that the mental capacity of the testator was in issue, the refusal to permit the defendants to file an amended answer to correct the failure of their answer to deny the allegation of testamentary incapacity was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106–4109; Dec. Dig. § 1041.*]

5. Witnesses (§ 205*)—Competency—Employé of Attorney—Stenographer.

A stenographer who, while employed by the testator's attorney, met the testator and conversed with him several times in the office of her employer and formed an opinion as to his mental condition, was not barred from testifying to such opinion in a contest of the testator's will by Code Civ. Proc. § 1881, subd. 2, providing that an attorney's stenographer cannot be examined without his consent concerning any fact learned in such capacity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 763; Dec. Dig. § 205.*]

6. Appeal and Error (§ 1050*)—Harmless Error—Exclusion of Evidence.

In a will contest, the exclusion of a witness' opinion as to the mental capacity of the testator, which opinion was competent under Code Civ. Proc. § 1870, providing that an opinion by any intimate acquaintance respecting the sanity of a person is admissible, was harmless, where the opinion was based upon scant knowledge gained from 10 or 15 conversations with the testator during a period of only 10 or 12 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160, 4166; Dec. Dig. § 1050.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. Appeal and Error (§ 1058*)—Harmless Error—Examination of Witness.

Error in excluding a question was harmless, where the witness subsequently testified as to the matter inquired about.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

8. Wills (§ 53*) — Contest — Exclusion of Evidence.

In a will contest, evidence that the testator was of sound mind when he made a former will, about three years prior to making the contested will, was properly excluded, where contestants did not attack his mental competency prior to the year in which he made the contested will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120–130; Dec. Dig. § 53.*]

9. Evidence (§ 471*) — Contest — Admissibility of Evidence—Opinion.

A witness' evidence as to his observation of the testator's appearance with reference to physical and mental condition, not being opinion evidence, was admissible in a will contest case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

Department 1. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Contest of will of D. H. Loveland, by Edna E. Benjamin and others against L. C. Bogliolio and others. From a judgment denying probate of the will and order denying defendant's motion for new trial, defendants appeal. Affirmed.

Law T. Freitas and Stafford & Stafford, for appellants. Budd & Van Vranken and R. C. Minor, for respondents.

SLOSS, J. D. H. Loveland died on September 15, 1910, in the county of San Joaquin. On October 10, 1910, there was filed in the superior court of said county a paper purporting to be the last will of said decedent, together with a petition for its admission to probate. By this document the decedent undertook to give the residue of his estate, comprising the bulk thereof, to L. C. Bogliolio and his wife, Mrs. Anna Bogliolio, who were in no way related to him, and appointed as executor of his will his "friend and attorney," Law T. Freitas. Edna E. Benjamin, Leta Franklin, and Mary A. Corson, the daughters and sole heirs of Loveland, filed an opposition to the probate of said paper; their grounds of opposition being that at the date of the execution of the alleged will the decedent was mentally incompetent to make a will, and that the will had been procured to be made by the undue influence of the Bogliolios and Freitas. A trial without a jury resulted in findings to the effect that the decedent at the time of signing the alleged will was "of unsound mind and incapable from such unsoundness of mind of making a will." On the issue of undue influence the finding was in favor of the proponents. Upon these findings the court entered a judgment denying probate of the will. From this judgment and from an order denying their motion for a new trial the proponents appeal.

The principal contention made on the appeal is that the evidence is insufficient to justify the finding against the mental competency of the testator.

The contestants introduced evidence tending to show that, at the date of the execution of the instrument in question, Loveland was over the age of 80 years. He had had four children—three daughters, who are the contestants here, and a son, Willard T. Loveland, who died intestate on March 20, 1910. The will in controversy was dated March 25, 1910, and the estate of which Loveland assumed to dispose by it consisted almost wholly, if not entirely, of his interest in the estate of his son who had died five days before. It appears that the father and son had been on good terms, whereas there had been some degree of estrangement between Loveland and his daughters. Freitas, who was named as executor in the will, had been the attorney of Willard T. Loveland. He had, however, had no acquaintance with D. H. Loveland until the day before the will was drawn. Notwithstanding this fact, we find him named in the will as executor, designated as the "friend and attorney" of the testator, and made the chairman of an advisory "board of arbitrators" attempted to be created by the will for the purpose of settling any controversy that might arise regarding the will.

On the 24th of March, the day before the will was executed, the contestants herein, daughters of D. H. Loveland, filed in the superior court of San Joaquin county a petition, alleging that said Loveland had property in said county, that he had "by reason of his old age, defective memory, and physical disability, become mentally incompetent either to care for himself or to manage his property," and asking that a guardian of the person and estate of said Loveland be appointed. Citation on this petition was served upon Mr. Loveland on the morning of the 25th of March, and it was after such service that he communicated with Freitas and that his will was drawn and executed. The petition for appointment of a guardian came on to be heard before the superior court on the 4th and 5th days of April, 1910, and such hearing resulted in the making of an order whereby the court, after finding that said David H. Loveland was incompetent and incapable of taking care of himself and managing his property, appointed one Thompson as guardian of the person and estate of said David H. Loveland. All of the evidence relating to these proceedings was introduced and received in evidence without objection.

[1] In addition, the contestants offered other testimony bearing upon the competen-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cy of the testator. It will be noted that the hearing in the guardianship proceedings took place only 11 or 12 days after the execution of the will. Several witnesses testified that at this hearing Loveland was asked whether he had by his will made residuary gifts to any strangers to his blood, and that in answer to this question he had stated that "it was not his will if it so set forth such legacies." He had also in the course of such examination stated that he had by such will left no property to Mrs. Bogliolio, and that he did not think any one was named in the will as executor. Two witnesses, whose testimony was offered as that of intimate acquaintances of the decedent, testified that they did not think Loveland "capable of transacting any business"; that he was not "able to do any kind of business."

At this point the contestants rested, and the proponents proceeded to put in their evidence. The case having been submitted, the court directed that it be reopened for further testimony. The contestants produced additional witnesses, who testified, in effect, that, at the time of the hearing in the incompetency proceeding, Loveland, was apparently very old, and quite decrepit, that his memory was very defective, that he remembered little or nothing about the making of a will, and was "very uncertain as to just what he had or with regard to any mortgages." Various witnesses testified, in addition, that the mental conditon of the testator at the time of the hearing and adjudication in the incompetency proceeding appeared to be the same as on the date of the signing of the will, some 10 days earlier.

There was very little conflict in the testimony; the showing made by the proponents being, as admitted by them in their brief, "not of a very strong character." But even if there had been a dispute on every item of testimony, we do not doubt that the proof offered by the contestants was ample to justify the trial court in finding that Loveland was not mentally competent to make a will. Entirely apart from the adjudication of incompetency, it appeared that the testator's faculties had been so far impaired that he had no clear idea of the character or amount of his property and was unable to remember, for even a few days, the provisions contained in the will which he had signed. The will itself contained statements and provisions which, when read in the light of existing conditions, indicated a want of comprehension of the signer's relations to the persons named in the will.

[2] But, in addition, we have the adjudication of incompetency, following closely upon the execution of the will. There is no need to discuss appellants' claim that this adjudication was not conclusive on the question of Loveland's competency to make a will. The lower court did not assume to give it such effect. What it did was to admit such adjudication in evidence as showing that, at the date of the adjudication. Loveland was so far incompetent as to justify the appointment of a guardian. This may not establish the want of capacity sufficient for the making of a will (Rice v. Rice, 50 Mich. 448, 15 N. W. 545), and of course could not fix the status of the person affected as incompetent to make a will on a date prior to that of the adjudication. But it is certainly evidence proper to be considered on the issue of want of testamentary capacity at the time of the appointment of the guardian. Ames v. Ames, 40 Or. 495, 67 Pac. 737; Chase v. Spencer, 150 Mich. 99, 113 N. W. 578; Schindler v. Parzoo, 52 Or. 452, 97 Pac. 755; Small v. Champeny, 102 Wis. 61, 78 N. W. 407; Terry v. Duffington, 11 Ga. 337, 56 Am. Dec. 423. And where there is testimony tending to show that the mental condition of the person has not changed between the date of the act in question and the appointment of a guardian, the appointment, although later in time, is admissible on the issue of capacity when the act was done. Here the connection between the time of the incompetency proceedings and that of the making of the will was sufficiently established both by direct testimony that the mental condition of Loveland had not changed in the interval separating the two dates and by the general aspect of the case, indicating, as it did, that any mental weakness on the part of Loveland was the result of that gradual decay which sometimes accompanies advanced age. Schindler v. Parzoo, supra; Giles v. Hodge, 74 Wis. 360, 43 N. W. 163; Deleglise v. Morrissey, 142 Wis. 234, 125 N. W. 452.

[3] Complaint is made of the action of the trial court in denying to the proponents permission to file an amended answer to the contest. Leave to file this pleading was not asked until after the case had been submitted and decided, and the refusal to allow the filing might well be sustained on the ground that no adequate excuse for the delay was offered.

[4] Furthermore, the filing of the amended answer would have accomplished nothing. The original answer of the proponents was open to the construction that it failed to deny the allegation of Loveland's mental incapacity to make a will. It was sought by the amended answer to correct the defect by raising a distinct issue on this point. But it appears that the trial had proceeded throughout the taking of testimony on the theory that the competency of Loveland was in issue. After the evidence was in, the court declined to grant the contestants' motion for a judgment on the pleadings, and passed on the question of competency as one of fact. The appellants were therefore given every advantage which they could have gained by the interposition of their amended answer, and it would have been useless to grant them leave to formally raise an issue which had been decided against them on sufficient evidence.

[5] Some of the rulings of the court in admitting or rejecting testimony are assailed as erroneous. Miss Davis, a stenographer employed by Mr. Freitas, one of the proponents, testified that she had met the decedent 10 or 15 times at the office of Mr. Freitas, and from conversations there had with him, had formed an opinion with regard to "his condition physically and mentally." The entire acquaintance covered a period of only 10 or 12 days. An objection to her stating her opinion was sustained; the court basing its ruling on the ground that she was barred from testifying by the provision of subdivision 2 of section 1881 of the Code of Civil Procedure. We are inclined to think that, on the state of facts shown by the record, the offered testimony did not come within the inhibition of the section cited.

[6] But the ruling was not of sufficient consequence to justify a reversal. The showing that Miss Davis was an "intimate acquaintance" of the decedent, and thus qualified, under section 1870 of the Code of Civil Procedure, to express an opinion regarding his "mental sanity," was so slender that the exclusion of her testimony for want of foundation in this particular would have been proper. It is true that this objection was not made, and may therefore be regarded as waived. If, however, the witness had been allowed to state that, in her opinion, Loveland was of sound mind, the fact remains that her opinion would have been based upon so brief and casual a knowledge of the decedent that we can hardly believe that the trial court would, by this testimony, have been materially influenced in its determination of the ultimate issue of competency.

[7] Appellants attack a ruling sustaining an objection to a question put to witness Parkinson, calling for his opinion respecting the competency of the decedent. But as it appears that, at a later stage, the witness was permitted to state his opinion that Loveland was competent, the ruling complained of was not injurious.

[8] A will made by Loveland in 1907 was introduced in evidence. The respondents sought to show that, at the date of the former will, the decedent was of sound mind. The offer of testimony to this end was properly rejected. The contestants had not attacked Loveland's competency at any time prior to 1910, and, if his state of mind when he made the former will was relevant at all, the proponents had the full benefit of the presumption of sanity, which, in the absence of any evidence to the contrary, is controlling. In re Wilson, 117 Cal. 262, 49 Pac. 172, 711; Estate of Dole, 147 Cal. 188, 81 Pac. 534; Code Civ. Proc. § 1961.

[9] There was no error in permitting the witness Thompson to testify to his observation of Loveland's "appearance" with reference to physical and mental condition. This is not opinion evidence. People v. Manoogian, 141 Cal. 592, 75 Pac. 177; De Arellanes v. Arellanes, 151 Cal. 443, 90 Pac. 1059. Similar rulings on the testimony of other witnesses may be supported either on the same ground or on the ground that, where the witnesses were permitted to give their opinions, they had sufficiently qualified as "intimate acquaintances."

The appellants make no other points.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

162 Cal. 611

PUTERBAUGH v. WADHAM et al.

(S. F. 6,014.)

(Supreme Court of California. May 2, 1912.)

1. MANDAMUS (§ 1*)—OCCASION FOR REMEDY.

While the writ of mandamus is not a writ of error and is not available to vary the finding of a judicial or quasi judicial body acting within its jurisdiction, yet where the facts are undisputed, and the only matter to be determined is the lawful duty of the body, the writ will issue not only to require the performance of this duty but to require it in a particular manner.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1–3; Dec. Dig. § 1.*]

2. MANDAMUS (§ 107*)—OCCASION FOR REMEDY—SALARY OF OFFICERS.

Mandamus is the proper remedy to compel the auditing committee of a city to pay the salary of a justice of the peace as fixed by law; such payment being a ministerial act not involving the exercise of any discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 225, 232, 234; Dec. Dig. § 107.*]

3. OFFICERS (§ 100*) — SALARY — INCREASE DURING TERM.

Const. art. 11, § 9, providing that the salary of a public officer shall not be increased during his term of office, places a limitation only upon the legislative power, and does not prevent the salary of a city justice of the peace being automatically increased, under a statute existing when he went into office, by an official determination that the population of the city has so increased as to place it in a higher class.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152–157; Dec. Dig. § 100.*]

4. OFFICERS (§ 100*)—INCREASE OF SALARY—JUSTICE OF THE PEACE.

In view of Act July 2, 1909, c. 2, § 20, 36 Stat. 7 (U. S. Comp. St. Supp. 1911, p. 557), providing that the 1910 census shall be taken as of April 15, 1910, and of Act 1883 (Stats. 1883, p. 24) § 2, providing that the federal census shall be the basis upon which to determine the populations of municipal corporations, and under Code Civ. Proc. § 103, fixing the salary of a justice of the peace in cities of the second class at $300 per month, a city of the third class, which was found by the 1910 census to have the population requisite for a city of the second class, became a city of the second class upon April 15th of that year, and a justice of the peace of that city was entitled to his increase in salary from that date, though the census was not promulgated until a later date.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152–157; Dec. Dig. § 100.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Estoppel (§ 54*)—Equitable Estoppel—Knowledge of Facts.

Where a justice of the peace accepted the salary due him as such officer of a city of the third class after the date of the federal census, but before its promulgation, he was not estopped thereby from claiming that he was entitled to an increase of salary as a justice of the peace of a city of the second class, from the date of the federal census which showed the city to be of the latter class, since there can be no estoppel where the facts are not known.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128–135; Dec. Dig. § 54.*]

6. Officers (§ 100*)—Increase in Salary.

Where the salary of a public officer is decreased by legislative enactment after he enters upon his term of office, Const. art. 11, § 9, prohibiting the increase of one's salary during his term of office, will not prevent a subsequent increase of his salary so long as the amount fixed does not exceed that to which he was entitled at the commencement of his term.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 152–157; Dec. Dig. § 100.*]

7. Officers (§ 101*)—Overpayment of Salary—Recoupment.

An overpayment made on the salary of a justice of the peace by the auditing committee of a city, under a mistake of law, is not deemed voluntary, and its amount must be deducted before he is entitled to any payment on future salary.

[Ed. Note.—For other cases, see Officers, Cent. Dig. §§ 158–162; Dec. Dig. § 101.*]

In Bank. Application for writ of mandate by George Puterbaugh against James E. Wadham and others. Writ ordered to issue.

George Puterbaugh, in pro. per. W. R. Andrews, for respondents.

MELVIN, J. Petitioner, George Puterbaugh, justice of the peace of the city of San Diego, asks this court for a writ of mandate to compel the auditing committee and the city auditor of said city of San Diego to draw warrants for the payment of his salary. Respondents demur generally to the petition. They also file answers without waiving the demurrers, but these answers admit all essential matters of fact pleaded in the petition; therefore our conclusions upon the demurrers will suffice to settle the whole subject before the court. The demurrer is based upon the assertion that, the auditing committee and the auditor having acted in a quasi judicial capacity in determining what salary petitioner is entitled to receive under the law, the court cannot by mandamus review or alter such action.

[1] It is undoubtedly true that the writ of mandamus is not a writ of error, and that, generally speaking, it is not available for the purpose of altering or varying in any particular the finding of a judicial or quasi judicial body or officer acting within its or his appropriate jurisdiction; but where the facts are not disputed, and the only matter to be determined is the duty of the body or officer under the law, the court will define such duty and enforce not only its performance, but the carrying out of the obligations of the respondent body or officer in a particular manner.

[2] Mandamus is the appropriate method of compelling the proper officer to pay the salary of a public servant as fixed by law. In such a case, the law being ascertained, it is the auditor's duty to order the payment of a lawful claim. In such a case his function is ministerial, and he cannot avoid the application of mandate to compel the performance of such duty by saying that in mistakenly acting upon a claim he has exercised his discretion. Fowler v. Peirce, 2 Cal. 167. The same doctrine applies in the present case to the auditing committee.

Petitioner was appointed July 7, 1909, to fill an unexpired term as justice of the peace of the city of San Diego. At the time of his appointment, San Diego was a city of the third class, and the salary of his office as then fixed by law was $2,000 per annum. The charter of the city of San Diego makes no provision for the election or appointment of a justice of the peace, and petitioner is the only judicial officer of that rank having jurisdiction in that city. From the time of his appointment to the end of his appointive term, petitioner drew salary at the rate of $2,000 a year. In November, 1910, he was elected to the full term beginning on the first Monday in January, 1911. At the time of his election and when his elective term of office began, the city of San Diego had passed, by reason of its increased population, from the third to the second class, and the city justice of a city of that class was entitled to a salary of $3,600 per annum, payable in equal monthly installments. Section 103, Code Civ. Proc. At the end of January, 1911, he demanded $300 as his salary for that month. The auditing committee allowed his claim for $166.66 without prejudice, and later upon advice of the city attorney of San Diego commanded that a further warrant of $133.33 be drawn. For the months of February, March, April, May, and June, 1911, he presented his claims for $300 per month, and they were duly audited and paid. On July 31, 1911, his verified claim for $300 as his salary for the month of July went to the auditing committee, and on August 2, 1911, said committee allowed the claim and ordered its payment. Before a warrant for the July salary had been drawn, however, the city attorney of San Diego received a copy of the laws enacted by the Legislature of 1911, and discovered that on February 8th of that year an act had been approved by which cities were reclassified in such manner that San Diego again became a city of the third class; that on March 24, 1911, municipal corporations were again classified with the result that San Diego passed into the second and one-half class; and that following the adoption of this latest classification section 103 of the Code of Civil Procedure had also been amended by an act approved April 29, 1911 (St. 1911, p. 1215), and the salary of a justice of the peace in a city of the second and one-half class had been fixed at $3,000 per annum. He thereupon advised the auditor that the justice of the peace had been overpaid at the rate of $133.33 a month from February 8 to June 30, 1911; that the latest reclassification of cities and the amendment to section 103 of the Code of Civil Procedure fixing the salary of a justice of the peace in cities of the second and one-half class at $3,000 a year could not operate in favor of petitioner Puterbaugh because it would be an increase of his compensation during his term of office in violation of section 9 of article 11 of the Constitution of California; and that the amounts paid to said Puterbaugh in excess of the sums found due by a computation based upon interpretation of the law must be either repaid to the city by him or earned at the rate of $166.66 a month before any warrant might be drawn in his favor, because under section 2 of chapter 2 of article 6 of the charter of the city of San Diego no demand upon its treasury may be allowed by the auditing committee or by any officer of the municipality in favor of one indebted to the city without first deducting the amount of such indebtedness. Acting upon this advice, the auditor refused to approve petitioner's warrant for July, although the auditing committee of the city had allowed his demand for $300. The auditor estimated that from January 1, 1911, to February 8, 1911 (the date of the first reclassification of cities), petitioner had earned at the rate of $3,600 per annum $380; that from the last-mentioned date to July 31, 1911, at the rate of $2,000 per annum he had earned $955.52, or $1,335.52 in the aggregate; but that having been paid $1,800 for the first six months of the year 1911, the justice of the peace was indebted to the city in the sum of $464.48 on August 1, 1911. To phrase it differently, the auditor estimated that on November 1, 1911, this petitioner would be entitled to a warrant for $35.51.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Following the auditor's refusal to audit his claim, petitioner demanded additional salary for that part of the year 1910, following the change in the classification of San Diego whereby it entered the third class. Under the twentieth section of the act providing for the taking of the census of the United States for the year 1910, it was specified that such census should be taken as of April 15, 1910, and by the official promulgation of the detailed figures of the census on or about March 22, 1911, it appeared that the population of San Diego was 39,578, which, according to the statute in force then and up to February 8, 1911, made it a city of the second class. Petitioner had been paid $166.66 for each month of the year 1910, but he claimed compensation at the rate of $300 a month after April 15th of that year, or an additional sum of $133.33 a month for 8½ months, or $1,133.33. The auditing committee rejected this claim upon the ground, as shown by their answer and in the brief of the city attorney, that by accepting $2,000 in full payment of his services for the year 1910, petitioner is estopped from demanding an additional sum, as well as upon the theory that the increased payment demanded would be in contravention of section 9 of article 11 of the Constitution. Petitioner insists that a city justice of the peace holding office by virtue of general laws is not a city, county, nor township officer, and is therefore not one of those contemplated by section 9 of article 11 of the Constitution, whose salaries may not be increased. Such justices of the peace have been repeatedly mentioned as "part of the constitutional judicial system of the state" (Graham v. Mayor and Board of Trustees of City of Fresno, 151 Cal. 471, 91 Pac. 147; People v. Cobb, 133 Cal. 76, 65 Pac. 325; People v. Sands, 102 Cal. 17, 36 Pac. 404; Kahn v. Sutro, 114 Cal. 331, 46 Pac. 87, 33 L. R. A. 620; In re Johnson, 6 Cal. App. 740, 93 Pac. 199), and the petitioner argues most forcibly that the constitutional inhibition cannot apply to those who do not come strictly within the classification of county, city, town, or municipal officers. We need not decide this interesting question, however, because, assuming that the said constitutional provision does apply to the case before us, there is no difficulty in determining the respective rights of petitioner and the city.

[3] Section 9 of article 11 is an inhibition directed to the Legislature because it applies not only to attempted increases of salaries but to efforts to extend terms of office. The latter part of the section is unquestionably a limitation upon legislative power, and the former from its association should be similarly construed. We think the section could have no application to the change in salary due to the passing of a city, not by legislative act, but by increased population, from one class to another—not a legislative but an automatic change. When petitioner was elected justice of the peace, the statute established his salary at $2,000 a year because of the population of San Diego; but the same statute fixed the salary of a justice of the peace in a city of the second class, and the evolution of the city into that class did not increase his salary as such—it merely placed him in a new class in which he was entitled to a certain salary which happened to be in excess of that payable to him when he took the office. The possibility of a change in his status when the city should grow into another class must have been in the contemplation of the officer and of the people who elected him. That

this change would operate to increase his salary must also have been within their contemplation, and section 9 of article 11 of the Constitution, which was designed to protect taxpayers from legislative interference with their rights by increasing the compensation paid to their elected officers without consent of the electorate, would have no application to such a case as this.

[4] If, then, the taking of the census of 1910 operated without action upon the part of the Legislature or the people of the city of San Diego to place that municipal corporation in the second class as of April 15, 1910, the petitioner is entitled to salary as a justice of the peace of a city of that class from April 15th to the end of the year 1910, unless estopped from demanding such increased compensation by his acceptance of $2,000 in equal monthly installments for his services during the year 1910. The act of Congress authorizing the taking of the census in the year 1910 provides that such census shall be taken as of April 15th of that year. Act July 2, 1909, c. 2, § 20, 36 Stat. 7 (U. S. Comp. St. Supp. 1911, p. 557). Section 2 of the act of 1883 for the classification of municipal corporations (Stats. 1883, p. 24) provided: "The census taken under the direction of the Congress of the United States * * * shall be the basis upon which the respective populations of said municipal corporations shall be determined. * * *" This section has not been changed by subsequent amendments of the statute. Stats. 1901, p. 94; Stats. 1911, pp. 11, 476. We think that for the purpose of determining the amount of salary to be paid to petitioner the city of San Diego passed without formal action of any sort into the second class (Stats. 1901, p. 94) as of April 15, 1910, and he thereby became entitled to $300 a month (section 103, Code Civ. Proc.). This conclusion, it seems to us, follows inevitably from the doctrine of Ex parte Fedderwitz, 62 Pac. 939.[1] In the opinion of the Chief Justice in that proceeding, discussing the Mitchell Case, 120 Cal. 384, 52 Pac. 799, he said: "The question discussed in that case in both the principal and concurring opinions was whether the police court of Los Angeles had ceased to exist the moment it was ascertained by a special enumeration that the population of the city exceeded 100,000, and all that was decided was that changes of municipal organization do not take place automatically in consequence of changes of population which remove cities from one class to another. This is quite in consonance with the provisions of the classification act. A city of the fourth class retains its charter notwithstanding an increase of population which puts it in the third class. But it does not follow that because its charter remains unchanged its class remains unchanged. On the contrary, the privilege of changing its charter depends upon a change of class. The charter has nothing to do with fixing its class. That is dependent upon population alone, which is an element of all cities, however organized. In organizing under the general law a city must accept the charter of its proper class, but, unless it elects otherwise, it retains its original charter, no matter to what class it may rise or fall by change of population. This is the whole effect of the decision in Re Mitchell, and it does not conflict with the proposition that Berkeley, like every other city of California, becomes at once, within the meaning of our statute law, a city of the class to which its legally ascertained population assigns it."

[5] In People v. Wong Wang, 92 Cal. 280, 28 Pac. 271, it was held that "the exclusive jurisdiction of the police court over certain public offenses committed in a city having 30,000 and under 100,000 inhabitants depends upon the fact of its having the specified number of inhabitants, and not upon any report or proclamation of the fact," so the right of Judge Puterbaugh to draw salary as a justice of the peace of a city of the second class depended, not upon the *proclamation*, but upon the *fact* that on April 15, 1910, the population of San Diego was ascertained by the federal authorities to be 39,578. There was no estoppel by his acceptance of the former salary of $2,000 a year because the facts were not known to him until after the official promulgation of the census. There can be no estoppel where the facts are not known. Wheaton v. North British & Mer. Ins. Co., 76 Cal. 429, 18 Pac. 758, 9 Am. St. Rep. 216. It is therefore the duty of the auditor to certify the petitioner's claim for additional salary from April 15, 1910, to the end of that year at the rate of $3,600 a year.

[6] When petitioner commenced his elective term in January, 1911, he was a justice of the peace of a city of the second class and was entitled to a salary of $3,600 a year. This, we believe, is conceded by the attorney for the city and was admitted by the auditing committee and the auditor when they allowed petitioner's salary of $300 for the month of January. Conceding, without deciding, that section 9 of article 11 of the Constitution is applicable, the subsequent changes in his salary brought about by the Legislature during the session of 1911 would not be in violation of that section, because none of them raised his compensation above $3,600 per year. The salary of an officer which may not be increased "during his term of office" has reference only to his compensation as fixed by law when his term of office began. That the first reduction was to $2,000 a year, and that the salary eventually became $3,000 a year, is im-

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 130 Cal. xviii.

material. The former enactment did not bar the latter nor render it inoperative. The very purpose of the constitutional provision, as we have indicated above, was to prevent the Legislature from adding to the rate of salary payable to a public officer at the time of his induction into office, and the prohibition of the Constitution would not apply to legislative adjustments as rates less than that to which he was entitled at the beginning of his term. Petitioner's right to salary at the rate of $3,600 a year existed from the first Monday in January to February 8th of that year when by an amendment to the classification act he became a justice of the peace of a city of the third class. Stats. 1911, p. 11. Under this reclassification and under section 103 of the Code of Civil Procedure as it then existed, he was entitled thereafter to compensation at the rate of $2,000 a year until the subsequent amendment which placed San Diego in the second and one-half class, and became a law March 24, 1911 (Stats. 1911, p. 476). Section 103 of the Code of Civil Procedure did not then provide for any salary in the second and one-half class, and we must conclude that petitioner was without right to salary after March 24, 1911, until the re-enactment of section 103 of the Code of Civil Procedure, April 29, 1911 (Stats. 1911, p. 1215), when the salary of a justice of the peace of a city of the second and one-half class was fixed at $3,000 per annum.

[7] It remains only to consider the auditor's claim that the city is entitled to recoupment for the overpayments mistakenly made after February 8th to July 1st upon the belief of the auditor and the auditing committee that San Diego was still a city of the second class. In our opinion these cannot be deemed such voluntary payments as prevent the city from enforcing its demands in an action like the present. The auditing committee is prohibited from allowing any demand upon the treasury in favor of any officer "*in any manner* indebted to the city." While this indebtedness has not been fixed by any judgment, it is easily ascertainable under the admitted facts of this case, and the auditing committee should not be compelled by mandate to allow any claim which does not recognize such indebtedness.

From the above discussion it follows that the demurrers to the petition herein are overruled, and upon the facts alleged in said petition, which are either directly admitted or not denied, it is ordered that mandamus issue to respondents that they audit and allow petitioner's claim for compensation at the rate of $133.33 a month from April 15, 1910, to January 2, 1911; $300 a month from January 2 to February 8, 1911; $166.66 a month from February 8 to March 24, 1911; and $250 a month from April 29, 1911, to October 1, 1911 (or to the last full month prior to the filing of the petition herein); subtracting from the aggregate of all such sums, however, the amounts in excess of petitioner's salary (according to the views above expressed), which were paid to petitioner during the months of February to June, 1911, inclusive.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; LORIGAN, J.

162 Cal. 588

SAN LUIS OBISPO COUNTY v. MURPHY, County Auditor. (L. A. 2,726.)

(Supreme Court of California. April 11, 1912.)

1. PRINCIPAL AND SURETY (§ 53*)—"SURETY COMPANY."

The term "surety companies" in St. 1903, p. 476, which is an act to provide for the payment by the state, counties, cities, or cities and counties of the premium on official bonds, when signed by surety companies, includes any corporation contemplated by Code Civ. Proc. §§ 1056, 1057, and Pol. Code, § 955, subd. 4, which authorized corporations organized for that purpose to become the sole surety on any undertaking or bond required by any law of the state.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 53.*]

2. STATES (§ 48*)—OFFICERS—BONDS—SURETIES.

Code Civ. Proc. §§ 1056, 1057, provide that corporations organized to become surety on bonds or undertakings required or authorized by law may, upon compliance with the requirements of the laws of the state for any cause thereon, become sureties on such undertakings. Pol. Code, § 955, subd. 4, provides that a corporation, such as is mentioned in Code Civ. Proc. § 1056, may be accepted as sole surety on any bond or undertaking required by law. Pol. Code, § 954, provides that the bond of an official must be signed by the principal and at least two sureties. Section 955 provides that the sureties on a bond of a state officer must swear that they are freeholders, and are worth the amount for which they become surety. *Held*, that two classes of official bonds with respect to the character of the sureties are authorized; and the bond of either class presented by the officers, if otherwise legal, must be accepted.

[Ed. Note.—For other cases, see States, Dec. Dig. § 48.*]

3. CONSTITUTIONAL LAW (§ 48*)—CONSTRUCTION OF STATUTES—PRESUMPTIONS.

In view of the inferences that must be recognized in favor of the validity of any legislative act, it will not be presumed, for the purpose of nullifying St. 1903, p. 476, which provides for the payment by the state, counties, or cities, or cities and counties, of the premium or charge on official bonds, when given by surety companies, that there was any intention to discriminate in favor of surety companies as against personal surety, or in favor of certain officers as against others.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 48.*]

4. STATUTES (§ 100*)—SPECIAL LEGISLATION—GENERAL LAWS.

St. 1903, p. 476, provides that the premium for official bonds given by surety companies shall be paid by the state, county, city, or city and county, respectively. Const. art. 1, § 11, provides that all laws of a general nature shall have a uniform operation. Article 1, §

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

21, provides that no citizen, or class of citizens, shall be granted privileges which, upon the same terms, shall not be granted to all. Article 4, § 25, subd. 9, provides that the Legislature shall not pass local or special laws in regulating county or township business or the election of county and township officers. *Held*, that the statute is not unconstitutional as being other than a general law for limiting the charges guaranteed to bonds furnished by surety companies, as the Legislature might well conclude that the security furnished was superior to that of a personal surety, and the use of such bonds was therefore a proper safeguard of the public interests, in addition to which the surety companies practically constitute the entire class of those making charges for furnishing bonds.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 112; Dec. Dig. § 100.*]

5. STATUTES (§ 100*)—SPECIAL LEGISLATION —SURETY BONDS.

Under Const. art. 11, § 5, which gives the Legislature power to prescribe the duties of the various classes of county and municipal officers, and to regulate their compensation, St. 1903, p. 476, is not unconstitutional, as other than a general law, because it does not include justices of the peace and constables, as the test of generality is whether the act applies equally to all the class of officers to which it refers, rather than to all officers of the class in which those referred to are included.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 112; Dec. Dig. § 100.*]

6. STATUTES (§ 100*)—SPECIAL LEGISLATION —SURETY BONDS.

The statute is not unconstitutional for its failure to include notaries, who are state officers, or officers of districts organized within counties for special purposes, between whom and county, township, or municipal officers there is an apparent distinction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 112; Dec. Dig. § 100.*]

7. STATUTES (§ 100*)—SPECIAL LAWS—SURETY BONDS.

Though St. 1903, p. 476, may not apply to officers of a municipality organized under a freeholder charter, by reason of the fact that under certain provisions of the Constitution the matters involved in such act is controlled by the provisions of the charters, or to state officers, whose compensation is fixed by constitutional provision, it is not rendered unconstitutional as other than a general law; it being sufficient if it be operative as to the state officers, or any particular class over which the Legislature has control in reference to the matters embraced therein.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 112; Dec. Dig. § 100.*]

In Bank. Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Injunction by San Luis Obispo County against P. H. Murphy, County Auditor. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Albert Nelson, Dist. Atty., for appellant. Paul M. Gregg and C. P. Kaetzel, for respondent.

ANGELLOTTI, J. This is an action by the county of San Luis Obispo, by its district attorney, to obtain a decree restraining and enjoining the auditor from allowing and auditing as a county charge a demand of the Ætna Indemnity Company, a surety company, for $20, the amount of the premium for the year 1910 on the official bond of the county recorder of said county, which demand had been allowed and approved by the board of supervisors thereof. Defendant's demurrer to the complaint was sustained; and, plaintiff having failed to amend, judgment went for defendant. This is an appeal by plaintiff from such judgment. The only question presented by this appeal is whether an act of the Legislature entitled "An act to provide for the payment by the state or counties, or cities, or cities and counties, of the premium or charge on official bonds when given by surety companies," approved March 25, 1903 (Stats. 1903, p. 476), is constitutional.

The act simply provides that "the premium or charge for bonds given by surety companies for state officials, county officials, city officials, or city and county officials, shall be paid by the state, county, city, or city and county respectively; provided, however, that no premium or charge shall exceed one-half of one per cent. per annum on the amount of such bond; and provided further, that this act shall not apply to notaries public." No question is suggested herein of any violation of provisions of the Constitution prohibiting the increase of the compensation of officers after their election or during their term of office, for the reason that the act in question became a law long prior to the election of a county recorder for the term that included the year 1910.

Our Constitution provides as follows: "All laws of a general nature shall have a uniform operation." Section 11, art. 1. "Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Section 21, art. 1. "The Legislature shall not pass local or special laws in any of the following enumerated cases; that is to say: * * * Ninth. Regulating county and township business." Subdivision 9, § 25, art. 4. It is claimed that the act in question is violative of one or more of these provisions.

No claim is made that the Legislature has not the power to make the cost or charge to a public officer of the official bond required by law to be given by him a public charge; and we know of no ground upon which it may properly be held that such power does not exist as to those officers as to whom the Legislature has the power to fix the compensation, or provide for such fixing, as in the case of cities and towns operating under the general municipal corporation act.

[1] The term "surety companies" in said act was intended, of course, to include any corporation organized for the purpose of carrying on the business of becoming a surety on bonds and undertakings, which, by sections 1056 and 1057 of the Code of Civil Procedure, and subdivision 4 of section 955, Polit-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ical Code, is authorized to become the sole surety on any undertaking or bond required by any law of this state, and may be accepted as such by the approving authority, in lieu of a bond with natural persons as sureties.

[2] Under certain provisions of our Political Code, as they have existed from the adoption of our Codes in 1872, a public officer may give a bond, signed by natural persons, possessing certain qualifications, as sureties. Pol. Code, §§ 954 and 955. We thus have two classes of official bonds with respect to the character of the sureties; and a bond of either class presented by the officer, if it conforms to the requirements of the law in other regards, must be accepted. Except as affected by the act under consideration, the two classes of bond thus authorized are equally credited; either satisfying the law.

[3] In view of the well-settled presumptions that must be recognized in favor of the validity of an act of the Legislature, we are of the opinion that this act cannot properly be held to be violative of any of the constitutional provisions referred to. It is not to be assumed, for the purpose of nullifying the act, that there was any intention to discriminate in favor of surety companies as against personal sureties, or in favor of certain officers as against others. If a reasonable ground for the conclusion of the Legislature, confining the operation of the act to bonds given by surety companies, can be conceived, we must assume that the Legislature acted on that ground; and, consequently, that the classification made by it was authorized by the Constitution. Two such grounds may readily be stated.

[4] The act may reasonably be construed as one designed to encourage the giving by the officers to whom it is applicable of surety company bonds, rather than personal surety bonds, upon the theory that the public interests will be better protected by such bonds. While both classes of bonds were, prior to the passage of the act, equally credited, and while either must still be accepted, when presented by a public officer, when we take into consideration the provisions of our law relating to the conditions and official supervision under which surety companies may transact business, it cannot fairly be said that the Legislature may not reasonably have concluded that, while the personal surety bond may still be used at the option of an officer, the surety company bond is a better and safer bond, so far as the public interests are concerned, and the giving of such bonds should be encouraged. Such companies being engaged in the business of furnishing security for a consideration, and an officer furnishing such a bond being necessarily compelled to pay a premium or charge therefor (if the same is not a public charge), while no premium or charge is ordinarily involved in the matter of obtaining personal sureties, manifestly the giving of such bonds, in lieu of the personal surety bonds, would be much increased by an act making such premium or charge a public charge. Under this construction, the Legislature practically says to the officer: While we do not refuse to accept a personal surety bond from you, we believe a surety company bond better and safer for the public interests, and therefore prefer such a bond. If you will give such a bond, the premium charged therefor by the surety company, not exceeding a certain rate, will be paid from the public treasury, thus saving you from the additional expense that would otherwise be imposed upon you by reason of giving a surety company bond, instead of a personal surety bond. No reason is apparent to us why the Legislature has not the power to so declare; and, if this be so, there is nothing in the constitutional provisions, above referred to, that makes the act void, because it is applicable only to the premiums and charges on bonds furnished by "surety companies."

The act may also be reasonably construed as one designed to make the cost of an official bond to the officer furnishing it a public charge, in the same way that the act of March 20, 1905 (Stats. 1905, p. 477), makes the cost of his bond to an executor, administrator, etc., a lawful expense in the execution of his trust, for which he is to be allowed credit in his accounts. In the latter act, it is true that there is no express limitation in respect to the character of the sureties; while, under the act here involved, the premium or charge collected from the officer as a consideration by a personal surety would not be a public charge. It is a matter of common knowledge, however, that the only persons really engaged in the business of becoming surety on bonds for a consideration, and especially on official bonds, are the corporations authorized by our statutes to engage in such business under such limitations and restrictions as are imposed by law; and that it is only as to a bond given by such a corporation that there is ordinarily any premium or charge for the risk assumed by the surety. While, perhaps, an isolated case may be found of an officer being compelled to give to a natural person some pecuniary consideration for his service in becoming a surety on his official bond, we know that such cases are extremely rare; and that in almost every case a personal surety becomes such as a matter of favor to the officer, and without any charge whatever. The Legislature may have reasonably concluded that the cases in which a charge is made by a personal surety on an official bond are so inappreciable and insignificant in number that, in reality, the surety corporation bonds "compose the entire class" as to which there is a premium or charge for the risk assumed by the surety; and such a conclusion would warrant the limitation of the provisions of the act to such bond. See In re Spencer, 149 Cal. 401, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105.

[5] The act does not apply, in express terms, to bonds given by township officers (unless the term "county officers" may be read to include township officers, a question which we do not decide), being limited to "state officials," "county officials," "city officials," and "city and county officials," and expressly excepts notaries public. Nor does it expressly include district officers, such as the officers of a school district, sanitary district, etc. There is, however, no discrimination therein as between officers of any particular character. By its terms, it includes *all* state officers (except notaries public, to whom we shall refer later), *all* county officers, *all* city officers, and *all* city and county officers; and we are of the opinion that, as to an act of this character, nothing further is essential, so far as the constitutional provision involved is concerned. The power of the Legislature to prescribe the respective duties of the various classes of county, township, and municipal officers, and to regulate their compensation, cannot be doubted. Section 5, art. 11, Const. We do not see how any provision applicable to all officers of a particular class, such as county clerks or sheriffs, etc., going to the question of the compensation, or the character or manner of qualification (including bonds), can reasonably be held to be inhibited by such provisions. For instance it would not be doubted that the Legislature might require an official bond to be given by members of certain classes of such officials, without requiring such a bond of members of other classes. It might dispense altogether with the requirement that justices of the peace and constables (the officers provided by law for townships) give any official bond. Requiring a bond from them, it might require a bond of a different character from that required of other officials, or might make different regulations as to sureties from those made as to other officers. The difference in the character of the respective officers and the duties to be performed furnish such a basis for different regulation as to render it impossible for a court to say that there was not reasonable ground for the action of the Legislature in this regard. As long as such an act applies equally to all of a particular class of such county, township, or municipal officers, it would seem, so far as the courts are concerned, to apply to all who stand in the same relation to it, and, consequently, to be a general law. We, therefore, are unable to see that the failure to include bonds given by justices of the peace and constables among those on which the premium or charge is a public charge renders the act violative of any of the constitutional provisions referred to.

[6] As to notaries public, who are state officers, and the officers of districts organized within the various counties for special purposes, such as school districts, sanitary districts, irrigation districts, etc., it is obvious, in view of what we have said, that such distinctions exist as would warrant their exclusion from an act of this character.

[7] It may be doubted whether the act here involved has any force as to state officers whose compensation is fixed by constitutional provision; but as to this we do not decide. It would seem, too, that it cannot have any force as to the officers of a city or city and county, organized and operating under a freeholders' charter. But these considerations do not affect the question of the validity of the act. There are many instances of general laws applicable to cities which are not operative in cities organized and existing under freeholders' charters, by reason of the fact that under certain provisions of the Constitution the regulation of the matters covered by such acts is controlled by the provisions of the freeholders' charter. The validity of such laws has never been doubted. It is sufficient for all purposes that such acts are operative as to all cities as to which the Legislature has control in regard to the matters embraced therein. And the same is true as to the matter of the state officers, whose compensation is fixed by the Constitution. It is sufficient if the act is operative as to the state officers of any proper class over which the Legislature has control in reference to the matters embraced therein.

Whatever may be our views as to the policy of the legislation here involved, we are unable to see that it is violative of any provision of our Constitution.

The judgment is affirmed.

We concur: SLOSS, J.; SHAW, J.; HENSHAW, J.; MELVIN, J. BEATTY, C. J., concurs in the judgment.

(18 Cal. App. 532)

EDMUNDS v. SOUTHERN PAC. CO.

(Civ. 1,083.)

(District Court of Appeal, Second District, California. March 21, 1912. Rehearing Denied by Supreme Court May 20, 1912.)

1. APPEAL AND ERROR (§ 1001*)—VERDICT—CONCLUSIVENESS.

If there is sufficient evidence to sustain the verdict, the appellate court will not weigh the evidence to determine its weight or character.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. § 1001.*]

2. RELEASE (§ 17*) — VALIDITY — "ACTUAL FRAUD."

A statement to plaintiff, to induce him to execute a release, while he was in a weak physical condition from personal injuries, by defendant railroad company's claim agent, to the effect that plaintiff would be able to work in two or three weeks, and would have no scars, if palpably false, was an act fitted to deceive, constituting "actual fraud," within Civ. Code, § 1572, providing that actual fraud, committed by a party to a contract, consists, among other things, in any acts fitted to deceive, or any suggestion as a fact of that which is not true by one who does not believe it to be true.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. § 17.*

For other definitions, see Words and Phrases, vol. 1, pp. 157–158.]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Edward G. Edmunds against the Southern Pacific Company. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Affirmed.

J. W. McKinley (W. R. Millar, of counsel), for appellant. E. B. Drake, for respondent.

ALLEN, P. J. The action was one for damages, occasioned by injuries to plaintiff through the negligence of defendant. There is evidence in the record tending to show these facts: Plaintiff, a mail clerk employed by the United States government, was injured in an accident on defendant's road. The car in which he was employed being thrown near the engine, escaping steam from the engine burned plaintiff to such an extent that the skin and flesh fell from his hands, and his hands were so injured that it was not possible to close them in a natural way. In addition to this, his face, ears, and ankles were burned so as to make a permanent discoloration of the skin, and he was bruised on his knees and one of his ribs injured. Plaintiff was so shocked nervously that he was unable to sleep, and within three weeks after the accident had lost over 40 pounds in weight. Through the result of the injury, he was rendered unable to perform his usual and ordinary work, his hands are permanently disfigured, and up to the time of the trial his sleep was disturbed, and he is probably so permanently injured as to render him unable to follow his usual avocation. After the injury, plaintiff was taken to a hospital belonging to defendant and kept there for about 18 days, when he was brought to the city of Los Angeles, at which place he arrived on the 7th of January, 1909. When he arrived at Los Angeles, he was irrational. Occasionally he would have lucid intervals of 5 minutes or more; but much of the time, as one witness expressed it, "he just acted like a man that was crazy; that is all I can tell." While he was in this condition physically and mentally, and within 4 days after his arrival at Los Angeles, a claim agent of defendant approached him and effected a settlement of his claim for damages and paid him $1,250. Plaintiff testified that when he signed the settlement and release he did not know what he was doing; that he did not know its contents, and did not know such contents until the 11th of February, 1910, at which date, through counsel, a notice of rescission of the release was served upon defendant, with a tender of the amount paid. There is evidence to the effect that the claim agent represented to plaintiff that he would be able to work in two or three weeks; and that he would be all right in two or three weeks, and would have no scars. Defendant, upon the trial, pleaded this settlement and release in bar of the action, admitted its negligence, but denied that plaintiff was damaged to the amount claimed. The action was tried by a jury, which returned a verdict in plaintiff's favor of $5,000. Judgment was rendered thereon for that amount, from which judgment, and from an order denying a new trial, defendant appeals.

[1] Appellant's principal contention is that no actual fraud was shown in the matter of the settlement, and that it does not appear that plaintiff was in such mental condition at the time of the settlement as to render him incompetent to act; and, further, that the amount paid was equal to the damages sustained. The jury, having before it the witnesses, and having heard all of the evidence in the case, determined these matters adversely to appellant; and, there being testimony in the record ample to sustain such verdict, it is not the province of an appellate court to review or weigh the evidence in a determination as to its weight or character.

[2] The suggestions of the claim agent and his statements to a man in the weak physical condition of plaintiff were acts fitted to deceive, and, under section 1572, Civil Code, amounted to actual fraud. In addition to this, a careful perusal of the transcript leaves little room for doubt that this man, upon the date of this attempted settlement, was unfitted to enter into or consummate any business deal or arrangement. His mental and physical condition were such that it cannot be said that two minds met in the contract of release, and the jury very properly so determined. The question of sanity or insanity in the abstract is not involved in matters of this kind. The question for the jury was whether or not, at the time of the settlement, plaintiff was so weak mentally and physically that he did not know and understand what he was doing. The court gave instructions to the jury as favorable to defendant as could be asked, and under these instructions the verdict of the jury must be accepted as a final determination of the matters at issue. The suggestion of counsel that the amount of the settlement was adequate, as compensating plaintiff on account of his injuries, merits no serious consideration.

We find no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

(18 Cal. App. 585)

FOX et al. v. ROBINSON. (Civ. 906.)

(District Court of Appeal, First District, California. March 27, 1912.)

1. Vendor and Purchaser (§ 165*)—Contract—Construction.

The contract of sale of land, described as commencing at a point on the southerly line of B. way, a certain distance from the intersection of said line with the easterly line of W. street, running thence southerly and parallel with said line of said street "fifty feet, more or less, but not less than forty-nine feet," to the center of a strip, formerly S. street; thence easterly along the center line of S. street 56 feet; thence northerly and parallel with said line of W. street "fifty feet, more or less, but not less than forty-nine feet," to the southerly line of B. way; and thence westerly along said line of B. way 56 feet to the point of beginning—is of a tract with definite north and south boundaries, controlling the calls for distances between them, with a warranty, however, that they are not less than 49 feet, so that there is no failure of title, but a breach of warranty, because they are less than 49 feet.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 329, 329½; Dec. Dig. § 165.*]

2. Cancellation of Instruments (§ 43*)—Rescission—Pleading—Variance.

While one may have rescission of a contract of purchase of land for breach of warranty of quantity, he must, to do so, plead the breach; and, having merely pleaded a failure of title, of which there was none, and proved such a breach, there is a variance.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 96–99; Dec. Dig. § 43.*]

3. Vendor and Purchaser (§ 170*) — Performance of Contract — Tender — Sufficiency.

A tender by a purchaser of the balance of price, with demand for a deed, by making tender to the vendor's wife, at his residence, in his absence, and leaving with her a written notice for him, is insufficient, in the absence of showing that he could not have been easily found; Civ. Code, § 1489, providing that an offer of performance may be made, where the person to whom the offer ought to be made can be found, or, if he cannot, with reasonable diligence, be found, then at his residence or place of business.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344–348; Dec. Dig. § 170.*]

4. Vendor and Purchaser (§ 170*) — Performance of Contract—Tender.

Under Civ. Code, §§ 1493, 1495, providing that an offer of performance, to be of any avail, must be made in good faith, and shall be of no effect if the person making it is unwilling to perform according to it, a purchaser can get no benefit from tendering the balance of purchase money and demanding a deed; his intention being to reject any deed, because the land was not of the depth warranted in the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 344–348; Dec. Dig. § 170.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Agnes Fox and husband against P. A. Robinson. Judgment for defendant, and plaintiffs appeal. Affirmed.

Samuel M. Samter, for appellants. Robert Edgar and O. Youngs, Jr., for respondent.

HALL, J. This is an appeal from a judgment of nonsuit, rendered, upon motion of the defendant, at the close of the testimony introduced upon behalf of plaintiff.

The only question presented by the appeal is as to whether or not the court erred in granting the nonsuit.

Defendant and plaintiff Agnes Fox entered into a written contract on the 25th day of September, 1907, in which defendant agreed to sell to said plaintiff, and said plaintiff agreed to buy from defendant, a certain piece of land situate in the town of Berkeley, and particularly described in the agreement as set forth in the complaint as follows, to wit: "Commencing at a point on the southerly line of Bancroft way, distant thereon easterly two hundred (200) feet from the intersection thereof with the easterly line of West street, running thence southerly and parallel with said line of West street fifty (50) feet, more or less, but not less than forty-nine feet, to the center of that strip of land formerly known as South street; thence easterly along the center line of South street fifty-six (56) feet; thence northerly and parallel with said line of West street fifty (50) feet, more or less, but not less than forty-nine (49) feet to the southerly line of Bancroft way; and thence westerly along said line of Bancroft way fifty-six (56) feet to the point of beginning."

The price to be paid was the sum of $2,200, of which $200 was paid at the execution of the agreement; and the balance ($2,000) was to be paid "in monthly installments of ten ($10) dollars or more on the principal, with interest on balance remaining unpaid each month at the rate of six (6) per cent. per annum, but at the end of each year there must be at least $180 paid on the principal. And more can be paid if he so desires."

Plaintiff went into possession of the premises, or, as she claims, a part of the premises, and so continued until after September, 1909, when she delivered possession of the premises to defendant, and brought this action to obtain a judgment for the sum of $962.50, being $750 paid on the purchase price, and $212.50 expended on the property; and that said agreement be canceled.

Evidence was introduced tending to show that at the time the agreement of sale was executed the boundaries of Bancroft way were not marked upon the ground; that it was in appearance simply a country road. Subsequently it was graded and macadamized. Plaintiff procured the city surveyor of Berkeley to make a survey of the lot in question, who gave testimony at the trial, which, it may be conceded for the purposes of this opinion, established, or at least tended to establish, the fact that the distance from the southerly line of Bancroft way, along the easterly boundary of the lot described in the agreement, to the center of the strip of land formerly known as South street was but 47.63 feet, and the distance between said southerly line of Bancroft way, along the westerly boundary of said lot, to the center line of said strip of land formerly known as South street was but 48.17 feet. It was and is the theory of appellant that the facts thus shown established a failure of a clear title to the land described in the agreement, which entitles her to recover the money paid under the agreement, and to a judgment canceling said contract. She accordingly alleged in her complaint "that said defendant is unable to execute and deliver to said Agnes Fox a good and sufficient deed, conveying the land in said Exhibit A described, free and clear of all incumbrances."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We think the theory of appellant is founded upon a misconception as to the correct construction of the agreement, and the effect of the words therein contained, "but not less than forty-nine (49) feet." The land in the agreement, as pleaded in the complaint, is described as bounded on the north by the southerly line of Bancroft way, and on the south by the center line of a strip of land formerly known as South street. Those lines, so far as the description of the land agreed to be sold is concerned, are controlling over the words indicating the distance between those lines. The words "but not less than forty-nine (49) feet," following the words "fifty (50) feet more or less," were intended to have, and did in fact have, the effect of a warranty that the distance between those lines was not less than 49 feet.

It is clear from the language of the agreement as pleaded that plaintiff only intended to buy, and defendant only intended to sell, a piece of land bounded on the north by the southerly line of Bancroft way, and on the south by the center line of the strip of land formerly known as South street. The defendant in the agreement did warrant that the distance between those two designated boundaries was at least 49 feet; but this warranty did not vary or change the identity or description of the land agreed to be sold. It was but a warranty as to the quantity of land contained within the description.

It is correctly stated in appellant's brief that "the insertion of the words 'but not less than 49 feet' was a warranty that the east and west sides were at least 49 feet in length." Plaintiff's complaint, however, was not framed upon the theory of a breach of warranty as to the distance between the given boundaries, but upon the theory of a failure of a clear title to the land described in the agreement.

[2] It is not doubted that a vendee may be entitled to a rescission of an executory contract, and to a return of money paid thereon, when such contract was procured by false and fraudulent representations as to the quantity of land contained within the parcel described, and also where there has been a breach of warranty as to such quantity. Eichelberger v. Mills Land, etc., Co., 9 Cal. App. 628, 100 Pac. 117; Quary v. Scher, 136 Cal. 406, 69 Pac. 96; Civ. Code, § 1786; Brooks v. Riding, 46 Ind. 15; Stevens v. Giddings, 45 Conn. 507; Davis v. Nuzum, 72 Wis. 439, 40 N. W. 497, 1 L. R. A. 774; Moore v. Harmon, 142 Ind. 555, 41 N. E. 599. But in such case the fraudulent representations or warranty and breach as to quantity must be pleaded. Such was the rule followed in each of the cases last above cited. Proof, either of false representations as to the quantity of land contained in the parcel described, or of a breach of a warranty as to the quantity, will not sustain a claim of failure in title to the land described.

In the case at bar, the boundary lines of the land contracted to be sold were correctly described. Only the land within those lines was intended to be sold. Defendant had a clear title to all the land within those boundary lines, and could give a clear title thereto. The record simply shows a breach of a warranty as to the quantity of land described in the agreement, and not a failure of title to any portion of the land described and agreed to be sold. It presents a clear case of a variance between the allegations of the complaint and the proof. For this reason, the court did not err in granting the judgment of nonsuit. Bailey v. Brown, 4 Cal. App. 515, 88 Pac. 518; Tomlinson v. Monroe, 41 Cal. 95; Elmore v. Elmore, 114 Cal. 516, 46 Pac. 458.

[3] In holding that, for the reasons above set forth, the court did not err in granting the nonsuit, we have not overlooked the allegation in the complaint to the effect that plaintiff made a tender of the balance of the money unpaid, and demanded of the defendant that he execute and deliver to plaintiff, within 10 days after the 1st day of September, 1909, a good and sufficient deed, conveying to said plaintiff the parcel of land in said Exhibit A described. The evidence as to this so-called tender does not show a compliance with the provisions of the statute relating to tenders or offers of performance. Appellant went to the residence of defendant in his absence, and made the tender to his wife, and left a written notice for defendant. No attempt was made to show that defendant could not have been easily found. Appellant simply went to his residence upon one occasion, ascertained that he was not then at home, and proceeded to make the alleged tender. This was not a compliance with the law. Civ. Code, § 1489.

[4] Furthermore, it is perfectly clear from the entire record that this so-called tender was not made in good faith; that appellant was not willing to perform; that is to say, if defendant had been present, and had of-

fered her his deed of the land, describing it as in the agreement it is described, she would not have accepted the deed or paid the money. An offer of performance must be made in good faith (Civ. Code, § 1493), and is of no effect, unless the person offering to perform is willing to perform according to the offer. Civ. Code, § 1495. The real purpose and intent was to reject any deed, because the lot was not 49 feet in depth. It may be noted that defendant, because of this deficiency in the quantity of the land, offered ficiency to abate $100 from the price. This offer appellant refused.

The judgment must be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

18 Cal. App. 577

CARLE v. HELLER et al. (Civ. 1,079.)

(District Court of Appeal, Second District, California. March 26, 1912. Rehearing Denied by Supreme Court May 24, 1912.)

1. Husband and Wife (§ 262*)—Community—Separate Property.

The presumption raised by Civ. Code, § 164, providing that when property is conveyed to a married woman it is presumed to be her separate property, is applicable whether the purchase money be the separate funds of the husband or community estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

2. Husband and Wife (§ 131*)—Separate Property—Presumptions.

Where the purchase money of property conveyed to a wife was the separate fund of the husband, the law presumes a gift from the husband to the wife, placing the burden upon one asserting the contrary to prove it.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 426, 471–483; Dec. Dig. § 131.*]

3. Husband and Wife (§ 124*)—Separate Property—Proceeds of Sale.

The proceeds of the sale of a wife's separate property continue to be her separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 89, 449–452; Dec. Dig. § 124.*]

4. Husband and Wife (§§ 49¾, 49½*)—Separate Property.

The mere fact that the proceeds of a sale of property belonging to a wife's separate estate was placed in a bank to the account of the husband "or" the wife, naming them, would not be evidence to rebut the presumption that the husband gave to the wife the property, from the sale of which the money deposited was derived, or show that the wife intended to give the husband any part of her interest in the fund.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 251, 256–260, 249–255; Dec. Dig. §§ 49¾, 49½.*]

5. Husband and Wife (§ 125*)—Separate Estate—Rents of Separate Property.

The rents, issues, and profits of a wife's separate estate are also her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 453–458; Dec. Dig. § 125.*]

6. Husband and Wife (§ 131*)—Separate Property.

In the absence of a contrary showing, it is assumed that the money borrowed upon the separate realty of one of the spouses will be treated as the separate property of the spouse owning such realty.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 426, 471–483; Dec. Dig. § 131.*]

7. Husband and Wife (§ 257*)—Separate Property.

Where property was purchased in a wife's name for $8,500, and thereafter a lot in the rear of such property was purchased by the husband for $1,700, and both tracts were afterwards sold for $26,000, there was not such a commingling of the proceeds as to make it impossible to segregate the wife's separate property from the community.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 904–908, 910; Dec. Dig. § 257.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Mary Louise Carle against Louise Heller and others. From a judgment for defendants and an order denying plaintiff's motion for a new trial, plaintiff appeals. Affirmed.

Constan Jensen, for appellant. Gibson, Trask, Dunn & Crutcher, for respondents.

SHAW, J. One Charles Heller died intestate, leaving surviving him a daughter, the plaintiff herein, and a widow and two sons, the defendants. The widow was appointed administratrix of his estate, and the same, as inventoried, was in due course settled and distributed in accordance with the orders of court. Thereafter plaintiff filed this complaint, alleging that her mother as such administratrix had neglected and failed to account for certain property owned by deceased at the time of his death. This property, all of which defendant Louise Heller claims as her separate estate, consisted of $12,000 cash in bank, household furniture of the alleged value of $1,000, and an undivided one-half interest in certain real estate designated as the "West Sixth street property," in all of which plaintiff claimed an interest as the daughter of the deceased. The court found that all of the property involved was the separate estate of defendant Louise Heller, and gave judgment accordingly. Plaintiff appeals from this judgment, and from an order denying her motion for a new trial.

While the record discloses upwards of 50 specifications of error based upon insufficiency of evidence, the only one necessary to consider in deciding the question involved is the finding that the property described in the complaint did not belong to the estate of Charles Heller, deceased, but was the separate estate of defendant Louise Heller. If this finding is supported by the evidence, other specifications of error based upon like want of evidence, and which are not discussed by appellant, are rendered harmless.

The evidence tends to establish the following facts: Charles Heller and Louise Heller were married in France in the year 1870, emigrating therefrom to Ohio, from which state they removed to California in 1896, bringing with them $6,000, the proceeds of the sale of real estate purchased in the name of the wife, out of the joint earnings of husband and wife. At the time of their removal, certain Ohio real estate, standing in the name of Louise Heller was by her deeded to plaintiff, then married and living in Ohio. The $6,000 brought with them to California was deposited in bank to the credit of Louise Heller. A piece of property located on San Julian street in the city of Los Angeles, and consisting of a lot upon which there were two storerooms, over which were rooms used as a lodging house, was purchased for $8,500, the title thereto being placed in the name of defendant Louise Heller, who paid thereon the $6,000 which she had in bank, and she and her husband jointly gave their note and mortgage for the balance of the purchase price. This property, it appears, increased rapidly in value. Later, at the request of Charles Heller, the daughter, plaintiff herein, conveyed to him the Ohio property which her mother, Louise Heller, had deeded to her, and which property Charles Heller conveyed to his wife. Louise Heller sold this property for $1,200, which sum she gave to Charles Heller with which to purchase, in his own name, a small piece of property in the rear of the lodging house on San Julian street. The reason she assigns for this act was an expressed wish on the part of Charles Heller to own the property in order to qualify himself for jury service, election officer, etc. The purchase price of this property was $1,700, and the balance thereof over and above the $1,200 was secured by mortgage thereon. Mrs. Heller conducted the lodging house in the San Julian street property for seven or eight years; the proceeds and rents derived therefrom being applied in reduction of the mortgage of $2,500 originally given to secure a part of the purchase price. On October 24, 1904, the San Julian street property, title to which stood in the name of Louise Heller, together with the small lot in the rear, the title to which stood in the name of the husband, was sold for the sum of $26,000, $18,000 of which was cash, and the balance evidenced by note and mortgage executed to Charles and Louise Heller. This money, less $500 required to pay the mortgage on the husband's lot, and a small sum still unpaid against the wife's lot, was, on the date of the sale, deposited in bank to the credit of "Charles Heller or Louise Heller." Of this sum, $13,000 was used in the purchase of the West Sixth street property, title to which was taken in the joint name of Charles Heller and Louise Heller. As administratrix, Louise Heller recognized the estate of deceased as the owner of an undivided one-half interest in this property, and the other interest therein, standing in her name, is the real estate involved in this controversy, and which plaintiff insists is not the estate of the mother, but, together with the $12,000, being the balance of the proceeds of the sale of the San Julian street property and lot in the rear thereof, constituted a part of the estate of Charles Heller.

[1] Counsel for appellant devotes much of his argument in support of the proposition that the property accumulated by the Hellers in Ohio was, under the laws of that state, the separate property of the husband. In so far as the decision of this case is affected by the question, such fact may be conceded. Section 164, Civil Code, provides that, "whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." This presumption is indulged in whether the purchase money be the separate funds of the husband, or funds belonging to the marital relation. Funds of either character are equally the subject of a gift from husband to wife. The property having been conveyed to the wife, the law regards it as her separate estate. No duty devolved upon Louise Heller to prove that it was the subject of a gift, for since, under the provisions of said section, it is presumed to be her property, "the law, in the absence of evidence to the contrary, presumes the existence of any fact showing the property to have been acquired by her in such manner as to constitute it separate property." Killian v. Killian, 10 Cal. App. 312, 101 Pac. 806. See, also, Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657; Fanning v. Green, 156 Cal. 279, 104 Pac. 308.

[2] As the purchase money paid for the property was the separate funds of Charles Heller, and a gift thereof being essential to the theory that it was the separate estate of Louise Heller, the law presumes a gift thereof from the husband to the wife. The burden of overcoming such presumption devolved upon plaintiff in attacking the mother's title, and in order to divest the latter's title plaintiff was required to produce competent evidence of sufficient weight to overcome the presumption that her father intended the property as a gift to his wife, Louise Heller, defendant herein.

[3] Little or no evidence was adduced at the trial, the tendency of which was to controvert the rights of Louise Heller in the San Julian street property; and if she owned the property, it necessarily follows, in the absence of some act transmuting the same, that the proceeds of the sale thereof continued as her separate estate.

[4] The mere fact of depositing the proceeds of a subsequent sale of the property in bank to the account of "Charles Heller

or Louise Heller" in itself constituted no evidence tending to disprove the presumption that the husband gave to the wife the property from the sale of which such proceeds were derived. Neither does such fact, standing alone, show that the wife intended to give to the husband any part of her interest in such fund. Denigan v. Hibernia, etc., Society, 127 Cal. 137, 59 Pac. 389; Freese v. Hibernia, etc., Society, 139 Cal. 392, 73 Pac. 172. Concededly, the husband owned a part of the deposit derived from the sale of his own lot, and as to which sum he was entitled to have it paid out on his order. The record discloses no act of either husband or wife with reference to this deposit which tends to prove that the wife intended to give the husband her separate funds in the deposit; on the contrary, the conduct of both husband and wife in dealing with the fund so deposited was consistent with a purpose other than so to do. "It should not be held that she intended to part with her title thereto by reason of an ambiguous phrase which is quite consistent with a contrary purpose." See, Denigan v. Hibernia, etc., Society, 127 Cal. 141, 59 Pac. 389, and cases cited.

[5] Of the purchase price of the San Julian street property, $2,500 thereof was evidenced by a note and mortgage, in the execution of which Charles Heller joined with his wife. Upon this fact appellant insists that an interest equivalent to the amount of said note and mortgage was community property. This contention is based upon Loring v. Stuart, 79 Cal. 202, 21 Pac. 651, and Schuyler v. Broughton, 70 Cal. 285, 11 Pac. 719. In the latter case it was decided that real property purchased by a married woman in her own name, and paid for in part with her separate funds and in part with money borrowed by her for that purpose, is in part the separate property of the wife and in part community property. In the case at bar, it appears that the husband at the time of the execution of the mortgage owned, in his own name, no property whatever. The loan was therefore made upon the faith of the existing separate estate of the wife. Except a small part thereof paid from the proceeds of the sale, it was paid from the rents, issues, and profits of defendant's separate estate, which, like the estate itself, was her separate property. Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; Walsh v. Walsh, 84 Cal. 101, 23 Pac. 1099.

[6] Under these circumstances, the case must be deemed controlled by the later authorities of Flournoy v. Flournoy, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39, and Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819, where it is said: "It is rational to conclude that money borrowed upon the separate real estate of one of the spouses will, in the absence of any showing to the contrary, be treated as the separate property of the party owning such real estate." Here there is no showing to the contrary. In support of his contention on this point, counsel for appellant cites at great length the opinion of the Court of Appeal rendered in the Estate of Pepper, 8 Cal. App. Dec. 720. It is but fair to counsel to assume that in thus quoting from this opinion he was unaware of the fact that the case, after the rendition of such decision, was transferred to the Supreme Court, which, in deciding the case, and upon the strength of section 163, Civil Code, held that the proceeds of a nursery conducted on land which was the separate property of the husband, and which the Court of Appeal held to be community property, was likewise his separate estate. Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092.

[7] It is next insisted that the depositing of the proceeds of the sale of the wife's separate estate with the proceeds of the sale of the lot standing in the name of the husband, conceded to have been funds of the marital relation, constituted such a commingling of the same as to render it impossible to trace and segregate the separate property from that of the community. We perceive no difficulty in this regard for the reason that, upon any theory adopted, it is apparent that a part of the proceeds of the sale of the wife's separate estate was, with the wife's consent, transmuted into community property. The price paid for the property owned by the wife was $8,500. It increased in value rapidly, and several years after it was purchased, a small lot in the rear thereof was bought by the husband for $1,700, making a total of $10,200 paid for the two pieces of property. Upon no reasonable hypothesis could the husband's share in the $26,000, for which the two pieces were sold, have exceeded the proportion which $1,700 bore to $10,200, or one-sixth of the whole, amounting to $4,333, from which, however, must be deducted the mortgage of $500, leaving a balance of $3,833. Add to this the additional sum of $548, which appellant claims Charles Heller had in this deposit, and we have $4,381 to apply on the West Sixth street property purchased for $13,000, paid out of the fund, the title to an undivided one-half interest in which, representing $6,500, was vested in Charles Heller. It thus appears that at his death the $12,000 deposit left standing in the name of Louise Heller, together with $6,500 paid for her half interest in the West Sixth street property, constituted a sum much less than the amount received from the sale of her property.

Appellant lays much stress upon the case of Bekins v. Dieterle, 5 Cal. App. 690, 91 Pac. 173, wherein a creditor of Bekins sought to enforce a judgment against property which it was alleged Bekins had conveyed to his wife in fraud of such creditor. While the facts of that case bear no analogy to the case at bar, this court in its opinion said: "The presumption of a separate estate created in Kate Bekins (the wife) by the conveyance from M. Bekins is overcome by the evidence, which clearly shows the property to have been purchased with community funds." The statement was wholly unnecessary to a decision of the case; the sole question involved being whether or not Bekins had made the conveyance in fraud of creditors. It was therefore purely dictum. Such statement is not the law when applied to the facts in the case at bar, and it has been repeatedly so held. Killian v. Killian, supra; Fanning v. Green, supra. With reference to the furniture of the alleged value of $1,000, which it is claimed was owned by Charles Heller at time of his death, no evidence was adduced thereon other than a statement of defendant Louise Heller to the effect that there were a few household pieces which she herself bought for the rooming house and took with her. What they were, the value thereof, or whether or not they had any value, is not made to appear.

We are unable to perceive any merit in the appeal, and the judgment and order are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(18 Cal. App. 535)

GRIESEMER v. HAMMOND et al. (Civ. 956.)

(District Court of Appeal, First District, California. March 22, 1912. Rehearing Denied by Supreme Court May 21, 1912.)

1. Vendor and Purchaser (§ 339*)—Remedies of Purchaser—Recovery of Payment.

Before a purchaser of land can sue to recover back the purchase money, he must, if there is no unremovable defect in the title, pay or tender the unpaid portion and demand a performance by the vendor, though the property is incumbered with an outstanding deed of trust.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 994–1002; Dec. Dig. § 339.*]

2. Vendor and Purchaser (§ 140*)—Title—Sufficiency.

Where a contract for the purchase of land did not require the vendor to furnish an abstract or certificate of title, his tender of title was not insufficient, because the purchaser did not know that the taxes on the property had not been paid; it being the purchaser's duty to learn the condition of the record.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 262–264; Dec. Dig. § 140.*]

3. Vendor and Purchaser (§ 134*)—Title—Sufficiency.

The tender of title by the vendor was not insufficient, because the property was incumbered with a deed of trust, where a reconveyance by the trustees was also tendered, and it was immaterial that the purchase money was relied upon and intended to be used to liquidate the indebtedness secured by the deed of trust.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238, 250–254, 258; Dec. Dig. § 134.*]

4. Vendor and Purchaser (§ 143*)—Title—Sufficiency—Recording Fee—Waiver.

Failure of the vendor to tender to the purchaser the fee for recording an instrument releasing an indebtedness against the property did not render insufficient a tender which was otherwise sufficient, where the purchaser did not object on such ground at the time; this objection not only being waived, but it being presumed that the vendor would have tendered the fee on request.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 267–270, 311; Dec. Dig. § 143.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Morris A. Griesemer against William Hammond and others. From an order denying defendants' motion for a new trial, defendants appeal. Reversed.

George E. Lawrence and Cary Howard (Henry G. Tardy and William C. Clark, on the briefs), for appellants. Edward Hohfeld, for respondent.

KERRIGAN, J. This is an appeal from an order denying defendants' motion for a new trial, in an action to recover money paid as a deposit on a contract for the purchase of land.

On the 24th day of October, 1907, Hammond & Hammond, copartners, as agents of the defendant F. S. Kelly, entered into a contract with the plaintiff, whereby the latter was to purchase a certain parcel of land, situated in Alameda county, and pay therefor the sum of $13,500. At the time of the execution of the contract, the plaintiff paid said agents the sum of $1,350 on account of and as a deposit to secure the sale of said land. The terms of sale were as follows: "Cash $6,000, balance flat loan of $7,500 at seven per cent. net. * * * 60 days are to be allowed for legal search of title. If it is not found good, the deposit * * * is to be returned; if the title is found good and the sale is not consummated in accordance with the above terms, the deposit is to be forfeited." The time allowed to plaintiff for examining title was extended, by mutual consent, up to January 29, 1908.

The contract did not call for the furnishing of an abstract of title or certificate of search. The uncontradicted testimony, however, of Mr. Hammond, Jr., shows that he procured a certificate of title for the plaintiff, without authority from the vendor; and that he expected payment therefor to be made by the plaintiff.

At about the end of the 60 days prescribed in the contract, Mr. Hammond, Jr., delivered to the plaintiff a deed of trust and two promissory notes, aggregating $7,500 (representing the "flat loan" figuring in the purchase price), for execution by plaintiff, and at the same time presented plaintiff with the certificate of title, which showed a tax lien and the existence of a deed of trust on the property securing the repayment to the Citizens' Bank of Alameda of a loan of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

$5,000. Plaintiff took the abstract, deed, and notes, and submitted them to his attorney for examination. As a result of the report on the title by said attorney, the plaintiff, on January 27, 1908, wrote Messrs. Hammond & Hammond a letter, wherein, after referring to the terms of the contract, he said: "I have to report to you that the title has been examined and found defective and not good in this, that the legal title to the property is vested in S. E. Biddle, Jr., and Frank V. Bordwell, as security for the payment of $5,000, and the property is subject to the lien of taxes, state, county and municipal." In this letter to the agents, plaintiff also complained that the notes and the deed of trust did not correctly embrace the terms of their oral agreement as to the time of payment of the balance of the purchase price, and the letter concluded with a demand for the return of the deposit.

Two days after receiving this letter, January 29, 1908, and within the life of the contract as extended, Mr. Hammond, Jr., called upon the plaintiff, and tendered him (1) a deed to the property from the vendor, F. S. Kelly, and Josie Kelly, his wife, (2) a deed of reconveyance thereof from Messrs. Biddle and Bordwell, as trustees, to said F. S. Kelly and wife, (3) a note for $7,500, and (4) a deed of trust to said property to secure said note, demanding that plaintiff execute said note and deed of trust. At the time of this tender, Mr. Hammond, Jr., demanded payment of the balance of the purchase price, payable in cash, to wit, $4,650. The nature of these documents was explained to the plaintiff; and, while he made no specific objection of any kind to them, still he declined to examine or accept them, and told Mr. Hammond that he would present the whole matter to his attorney.

It was admitted at the trial that the taxes mentioned in the letter of January 27th were paid on January 20th, although the record fails to show that plaintiff was informed of this fact. It was also uncontradicted that the cost of recording the deed of reconveyance from Messrs. Biddle and Bordwell, trustees, was not tendered to plaintiff. The evidence in the case also shows that said deed of reconveyance was intrusted to Mr. Hammond, Jr., by Messrs. Biddle and Bordwell, trustees, to be delivered only upon the payment to him, for their account, of the $5,000 for which it was security.

The plaintiff made at no time a tender of the money to be paid by him, or in any other manner offered to comply with the terms of the agreement, or otherwise placed the vendor in default. He contradicted the testimony introduced by the defendants to the effect that he had stated that he could not spare from his business the money necessary to carry out the transaction, and that for this reason did not want to do so.

[1] The covenants in this contract are mutual and dependent; and before the plaintiff could rescind the contract and recover the amount of his deposit he must have paid or offered to pay the unpaid portion of the purchase price due thereunder. In such a contract, the rule is plain that the vendor must be given an opportunity to perform his part of the contract, before he can be put in default and an action maintained against him to recover back the purchase money. Maupin on Marketable Title, 200 and 792; Hooe v. O'Callaghan, 10 Cal. App. 567, 103 Pac. 175. And the general rule is that a vendee cannot recover purchase money paid on his contract to purchase until after he has made a tender of the purchase money due under the contract and demanded a deed. Hanson v. Fox, 155 Cal. 106, 99 Pac. 489, 20 L. R. A. (N. S.) 338, 132 Am. St. Rep. 72; Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; Newton v. Hull, 90 Cal. 487, 27 Pac. 429; Townsend v. Tufts, 95 Cal. 257, 30 Pac. 528, 29 Am. St. Rep. 107; North Stockton, etc., Co. v. Fischer, 138 Cal. 100, 70 Pac. 1082, 71 Pac. 438; Leach v. Rowley, 138 Cal. 709, 72 Pac. 403; Englander v. Rogers, 41 Cal. 420; Poheim v. Meyers, 9 Cal. App. 31, 98 Pac. 65.

This rule was also announced in Peckham v. Stewart, 97 Cal. 147, 31 Pac. 928; the court saying: "The plaintiffs were not, under the contract set out in the complaint, entitled to a conveyance of the lots described in the agreement until they first paid, or offered to pay, defendant the balance of the purchase price agreed upon; and, unless the complaint alleges a full performance or offer to perform their part of the contract in this respect, they are not entitled to maintain this action."

The fact that there was a deed of trust outstanding did not excuse plaintiff from the necessity of making a tender of the purchase money, in order to recover his deposit. Ziehen v. Smith, 148 N. Y. 558, 42 N. E. 1080; Campbell v. Prague, 6 App. Div. 554, 39 N. Y. Supp. 558.

The case of Higgins v. Eagleton, 155 N. Y. 466, 50 N. E. 287, is decisive of the case at bar. There, under the contract, the payment of the unpaid consideration and the transfer of title were dependent and concurrent acts; and the court, after stating that the vendee, in order to put the vendor in default, must have tendered a performance on his part and demanded a performance by the vendor, said (referring to a mortgage on the premises): "The agreement was not broken by the fact that there was a mortgage upon the property. * * * The mere existence * * * of an incumbrance on the property, which it was within the power of the vendor to remove within the time fixed for performance, did not constitute a breach of the contract on his part." Referring to the case of Ziehen v. Smith, 148 N. Y. 558, 42 N. E. 1080, the court, continuing, said: "The decision of this court in Ziehen v. Smith seems to be decisive of this question. It was there held that the mere fact that at the time fixed for the concurrent and mutual performance of an executory contract for the conveyance of real estate there existed a lien or incumbrance upon the property, which it was within the power of the vendor to remove, did not relieve the vendee from making a tender and demand of performance as a condition precedent to the maintenance of an action to recover the money paid on the contract, or for damages as for its breach on the part of the vendor." See, also, Easton v. Montgomery, 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123; Raben v. Risnikoff, 95 App. Div. 68, 88 N. Y. Supp. 470.

A deed of trust, given as security for the repayment of money, is, under the circumstances of this case, regarded as a mortgage. Weber v. McCleverty, 149 Cal. 316, 86 Pac. 706.

There was no unremovable defect in the title to the property involved in this controversy; nor had the vendor indicated in any manner that he would not comply with the terms of the contract. Therefore, under the authorities cited, if the plaintiff desired to consummate the contract, or to recover back his deposit, he should have made a tender of the balance of the purchase price and demanded a performance by the vendor.

The vendor, through one of his agents, tendered the plaintiff a perfect title to the property; and for this additional reason the plaintiff is not entitled to the return of his deposit. Plaintiff asserts that he was not tendered a merchantable title, because (1) the taxes for the current fiscal year had not been paid, and (2) the vendor did not tender him a deed to the property free from incumbrance.

[2] As to the taxes, it appears that they were paid a week prior to the time when plaintiff wrote his letter rejecting the title, and nine days before the tender by the vendor. The contract did not require the vendor to furnish an abstract, nor did he at any time subsequent to the making of the contract, directly or through his agents, obligate himself to furnish a certificate of title; and consequently it was the duty of the vendee himself to learn the condition of the record. Easton v. Montgomery, 90 Cal. 313, 27 Pac. 280, 25 Am. St. Rep. 123.

[3] As to the fact that the record showed the property to be incumbered with a deed of trust in favor of Biddle and Bordwell, we are of the opinion that this defect was remedied by the tender to the plaintiff by the vendor's agents of the reconveyance by said trustees. This reconveyance was properly drawn and acknowledged; and it was handed to the vendor's agents with the understanding that upon repayment of the amount of the loan they were to take the necessary steps to release the property from the incumbrance. The vendor had a right to rely on the purchase money to liquidate the indebtedness secured by the deed of trust. Webster v. Kings County Trust Co., 80 Hun, 420, 30 N. Y. Supp. 357; Ziehen v. Smith, supra. The $4,650 due at the time of the tender, and the $1,350 already in the hands of the vendor's agents, were more than sufficient for this purpose.

[4] Plaintiff also objects that, the amount of the recorder's fee for recording the reconveyance from Biddle and Bordwell, trustees, not having been offered to him, the tender of the vendor was insufficient. No such objection to the tender was made at the time the deed was presented. Obviously the vendee, for some reason not consonant with good faith, was trying to avoid performance of the contract. On the other hand, the vendor was doing promptly everything reasonable to complete the transaction; and, if this objection had been raised, no doubt the vendor would have gladly defrayed the expense in question. Dwork v. Weinberg, 120 App. Div. 508, 105 N. Y. Supp. 504. The mere possibility that he would have failed to do so would not authorize the plaintiff to cancel the contract, on the ground that the vendor had failed to perform. Teller v. Schulz, 123 App. Div. 883, 108 N. Y. Supp. 325; Maupin, Marketable Titles (2d Ed.) 707. Moreover, the plaintiff, not having raised this objection at the time, is deemed to have waived it.

One other objection made by plaintiff remains to be noticed. In his letter of January 27th, he objected to proceed with the contract for the reason that the deed of trust, to be given by him as security for the last payment of $7,500, empowered the trustees to realize on the security in a shorter time than was agreed upon in his conversation with the vendor's agent at the time of the making of the contract. This ground of objection appears to have been abandoned by the plaintiff, and we think properly so for a number of reasons, and particularly in view of the uncontradicted evidence in the case that on the occasion of the tender of the 29th of January the agent of the vendor informed the plaintiff "that if the note and deed of trust were not to his liking he could have them drawn any way he saw fit within reason." Under the circumstances of this case, with the taxes all paid, with the offer of the vendor to release the deed of trust, and to give the plaintiff all the time to pay the balance of the purchase price that he might reasonably desire, we do not hesitate to hold that the plaintiff is not in a position to insist upon a rescission of the contract and to recover his deposit.

We conclude that the finding of the court that the intent and purpose of the agreement of sale was that plaintiff should rely upon the abstract to determine the nature and state of the title to the property is not supported by the evidence in the case. Neither does the evidence sustain the finding that the vendor failed to make a tender of a good title, nor the view that the plaintiff was not required to make a tender of the balance of the purchase price under the contract.

The order denying defendant's motion for a new trial is reversed.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 593

Ex parte ANDERSON. (Cr. 233.)

(District Court of Appeal, Second District, California. April 1, 1912.)

1. Constitutional Law (§ 46*)—Constitutional Objection — Grounds for Discharge.

The court will not seek to discover a ground for holding an ordinance under which petitioner for habeas corpus was convicted unconstitutional, if it does not so appear on its face where petitioner filed no briefs and did not undertake to point out the unconstitutional feature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43–45; Dec. Dig. § 46.*]

2. Constitutional Law (§ 48*)—Constitutional Objection.

The courts will not hold ordinances unconstitutional, unless it clearly appears that they are inconsistent with the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.*]

In the matter of the application of John F. Anderson for a writ of habeas corpus. Writ discharged, and petitioner remanded.

J. G. Rossiter, for petitioner. William J. Carr, for respondent.

JAMES, J. Petitioner herein, after having been convicted of violating an ordinance of the city of Pasadena designed to regulate the standing of public carriages on the streets of said city, and after having been imprisoned in default of payment of a fine imposed by the police court, petitioned for release upon habeas corpus. In his petition he assigned as ground thereof that the ordinance under which his conviction was had is unconstitutional and void. Although time was allowed petitioner within which to file a brief and point out wherein the provisions of the ordinance are in conflict with the Constitution, no brief has been filed and no authorities cited in support of the petition. We conceive it not to be the duty of this court to seek for some cause which shall result in nullifying the ordinance on the ground proposed by petitioner.

[1] An inspection of the ordinance does not disclose any apparent infirmity of the kind suggested and with that conclusion we shall rest content, unless differently convinced in a case where the contentions here made are supported by argument or authority.

[2] Courts will not hold statutes or ordinances unconstitutional unless it is clearly shown that they are inconsistent with the fundamental law. Deyoe v. Superior Court, 140 Cal. 476, 74 Pac. 28, 98 Am. St. Rep. 73.

The writ is discharged and the prisoner remanded to the custody of the chief of police of the city of Pasadena.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 590

MATTERN v. ALDERSON et al.

(Civ. 1,078.)

(District Court of Appeal, Second District, California. March 29, 1912.)

1. Appeal and Error (§ 1010*)—Review—Findings—Conclusiveness.

Findings supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. § 1010.*]

2. Evidence (§ 113*)—Admissibility—Value of Land.

In an action to rescind a contract to exchange lands based on defendant's fraudulent representations, it was proper to exclude testimony by plaintiff as to what she paid for her property, since that was incompetent to prove market value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259–296; Dec. Dig. § 113.*]

3. Evidence (§ 142*)—Admissibility—Value of Property.

In an action to rescind a contract to exchange lands on account of defendant's fraudulent representations as to value, testimony as to the value of property other than that involved was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416–423; Dec. Dig. § 142.*]

4. New Trial (§ 102*)—Newly Discovered Evidence—Diligence.

A new trial, asked on the ground of newly discovered evidence, is properly refused where failure to produce the evidence at the former trial is not sufficiently excused.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. § 102.*]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by Harriet O. Mattern against G. Edwin Alderson and J. C. Anderson. From a judgment for plaintiff and from an order denying a new trial, defendant Anderson appeals. Affirmed.

J. Vincent Hannon and Hannon & McCormick, for appellant. Murphey & Poplin, for respondent.

JAMES, J. Action to enforce rescission of a contract for an exchange of real property predicated upon alleged fraudulent representations made by defendants. In February, 1907, plaintiff was the owner of a half section of land in the county of San Bernardino of the alleged value of $8,000. Alderson was a real estate agent, and offered to secure for plaintiff in exchange for her property certain lots of land at Vineland in Los Angeles county. The exchange of properties was finally consummated, the plaintiff receiving, in addition to the Vineland lots, 37 shares of the capital stock of a corporation called the Toledo, Columbus & Cincinnati Railway Company. In her complaint she alleged that Alderson and Anderson had conspired together to cheat and defraud her, and that they had represented that the Vineland lots were of the value of $6,125, less an incumbrance of $1,825, then a lien thereon, and that the shares of stock were reasonably worth the sum of $3,700. She alleged, further, that the stock was valueless, and that the real property received by her as a part of the consideration for the exchange was not worth in excess of $1,825; that being the amount of the incumbrance against it. In the complaint it was further set forth that the fact that the representations as to the value of the Vineland lots and the shares of stock were untrue was not discovered until the 1st day of March, 1908, and that on April 1, 1908, plaintiff served a written notice rescinding the contract of exchange. The trial court found the issues generally in favor of plaintiff, and a decree was entered accordingly. From the judgment and from an order denying a motion made by him for a new trial, defendant Anderson appeals.

[1] As to many of the facts found by the court, appellant contends that there was no sufficient evidence upon which to found such findings, but, without particular reference to each specification, the objections so made may be briefly disposed of. A careful examination of the testimony as set out in the record discloses that there was some evidence before the trial judge tending to prove all of the facts found against appellant, and, this being the state of the case, this court has not the privilege of questioning the correctness of those conclusions. Counsel's argument is largely by way of contending that the preponderance of the evidence was in favor of their client. It was the duty of the trial court to determine the questions of fact, and, the evidence being conflicting, its decision thereon is conclusive upon this court. A number of exceptions were taken to the rulings of the court made during the course of the trial.

[2] In our opinion the court did not err in sustaining an objection to a question asked the plaintiff as to what she paid for her property, as that question was incompetent as tending to prove the market value of the real estate. Appellant was not hindered in any proper effort made by him to prove the value of either the property of plaintiff, or the property given in exchange therefor, and all of the questions to which objections were sustained relative to advertisements in newspapers and public report tending to show an excited condition of the real estate market at the time of the exchange as affecting the Vineland property, had for their purpose the eliciting of evidence not competent to establish market values.

[3] Neither was it competent for the defendant to prove, as he offered to prove, the value of property other than that involved in the transaction of exchange. The witness Broadwell, who was not permitted, upon an objection by plaintiff, to give his opinion as to the value of plaintiff's property, did not, as the trial court held, show that he was familiar with the market value thereof. It was therefore proper to sustain that objection on the ground that no sufficient foundation had been laid to entitle the witness to give his opinion on the question of value.

[4] The alleged newly discovered evidence, which was offered in support of one of the grounds of the motion for a new trial, was that of a witness who had testified at the trial on behalf of appellant, and who, it was alleged, had discovered some further correspondence had with the husband of plaintiff. Conceding that this testimony would have been material, and that it might have changed the conclusions of the trial court upon the issues, sufficient excuse did not appear to show why this evidence could not have been produced at the trial. In denying the motion for a new trial on this ground the trial court did not err.

Respondent objected to the consideration of the statement prepared for use on the motion for a new trial on the ground that the trial court committed error in settling a bill of exceptions of the appellant as to the proceedings had upon the hearing of that motion, which bill of exceptions was settled after the time fixed by the statute for the settlement of the same. Appellant, however, in our opinion, did present to the trial judge sufficient excuse warranting the relief afforded him under the provisions of section 473, Code of Civil Procedure, in this regard. However, upon a careful examination of the record and a close scrutiny of all of the contentions urged by appellant in his brief, we are convinced that appellant is entitled to no relief on this appeal.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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18 Cal. App. 572

GREEN v. ROGERS, Justice of the Peace.

(Civ. 924.)

(District Court of Appeal, Third District, California. March 25, 1912.)

1. Justices of the Peace (§ 202*)—Certiorari—Application—Presumption.

On application for writ to review proceedings of a justice in an action, his authority to proceed on the trial of which, without notice to defendant therein, depended on whether defendant's demurrer was filed before or after his default, it will, in the absence of allegation, be presumed in favor of the authority, that such filing was after the default.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 778–789; Dec. Dig. § 202.*]

2. Justices of the Peace (§ 194*)—Certiorari—Loss of Appeal by Laches.

Writ to review proceedings of a justice in an action will not lie where the justice's judgment was known of in time for appeal, and the right of appeal was lost by laches.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

3. Certiorari (§ 69*)—Judgment.

Under Code Civ. Proc. § 1074, limiting the determination on writ of review to the question whether the inferior tribunal regularly pursued its authority, the judgment should be to annul the proceedings, where such tribunal had not so pursued its authority.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 185–194; Dec. Dig. § 69.*]

Appeal from Superior Court, Butte County; John C. Gray, Judge.

Petition by A. D. Green for writ to review proceedings of George A. Rogers, Justice of the Peace in and for Gridley Township, County of Butte. From an adverse judgment, defendant appeals. Reversed.

J. R. King and Lon Bond, for appellant. R. C. Long, for respondent.

CHIPMAN, P. J. Plaintiff petitioned the superior court of Butte county for a writ to review the proceedings of defendant in an action entitled A. E. Cole, Plaintiff, v. A. D. Green (petitioner here), Defendant. It appears from the complaint herein that on July 11, 1911, said action was commenced in said above-entitled court for the restitution of possession of certain leasehold property held by said Green. On July 13, 1911, summons was duly served and filed commanding defendant therein to answer within three days from date of service. On July 18, 1911, defendant, by his attorney, R. C. Long, filed a demurrer to the complaint. It is then averred that about July 27, 1911, the said justice promised said attorney that he would postpone all proceedings in the case "until said attorney should return from his vacation" (no time stated); that afterwards, to wit, on August 1, 1911, the said justice, at the request of the attorney for said Cole, plaintiff in said pending action, brought the case to trial without notice to defendant or his attorney as required by section 850, Code of Civil Procedure, and, after hearing evidence, the said justice rendered judgment, as prayed for in the complaint in said action, for restitution of the premises and for treble damages; that said demurrer was never ruled upon by said justice; that on August 8, 1911, without notice to defendant or his attorney therein, said justice issued execution, to the constable of said township, on said judgment, which was by said officer executed; that "said judgment was and is illegal and void, and the said justice exceeded his jurisdiction therein, and that the said defendant cannot appeal said action for the reason that the time for appeal has expired and plaintiff herein and petitioner has no plain, speedy, or adequate remedy except by writ of review."

It appears from the return, and is shown by a copy of the justice's docket, that on July 18th, the day on which demurrer was filed in the original action, and on the motion of plaintiff's attorney, the default of defendant was entered on the ground that he had "not answered within the time provided by said summons"; that on August 1st witnesses were sworn, and the case was submitted and judgment entered for plaintiff. Other entries in the docket are: "August 8th. Execution issued. August 16th. Execution returned as served and same filed. August 31st. Notice of appeal filed. September 2nd. Undertaking on appeal filed. September 7th. Papers on appeal sent Superior Court. November 1st. Writ of Review received from Superior Court. November 3rd. Papers on appeal sent back to this court." It appears that Green, defendant in the original action, filed notice of appeal on August 31, 1911, and an undertaking on appeal on September 2, 1911, but no copy thereof was served "on the adverse party," as required by section 974, Code of Civil Procedure, nor was notice of the filing of the undertaking "given to the respondent" as required by section 978a of the same Code. It is conceded that the attempted appeal was ineffectual for any purpose. The matter stood thus when on November 1, 1911, plaintiff in the present proceeding filed his petition in the superior court for a writ of review, and on November 20, 1911, the court entered its judgment "that the defendant George A. Rogers, Justice of the Peace, * * * restore the case of Cole v. Green to his calendar, notify the parties of the time and place of hearing the demurrer, and then proceed with the usual course in disposing of the case as though nothing had been done heretofore." From this judgment defendant appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The writ of review may be granted when an inferior tribunal "has exceeded the jurisdiction of such tribunal * * * and there is no appeal, nor, in the judgment of the court, any plain, speedy and adequate remedy." Section 1068, Code Civ. Proc. "The review upon this writ cannot be extended further than to determine whether the inferior tribunal, * * * has regularly pursued the authority of such tribunal. * * *" Section 1074, Code Civ. Proc. In Elder v. Justice's Court, 136 Cal. 364, 68 Pac. 1022, it was held that, under section 850, Code of Civil Procedure, when the party served with process has appeared, he is entitled to notice of the time fixed by the justice for the trial of the cause, and that such notice is imperative and is as essential to the authority of the justice to proceed upon the trial of the case as is the summons and return of the service thereof to his entering judgment by default. "The giving of the notice is a duty which the statute imposes upon the justice before he has any authority to proceed with the trial." In that case Elder had not received notice of the trial and the time for appeal had expired, but the court said that there was no unnecessary delay in initiating the certiorari proceedings after "the respondent had knowledge of the judgment against him." In the case here defendant in the original action had knowledge of the judgment against him, as shown by his notice of appeal filed in the case. It was three months after judgment when he commenced the present proceeding.

[1] It is not alleged nor does it appear that the demurrer was filed before the default of defendant was entered. If filed after default was entered, it conferred no right without first having the default vacated which was not asked and was not entered. The subsequent filing of the demurrer did not prevent the court from setting the case for trial and trying it without notice to defendant, for, being in default, he was not entitled to notice, and, we think, it must be assumed that the demurrer was filed after the default was entered.

[2] It is alleged that the justice verbally promised counsel "to postpone and continue all the proceedings in said case until said attorney should return from his vacation." It does not appear that plaintiff's attorney in that action had any notice or knowledge of any such arrangement, and no order or record of the court was made of such indefinite continuance. The action was summary in its nature entitling plaintiff therein to a speedy trial. We do not think the alleged verbal statement of the justice can be regarded as an order of the justice's court continuing the case to an indefinite period. However this may be and whether the demurrer preceded the default entered, the fact is that defendant knew that the case had been tried and the judgment of the court entered, and he had an adequate remedy by appeal. No reason is shown for his not having availed himself of this remedy and the remedy by writ of review is therefore not open to him.

In Elder v. Justice's Court, the time for appeal had expired without fault of respondent, an entirely different case from the one here. It was said in Valentine v. Police Court, 141 Cal. 615, 617, 75 Pac. 336: "The writ of certiorari issues only in cases where there is no remedy by appeal. Code Civ. Proc. § 1068; White v. Superior Court, 110 Cal. 54, 42 Pac. 471. And this rule applies with equal force where the right of appeal has been lost by laches. Faut v. Mason, 47 Cal. 7; Bennett v. Wallace, 43 Cal. 25." Here the right of appeal was lost by laches, and not through some condition of circumstances such as appeared in Elder v. Justice's Court, supra. It was said in Grant v. Justice's Court, 1 Cal. App. 383, 388, 82 Pac. 263, 265: "No litigant should be permitted the use of the writ of review where he has the right of appeal. Nor should he be allowed the writ where he slumbers on his right of appeal until the time in which he might take such appeal has gone by."

[3] Appellant makes the point that the judgment exceeded the powers given by section 1074, Code of Civil Procedure, and was not such determination as is therein contemplated. This section plainly limits the court to the determination of the single question—whether the inferior tribunal has regularly pursued its authority. The judgment should be to annul the proceedings where the inferior tribunal has not regularly pursued its authority.

The learned trial judge doubtless thought that defendant in the original action had suffered a wrong from which he should in some way be relieved. But established rules of procedure cannot be disregarded to meet individual cases without setting at large the rules themselves, and destroying their vitality.

The judgment is reversed.

We concur: HART, J.; BURNETT, J.

18 Cal. App. 614

CULVER v. NEWHART. (Civ. 916.)

(District Court of Appeal, Third District, California. April 2, 1912.)

1. ASSIGNMENTS (§ 23*)—CHOSES IN ACTION—ASSIGNABILITY.

A mutual, open, and current account is a chose in action which the owner under Civ. Code, §§ 953, 954, 1458, authorizing the transfer of a thing in action, may transfer.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 40, 41; Dec. Dig. § 23.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. ACCOUNT, ACTION ON (§ 6*)—OPEN ACCOUNTS—ISSUES, PROOF AND VARIANCE.

A complaint in an action for the balance of an open, current, and mutual account, which makes the account a part of it, and which alleges that the owner assigned the same to plaintiff, and which avers that on a designated date defendant was indebted to the owner and that on that date he assigned the account to plaintiff, is sustained by proof that plaintiff assigned his business and accounts to his wife, that the accounts included the claim against defendant, and that the wife reassigned the account on the designated date, that after the assignment and before the reassignment an account was rendered to defendant who made a cash payment and delivered materials.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 8–12; Dec. Dig. § 6.*]

3. PLEADING (§ 388*)—ISSUES, PROOF AND VARIANCE—"MATERIAL VARIANCE."

The variance between a complaint setting forth a cause of action on an open, current, and mutual account, and the proof of a stated account, was immaterial within Code Civ. Proc. § 469, providing that no variance between the pleading and the proof shall be deemed material unless it has actually misled the adverse party, where defendant was not misled as disclosed by his answer in denying the existence of the account made a part of the complaint, but merely tendering an issue on the question whether the account was mutual, open, and current between himself and plaintiff's assignor.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1305–1308; Dec. Dig. § 388.*

For other definitions, see Words and Phrases, vol. 5, p. 4408.]

4. ACCOUNT, ACTION ON (§ 2*)—"MUTUAL ACCOUNTS."

A husband transferred his business and accounts due him to his wife, who executed to him a power of attorney to manage the business for her. At the time of the transfer, a debtor was indebted to the husband for goods sold at various times. After the transfer, an account therefor was rendered the debtor, who made a cash payment, and at various times delivered materials to the husband. Subsequently the wife reassigned the account to the husband. *Held*, that the account was an open account as distinguished from an account stated, since mutual accounts are made up of matters of set-off, and there must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. §§ 1, 2; Dec. Dig. § 2.*

For other definitions, see Words and Phrases, vol. 5, pp. 4646, 4647.]

5. BAILMENT (§ 31*)—RENT OF PERSONALTY—EVIDENCE.

Evidence *held* to justify a finding of liability of defendant in favor of plaintiff for the rent of a planer for a specified period at a monthly rental.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124–131; Dec. Dig. § 31.*]

6. PRINCIPAL AND AGENT (§ 123*)—EXISTENCE OF RELATION—POWER OF ATTORNEY—EVIDENCE.

Where a grantee in a power of attorney testified that he had mislaid the instrument and that he had made a thorough search of all the places where he customarily kept important documents without finding the writing, and that the power gave him authority to transact all kinds of business in the name of the grantor, and his testimony was not contradicted, there was evidence of the execution of a power of attorney authorizing the grantee therein to transact any and all business for the grantor therein.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420–429; Dec. Dig. § 123.*]

7. APPEAL AND ERROR (§ 206*)—RULINGS ON EVIDENCE—OBJECTIONS.

Where a defendant did not make any objection to a question on the ground that the same was leading, or on any other ground, he could not object thereto on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1273, 1283–1289; Dec. Dig. § 206.*]

8. EVIDENCE (§ 471*)—OPINION EVIDENCE—CONCLUSION OF WITNESS.

The testimony of a grantee in a power of attorney shown to have been lost that the power vested him with authority to transact all kinds of business in the name of the grantor is not objectionable as a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

9. EVIDENCE (§ 460*)—PAROL EVIDENCE—AMBIGUOUS CONTRACTS.

Where a bill of sale of the seller's business and accounts and indebtedness due him is ambiguous, parol evidence that the bill of sale included a specified account is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. § 460.*]

10. BAILMENT (§ 31*)—EXISTENCE OF RELATION—EVIDENCE—ADMISSIBILITY.

Where, in a transaction between plaintiff and defendant and a third person, a planer in the possession of the third person as tenant of plaintiff was delivered to defendant, and plaintiff sought to recover rent from defendant for its use, the testimony of the third person as to the transaction involving the transfer of the possession and as to the rental paid by the third person was admissible.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124–131; Dec. Dig. § 31.*]

Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Action by A. E. Culver against J. W. Newhart. From a judgment for plaintiff, defendant appeals. Affirmed.

Taylor & Tebbe and C. J. Luttrell, for appellant. L. F. Coburn, for respondent.

HART, J. The complaint alleges that on the 1st day of September, 1910, the defendant was indebted to Mrs. A. E. Culver, wife of the plaintiff, in the sum of $687.90, "the same being a balance of an open, current, and mutual account," etc., which said account is annexed to and made a part of the complaint; that on said 1st day of September, 1910, Mrs. Culver "sold, assigned, and set over the said account to this plaintiff."

The answer denies that the defendant was at any time indebted to Mrs. Culver in any sum or amount, and also denies the alleged assignment of the account referred to in the complaint or of any account by Mrs. Culver to the plaintiff.

The court's findings of fact were in favor of the plaintiff, and the court rendered and caused to be entered a judgment in accordance with said findings for the sum of $492.13. The defendant has appealed to this court from said judgment and from the order denying his application for a new trial. The defendant challenges all the findings, and furthermore charges that a number of rulings as to the evidence were erroneous and damaging to his rights.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The first and perhaps the most important point urged is that the evidence does not support the finding that the transactions from which this action arises "constitute an open, current, and mutual account between the defendant and the said Mrs. A. E. Culver from August 10, 1909, to September 2, 1910, of which the said $432.13 was and is the balance." In other words, the claim is that there is "not only no evidence that Mrs. A. E. Culver ever had any account whatever against defendant, but also no evidence whatever of any account that defendant, Newhart, had against Mrs. Culver at any time"; that the account put in evidence, whatever its character, was one between the plaintiff and the defendant. Hence it is argued Mrs. Culver could not assign an account which she never owned. We understand it to be also claimed that the alleged account is not a "mutual, open, and current account" within the meaning of section 344 of the Code of Civil Procedure, and that therefore, by reason thereof, a variance also arises between the pleaded account and the one proved. The points as thus stated result from the defendant's construction of the several transactions from which the account pleaded in the complaint arose.

1. It appears that the plaintiff had been engaged in business in the town of Dunsmuir, Siskiyou county, under the name of "Nelson Lumber Company," and that on the 10th day of August, 1908, he transferred to his wife, Mrs. A. E. Culver, said business, together with all "the accounts and indebtedness" then due him, and among the accounts so transferred was the one which the evidence discloses constitutes the subject of this action. This transfer was evidenced by a written instrument or bill of sale, executed by the plaintiff, and, with the property and accounts so sold, delivered to Mrs. Culver and recorded in the office of the county recorder of Siskiyou county on the 11th day of August, 1908.

The plaintiff testified and the court found that on the 10th day of August, 1908, Mrs. Culver, by a written power of attorney, clothed him with full authority to manage said business for her, and that, in pursuance of the authority so conferred, he continued, after the sale of the business to her, to give his personal attention to said business and to manage it for his wife in the same manner as he had prior to the transfer of the same.

At the time of the transfer of the business and book accounts to Mrs. Culver, there was due the plaintiff from the defendant on the account referred to in the complaint the sum of $1,650, made up of the following items: April 1, 1908, one donkey engine, $1,200; May 1, 1908, 500 feet ⅞-inch cable, $100; May 20, 1908, 1,000 feet of ⅞ cable, $200; May 20, 1908, 4,000 feet of ½-inch steel cable, $150. A short time prior to the 1st day of January, 1909, the above account was rendered to the defendant, and on the said 1st day of January there was added thereto the interest which had accrued thereon amounting to the sum of $87.50, and bringing the total indebtedness of the defendant to the plaintiff up to the sum of $1,737.50. On said account the defendant made one cash payment of $100, and at various times delivered to the plaintiff lumber and orders on certain individuals; the value of said lumber and orders being credited by plaintiff on said account, the amounts so credited aggregating the sum of $1,314.27. The last item noted on the debit side of said account is dated May 20, 1908. There were two items on that date, the others being dated April 1, 1908, and May 1, 1908, respectively. The last item on the credit side of said account is dated November 2, 1909, said credit, as well as several more, having been given and noted on said account by the plaintiff as agent of Mrs. Culver.

[1] This action was commenced on the 2d day of September, 1910, or within two years from the date of the last item noted on the credit side of the account and more than two years after the date of the last item on the debit side. But no issue as to the statute of limitations is presented here; no plea of that character having been made by the defendant. The sole contention as to the point now under consideration seems to involve the claim that there is a fatal variance between the account pleaded and the one proved. This contention is, as before suggested, based upon the proposition that the defendant never had any dealings of any kind or character with Mrs. Culver—that is to say, that the account was one entirely between the plaintiff himself and the defendant, and that Mrs. Culver was a stranger to and in no sense connected with the transactions culminating in the account; that, to quote counsel's language, "to have constituted an open, current, running account between Mrs. Culver and defendant, there must have been some sale from Mrs. Culver to defendant; that there is no proof of any such occurrence."

We see no merit in the proposition as thus laid down. To sustain it would be to hold that a mutual, open, and current account cannot be made the subject of transfer or sale or assignment, for obviously, if the contention of appellant be sound, an action on such an account could not be supported by an assignee or purchaser of the same, since it is very plain that, in the very nature of things, he could not show as to the account as assigned that he had personally made "some sale" to the debtor, or that the items on the debit side of the account involved transactions between himself personally and the debtor. This is not the law, however. No one will dispute the proposition that a mutual, open, and current account, like an ordinary account, is property—that is, a chose in action—and that therefore the plaintiff, as the original owner of the account in question, had the undoubted right to sell and transfer the same to his wife or to any other person (sections 1458, 953, and 954, Civ. Code), subject, of course, to any equities which might have existed as to said account in favor of the debtor, and that she, having legally so far as it appears here acquired ownership of said account, could likewise sell and transfer it to whomsoever she pleased, or, as in this case, resell or assign it to her husband.

[2] The complaint contains no averment that Mrs. Culver personally had anything to do with any of the several transactions from which said account arose. It merely alleges that on the 1st day of September, 1910, the defendant was indebted to Mrs. A. E. Culver on a certain "open, current, and mutual account," and that on that day she sold and assigned said account to the plaintiff. The evidence discloses, as we have shown, that Mrs. Culver was the owner of the account on the day named, and that there was due her on said account a balance of several hundred dollars, and, assuming that the account was mutual, open, and current between the defendant and the party from whom she purchased it, there is absolutely no variance between the account pleaded and the one proved.

[3] But, even conceding that the account is shown by the evidence to be a stated account and not "mutual, open, and current" within the meaning of section 344 of the Code of Civil Procedure, still the variance arising by reason thereof would be immaterial. Section 469, Code Civ. Proc. That section provides that "no variance between the allegation in a pleading and the proof is to be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." It cannot be said that the defendant was misled to his prejudice in maintaining his defense upon the merits. His answer does not deny the existence of the account which is made a part of the complaint, but merely tenders an issue upon the question whether said account was "mutual, open, and current" between himself and plaintiff's assignor. Had he so elected, he could have denied the existence of any open and current account against him, since the account relied upon by plaintiff was set out in hæc verba as a part of the complaint, and fully and clearly notified him of each of the transactions or items constituting the basis or gist of plaintiff's action. And it is to be noted that the answer does not deny that the account pleaded is a "mutual, open, and current" account between the defendant and Mrs. Culver. This leads to the suggestion that, since the importance of alleging and if necessary proving that the account was "mutual, open, and current" lay in the proposition that thus plaintiff's action thereon would avoid the operation of the statute of limitations, and, since the defendant did not plead the statute and therefore waived his right to rely upon that defense, the question whether the account is a "mutual, open, and current" or merely a stated account is immaterial, and consequently the questions left for determination under the issues are narrowed down to the following: (1) Was Mrs. Culver the owner of the account when the purported assignment thereof to her husband (the plaintiff) was effected? (2) Did she assign the same to plaintiff? (3) Was there a balance due from defendant on said account? But, if we deemed it important and necessary in the decision of this case to determine the question as to the nature of the account involved here, we would not hesitate to hold it to be a "mutual, open, and current account" within the contemplation of section 344 of the Code of Civil Procedure, supra.

[4] We have seen that the credit side of the account consists of credits for one cash payment, several orders on others, and for lumber sold and delivered to the plaintiff as the original owner of the account by the defendant. The last five items on the credit side were for lumber sold and delivered at various times by the defendant to the owner of the account, and the value of this lumber was credited on the account as a set-off pro tanto. This constituted the account "open as contradistinguished from an account stated." Norton v. Larco, 30 Cal. 131, 89 Am. Dec. 70. In that case which has been approved in many subsequent cases in this state, a "mutual, open, and current account" is thus defined: "Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. A natural equity arises when there are mutual credits between the parties, or where there is an existing debt on one side which constitutes a credit on the other, or where there is an express or implied understanding that mutual debts shall be a satisfaction or set-off pro tanto between the parties. Angell on Lim., c. 14, § 7."

In Penniman v. Rotch, 3 Metc. (Mass.) 216, the plaintiff proceeded in assumpsit for provisions sold and delivered. The defendant did not plead any set-off, but interposed the plea of the six years' statute of limitations as a bar to the action. In resistance to the defendant's plea, the plaintiff stood on two items, both bearing date in excess of six years before the action was instituted. One of these items was a credit for cash, naming the sum, and the other was for a calf, with its value specified. One of the issues presented was whether the evidence disclosed a mutual and open account between the parties within the purview of the statute, which was substantially in the language of our section 344, Code of Civil Procedure. The court, speaking by Chief Justice Shaw, "held that the calf was an article of merchandise delivered by the defendant to the plaintiff in the ordinary course of business, either at the agreed price or upon an implied promise of the plaintiff to allow its value in amount, and that the evidence established that there was an open and mutual account between the parties, and that no part of the plaintiff's demand was barred by the statute of limitations." Norton v. Larco, supra.

There is absolutely no ground upon which any distinction as to the facts between the foregoing cases and the one at bar can be suggested. Whether there was or was not an express agreement between the parties here that the value of the lumber, obviously an article of merchandise, was to be credited on the account as a set-off in a ratio equal to such value, the irresistible inference from the circumstances of the transactions between the parties is nevertheless that there was an implied understanding that such was the arrangement between them. Indeed no other conclusion could with any reason follow the circumstances by which the transactions leading to the existence of the account were carried on.

[5] 2. Among the items charged in the account against the defendant was one for the rent of a "planer" for one year at the monthly rental of $20, the total sum of said item being $240. Appellant insists that the evidence does not justify the finding in favor of the plaintiff as to said item.

It appears that a planing mill, located at Dunsmuir, had been leased by the plaintiff to one George Miller. The latter was indebted to both the plaintiff's assignor, as successor to the business of plaintiff, and the defendant, and on the 14th day of January, 1909, he proposed to both the plaintiff (acting for Mrs. Culver) and the defendant that, if the latter would assume his indebtedness to Culver and cancel his (Newhart's) claim against him (Miller), the latter would turn the planing mill and the business over to the defendant. This proposition was acceded to by all the parties. Miller's lease of the planer called for the payment of rent at the rate of $20 per month. There was no definite understanding between the plaintiff, as agent of Mrs. Culver, and the defendant as to the amount which the latter would pay as rent for the planer, but the plaintiff, assuming that the transaction between himself, Miller, and the defendant amounted only to a transfer of the lease, with all its rights and burdens, from Miller to the defendant, charged the latter on the account as rent for the planer the sum specified in the lease to Miller, viz., $20 per month. As a matter of fact, so testified the plaintiff at the time of the relinquishment of the lease by Miller, the real understanding was that the defendant would buy the planer, but, not having done so, he (the plaintiff) treated the transaction as involving merely a lease of the planer. In some particulars the testimony of the plaintiff with respect to this transaction was corroborated by Miller. The point made by counsel against the finding as to the planer is twofold: (1) That there is no evidence which shows that the defendant rented the planer from Mrs. Culver for one year at the monthly rental of $20; (2) that the evidence does not show that the defendant entered into a contract for the leasing of the planer at $20 per month with anybody or at all.

As to the first of the foregoing propositions, the reply is that, while it is true that Mrs. Culver did not in person conduct the negotiations by which the possession of the planer was transferred to Newhart, in legal contemplation she did do so, for the plaintiff, in the execution of that transaction, was acting for her as her agent, under the authority of the power of attorney referred to. This also constitutes a reply to a portion of the second proposition, but by the latter we understand it to be also the contention that there is no evidence disclosing that the sum of $20 per month was the sum agreed upon as compensation for the possession and use of the planer. It is true, as before stated, that there is no evidence disclosing that any particular or definite amount as rental was expressly agreed upon by the parties; but it was indisputably shown that Newhart took possession of the planer on the 15th day of January, 1909, and that he maintained such possession for at least one year. It was further shown by uncontradicted testimony that Miller had paid for the use and occupation of the planer the monthly rental of $20. From this testimony the court was justified in finding, in the absence of evidence revealing an express agreement as to rental, the reasonable value of the possession and use of said planer, and we know of no safer standard for the fixing of such value than the rental specified in the lease to which the defendant in practical effect succeeded when he took possession of the planer. The defendant offered no testimony to show that the sum of $20 per month as rental for the use of the planer was excessive or beyond its actual value for his purposes. Indeed, the defendant offered no testimony whatsoever with regard to the transaction involving the transfer of the possession of the planer to him. We think, as stated, that the finding as to the planer transaction is sufficiently supported.

[6] 3. It is further claimed that the evidence is insufficient to uphold the finding that on the 10th day of August, 1908, Mrs. A. E. Culver "made, executed, and delivered unto this plaintiff full power of attorney to transact any and all business for her," and that during all the time from the date of the execution of said power he acted as her agent and attorney in fact in all matters appertaining to the business acquired by her from him, including some of the transactions involved in this action.

The plaintiff testified that Mrs. Culver did by writing on the date mentioned make him her attorney in fact with full power to act as her attorney or agent to collect "the accounts and dispose of the property" that had been assigned to her; that he had mislaid or lost the instrument; and that he had made a thorough but futile search before the trial of all the places where he customarily kept important documents to find the writing. He testified that, while the power did not specify the transactions upon which this action is founded, it nevertheless gave him authority to "transact all kinds of business in her name." This testimony was in our judgment sufficient to justify the finding as to the power of attorney. The defendant did not attempt to contradict this testimony in any manner. Indeed, we may add that the defendant offered no testimony whatsoever upon any of the issues presented. He did not by evidence controvert the account or attempt to overcome the force of plaintiff's testimony relative to any of the transactions giving rise to the pleaded account.

[7, 8] 4. The ruling of the court allowing the plaintiff to state the contents of the power of attorney mentioned is assigned as prejudicial error. The specific objections to the inquiry concerning said instrument were that the questions to the witness were leading and suggestive, and that his answers thereto involved his conclusions. The exceptions to the testimony upon this point appear to possess no merit. The witness was permitted, without objection, to say that his wife had executed and delivered to him a power of attorney, that he had lost it, and that he searched for and could not find it. When the witness was requested to state the contents of the instrument, one of the attorneys for the defendant interrupted by inquiring whether the power had been recorded, to which question a negative answer was given. Thereafter, on redirect, over objection by the defendant, the plaintiff was allowed to say, as before noted, that he was by said instrument clothed with full authority to transact "all kinds of business in her name." As to the first question addressed to the witness with regard to the execution of the power of attorney, it may be conceded that it was leading and suggestive in form, but, there having been no objection to the question on that or any other ground, the defendant cannot of course claim any advantage here from the question so propounded and the answer thereto. As to the objection that the answers to the questions calling for the contents of the instrument involved mere conclusions of the witness, it is to be said that we cannot see how the instrument itself could have furnished superior evidence in that respect. It is commonly known that instruments conferring general authority on a person to act as the agent of another usually set forth the terms and scope of such authority in general language or in language which may in a sense be regarded as involving the statement of a conclusion as to the proposition to which it relates. The witness declared that the power vested him with authority "to transact all kinds of business in her name," and, as stated, it is highly probable that, since he was thus clothed with general authority in that regard, the instrument itself would have disclosed such authority to have been prescribed in language no less general than that in which the witness declared his authority to have been thus defined.

[9] 5. It is argued that the bill of sale from plaintiff to Mrs. Culver was erroneously admitted in evidence. We can perceive no possible objection to said instrument as evidence of the sale of the business of plaintiff and the account in controversy to Mrs. Culver. The bill of sale, as stated, is the written evidence of the sale by the plaintiff to Mrs. Culver of all his personal property, etc., and "accounts and indebtedness due said party of the first part." The plaintiff testified, and was thus entitled to show, if the bill of sale was ambiguous in that respect, that the account concerned here was included in the "accounts" he sold and delivered to Mrs. Culver.

[10] 6. The objection that the court erred in allowing the witness Miller to testify as to the transaction involving the transfer of the possession of the planer from him to the defendant, and as to the rental paid by the witness for the use of the planer for a year and a half, is untenable. Manifestly the plaintiff had the right to show that the defendant took possession of the planer and, as evidence of the rental value thereof, to prove what the witness had paid Mrs. Culver for the use of the same for the period during which he had possession of it.

We have now reviewed all the points submitted on this appeal by the appellant. As must be apparent from the foregoing views, our opinion is that the appeal is altogether without merit.

The judgment and order are accordingly affirmed.

We concur: CHIPMAN, P. J.; BURNETT J.

18 Cal. App. 595

MANNIX v. WILSON et al. (Civ. 933.)

(District Court of Appeal, Third District, California. April 1, 1912.)

1. Mechanics' Liens (§ 281*)—Delay in Performance of Work—Evidence.

In a suit to foreclose a mechanic's lien, evidence *held* not to show delay in the performance of the work by the lien claimant.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. § 281.*]

2. Appeal and Error (§ 1001*)—Findings—Evidence—Review.

The court on appeal in determining the sufficiency of the evidence to sustain a finding must give full credit to the testimony of the successful party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. § 1001.*]

3. Mechanics' Liens (§ 111*)—Subcontractors—Obligations of Owner.

Under the lien law reserving for the use of lien claimants a specified percentage of the contract price, enacted pursuant to Const. art. 20, § 15, guaranteeing to laborers and materialmen a lien, an owner must apply to the satisfaction of a subcontractor's lien the specified percentage, regardless of any demand existing in his favor against the contractor by reason of the latter's failure to complete the building within the time specified in the contract, and though by the contract time is made of the essence, and the contractor is required to make good to the owner loss sustained by delay.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 144–146; Dec. Dig. § 111.*]

4. Mechanics' Liens (§ 125*)—Subcontractors—Obligations of Owner.

Under Code Civ. Proc. § 1184, requiring an owner on receiving notice of a lien to withhold from the contractor sufficient money due or to become due to the contractor to answer the claim, an owner receiving a notice must sequester sufficient money to meet the demand, and, where he settles with the contractor, he does so at his peril, and his asserted claim against the contractor for damages for delay in completing the building cannot impair the availability of the sequestered fund for the payment of the subcontractor's claim.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 172; Dec. Dig. § 125.*]

5. Mechanics' Liens (§ 279*)—Subcontractor—Obligations of Owner.

Where an owner settled with the contractor, the court in an action to enforce a subcontractor's lien must presume that the owner was allowed what he was entitled to because of the contractor's failure to complete the contract within the time specified, and the owner could not urge an abatement therefor from the claim of the subcontractor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 555, 556; Dec. Dig. § 279.*]

6. Contracts (§ 305*)—Building Contracts—Acceptance of Building—Effect.

The acceptance of a building by an owner contracting for the construction thereof implies a waiver of any claim for damages for nonperformance in any particular in the absence of fraud or mistake.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1398, 1399, 1400, 1463, 1464, 1467–1475; Dec. Dig. § 305.*]

7. Guaranty (§ 78*)—Defenses—Breach by Principal.

Where an owner unconditionally guaranteed the obligation of the contractor to pay for the work of subcontractors, he acquired all defenses which the contractor could assert against the subcontractor, but he could not avoid liability on the guaranty on the ground that the contractor failed to comply with the contract.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 91, 92; Dec. Dig. § 78.*]

Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Action by Thomas Mannix against A. W. Wilson and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Dorn, Dorn & Savage, for appellant. Roger Johnson, for respondent.

BURNETT, J. The original complaint, as stated by respondent, set forth a cause of action for the foreclosure of a mechanic's lien upon the property therein described for plastering the building thereon under a contract between respondent and the original contractor, one J. W. Mitchell, and also against the owner appellant Wilson personally on a "stop notice" served upon him pursuant to section 1184 of the Code of Civil Procedure. By a subsequent amendment another cause of action for the same debt is alleged against appellant on a written guaranty which appellant gave respondent for the payment by said Mitchell of the contract price of said plastering. No question is raised nor indeed could be as to the sufficiency of the complaint, and the only issue presented by the answer which can be considered here is found in the averment that "plaintiff hindered and delayed the said work and did not prosecute the same with reasonable or any diligence, but unreasonably and without any valid excuse therefor did so negligently and slothfully perform the same, and so neglected the performance of and hindered and delayed the same, that the same was not completed by him until 60 days subsequent to the time when the same should have been completed by him and when the same would have been completed by him had he not delayed the work as aforesaid and had he prosecuted the same with reasonable diligence," and that thereby appellant was damaged by loss of rents to the extent of $2,840. The finding of the court directly negatives these allegations in the answer and, outside of a single ruling upon offered evidence, to be hereafter noticed, it is apparent from the record that the only matter for adjudication here is as to the sufficiency of the evidence to support said finding.

[1, 2] As to this there can be no serious controversy. Indeed it is strange that the question should be raised at all. It may

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be said that the testimony for appellant in this respect is so equivocal and uncertain as to hardly create even a conflict. The contract involved herein was executed September 2, 1908. It is apparent that the lathing and plastering could not be done until the building was made ready for it. It does not appear definitely when the building was ready for respondent's work. Appellant testified that he thought that a month before respondent started to work he notified the latter that the building was ready for him, but furthermore he testified: "He didn't start his work before away back in September. * * * I could safely say he delayed in starting work after I had notified him that it was ready for him for 30 days. It was at least two or three weeks. It was fully a month. * * * I notified him to commence work the beginning of July, I think it was. * * * He commenced to make his mortar two or three weeks afterwards. * * * He commenced plastering about August 13th. No; I don't think he commenced plastering until about September 1st. * * * I think he started in to plaster between the 1st and 15th of September; no, between the 15th of September and the 1st of October." His other witness, the architect, also testified: "I don't remember the date when Mannix commenced the work. I should judge some time during the month of September." Furthermore he said: "A plastering contractor mixes his mortar first, which takes some time. Then that mortar must lay for 10 or 12 days so it will become aged." As to this asserted delay of 30 days in beginning the work it is therefore apparent that the question was at least left in doubt by the testimony of appellant's witnesses.

Turning, however, for support of the challenged finding to the evidence, which under the established rule requires of us full credit, we may adopt the epitome furnished by respondent as follows: Mannix says that when Wilson notified him to commence work he went to the building and found it was not ready for plastering, but he commenced to mix his mortar on the street and was stopped by a policeman, which occasioned a delay of about two days. There was not room to mix it in the basement because it was full of rubbish and carpenter stuff, and they had men there getting it ready to plaster. When the architect called on him to commence plastering the building was not ready. Neither the front nor back stairway was up; the electric wires had not been inspected, and his work went over them; the carpenters' work on the first floor was improperly done, and Wilson made him do it over afterwards. "I proceeded just as soon as the work was ready and continued it as quick as it could be done." One Ziegler did the lathing and "I started him as soon as he could get to work and followed it up with the plastering." Furthermore plaintiff testified that he talked with appellant at different times and that the latter said, "Of course he had to pay the bill, he knew he had to pay the bill, he knew he had to pay it and he did not complain about the character of the work or about any delays, and he said that he was ready to pay as soon as the affair could be settled up." The testimony of plaintiff as to the progress of the work is also corroborated by two of the lathers who made clear the fact that any unwarranted delay in the plastering was not at all the fault of respondent. It seems idle to pursue the subject any further or to argue—what certainly will not be disputed—that respondent was not responsible for delays caused by those over whom he had no control, and with whom he sustained no contractual relations.

The only ruling which is assailed is exhibited in the transcript as follows: "The defendant thereupon offered in evidence the original plans and specifications and contract between A. W. Wilson and J. W. Mitchell. * * * Counsel for defendant Wilson stated that said contract was offered in evidence to show that Mitchell was required by it to complete the building within 100 working days after June 22, 1908, and, that in case of his failure so to do, that he should be liable to the owner for all loss and damage arising by reason of such delay, to which introduction of said evidence the plaintiff objected upon the ground that the same was immaterial, irrelevant, and incompetent, and was a contract between Mitchell and Wilson, and not binding upon Mannix except so far as it was made so by his agreement." The objection was sustained.

[3] The question may be considered from several viewpoints, and from each we shall discover that the said ruling was either justifiable or innocuous. One of these is set forth perspicuously by Mr. Justice Henshaw in the case of Hampton v. Christensen, 148 Cal. 729, 84 Pac. 200. Therein it is said: "It is a perfectly legal contract which makes time of completion of its essence and provides that the contractor, for a failure to perform in time, shall make good to the owner such loss as the latter may sustain thereby. More than this, it is a deduction or offset which but for the lien law the owner would have the unquestioned right to claim from the amount found due the contractor under the contract. * * * But the right of materialmen, artisans, and laborers of every class is to have a lien upon the property upon which they have bestowed their labor or furnished their material for the full value of the same, and this right is one solemnly guaranteed them by the Constitution of the state. Article 20, § 15. The Legislature is enjoined to pass laws for the speedy and efficient enforcement of these liens. * * * It will be noted that in framing these laws, primarily

designed for the protection of materialmen and laborers, the Legislature has seen fit to reserve for the use of these lien claimants but one of the payments. * * * Whatever may be said of other payments, this amount of money [the 25 per cent. to be set aside for the lien claimants] cannot lawfully be depleted or reduced to the injury of any such claimant. If it could be, it would be setting at naught the constitutional provision granting a lien for the full value of the labor done or material furnished." The opinion proceeds to point out how the owner may protect himself against the derelictions of the contractor, and it is declared that "we hold that the excess of such demand cannot be carried over and made a charge against the 25 per cent. final payment, to the injury of any lien claimant thereon; for, as has been said, since this final payment is the only fund which the Legislature has sequestered to meet the demand of the lien claimants, to permit this would be to deprive them of their constitutional right to a lien."

The application of this principle to the situation here is simple. The pleadings admit a contract between Wilson and Mitchell for $45,500, of which 25 per cent. was required to be withheld to satisfy lien claimants, viz., $11,375. The building was completed and accepted and notice of acceptance filed about February 9, 1909. This $11,375 could not lawfully be paid for any other purpose than to satisfy lien claimants for at least 35 days thereafter, which would bring it to March 16, 1909. Plaintiff's lien was filed March 5, 1909, and the evidence shows that a settlement was made with all the other claimants. It is perfectly manifest, therefore, that the necessary portion of this $11,375 must be applied to the satisfaction of respondent's claim, regardless of whatever demand might exist in favor of appellant against the contractor by reason of the latter's failure to complete the building within the time provided.

[4] Again it is admitted that respondent on February 2, 1909, served a notice upon the owner pursuant to section 1184 of the Code of Civil Procedure, and also that subsequently in the completion and acceptance of the building there was due on the completed payment from Wilson to Mitchell the sum of about $7,000. Said section provides that: "Upon such notice being given, it shall be the duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter." Therefore the owner was required to sequester this amount and hold it to meet respondent's demand; but, notwithstanding this notice, the evidence shows that appellant settled with the contractor, Mitchell. It is too plain for argument that he did so at his peril and that, under the circumstances detailed, his asserted claim for damages against Mitchell cannot be permitted to impair or offset the availability of said sequestered fund for the payment of respondent's claim. Hampton v. Christensen, supra.

[5] But the settlement with Mitchell is a complete answer to appellant's contention. The latter's testimony is: "There were other subcontractors on the building. I settled with all the rest except Mannix. Some got 60 per cent. and some got more, I think. I also settled with Mitchell." His settlement with Mitchell, of course, included whatever claim he might have for a reduction of the contract price in consequence of said delay. We must presume that appellant was allowed whatever he was entitled to. Suitable allowance having been made by the contractor, manifestly the owner could not urge an abatement therefor from the just claim of respondent.

[6] Moreover, the acceptance of the building, in the absence of fraud or mistake, neither of which is urged, implies a waiver of any claim for damages on account of nonperformance in any particular. Moore v. Kerr, 65 Cal. 519, 4 Pac. 542; Baltimore, etc., Ry. Co. v. Scholes, 14 Ind. App. 524, 43 N. E. 156, 56 Am. St. Rep. 307, and cases collected in note.

[7] Finally appellant was an unconditional guarantor of the obligation of Mitchell to pay respondent for his work. His liability is therefore coextensive with that of the principal obligation. It is no doubt true, as asserted by appellant, that "Wilson, in assuming Mitchell's liability to Mannix, acquired thereby all defenses and claims which Mitchell might assert against Mannix, and it cannot be said that Wilson has waived any defenses or that he is estopped from asserting them. 1 Brandt on Suretyship & Guaranty, §§ 255, 259; 20 Cyc. 1487." But Mitchell could not urge his own failure to comply with the contract as a defense against the claim of respondent, and the court has found, as we have seen, upon sufficient evidence that there was no fault upon the part of Mannix. It follows necessarily that appellant is liable for the debt regardless of the said ruling of the court.

In any view that we may take of the case we can see no merit in the appeal, and the judgment and the order denying the motion for a new trial are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(18 Cal. App. 639)

Ex parte HEMSTREET. (Cr. 234.)

(District Court of Appeal, Second District, California. April 4, 1912.)

1. INTOXICATING LIQUORS (§ 222*) — COMPLAINT—NEGATIVING EXCEPTIONS.

Pen. Code, § 397b, provides that every person who sells, gives, or delivers to any minor child, under 18 years of age, any intoxicating drink, in any quantity whatsoever, shall be guilty of a misdemeanor, provided that the section shall not apply to the parents of such children, or to guardians of their wards. *Held*, that the exception did not in any wise purport to describe the offense specified, which was the sale of intoxicating drinks to minors under 18 years; and hence it was not necessary to negative the exception in a complaint for violation of such act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 240-248; Dec. Dig. § 222.*]

2. CRIMINAL LAW (§ 977*)—JUDGMENT—PRONOUNCEMENT—TIME—EFFECT OF OMISSION.

Pen. Code, § 1449, provides that after verdict against defendant the court must appoint a time for rendering judgment, not more than two days nor less than six hours after verdict, unless defendant waives the postponement. *Held*, that a judgment pronounced more than two days after verdict is not void for that reason, but merely erroneous, and a ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2482, 2483, 2488, 2489, 2492, 2499, 2502; Dec. Dig. § 977.*]

Application by C. S. Hemstreet for a writ of habeas corpus. Writ denied, and petitioner remanded.

Wallace W. Wideman and Frank Herald, for petitioner. L. A. West, Dist. Atty., and A. E. Koepsel, Deputy Dist. Atty., for respondent.

SHAW, J. Petitioner was convicted upon a complaint filed in the justice's court, charging him with selling and giving to a minor, under the age of 18 years, an intoxicating drink, in violation of section 397b of the Penal Code. The verdict of the jury finding him guilty was rendered on November 23, 1910, and the time for rendering judgment was, in the absence of any waiver on the part of petitioner, postponed to November 26th, at which time, over his objection, judgment was rendered. Petitioner appealed to the superior court, which, on account of the failure of the justice to pronounce judgment within two days after the verdict, granted a new trial, upon which he was again convicted. He bases his right to be discharged from custody upon the grounds: First, that the complaint failed to state an offense; and, second, that jurisdiction of defendant and the subject-matter of the action was lost by reason of the justice failing to pronounce judgment within the time fixed therefor by section 1449, Penal Code.

[1] The alleged vice of the complaint is due to the fact that it did not negative the exception contained in section 397. This section provides: "Every person who sells, gives or delivers to any minor child, * * * under the age of eighteen years, any intoxicating drink in any quantity whatsoever, * * * shall be guilty of a misdemeanor; * * * provided, that this section shall not apply to the parents of such children, or to guardians of their wards." The offense described in the enactment is the sale, etc., of intoxicating drinks to minors under the age of 18 years. The language of the exception, providing that the offense specified shall not apply to parents or guardians of such minors, in no wise purports to describe the offense specified. "When an exception is stated in the statute, it is not necessary to negative such exception, unless it is a constituent part of the definition of the offense. * * * When the exception is not a part of the definition of the offense, and in this way does not therefore become a part of the enacting clause, it is a matter of defense." Territory v. Burns, 6 Mont. 72, 9 Pac. 432. The offense with which petitioner was charged was selling intoxicating drinks to a minor. The fact that parents or guardians were declared not within the operation of the statute was no part of the act defining the offense. An examination of the authorities convinces us the application of the rule requiring the complaint to negative exceptions found in a statute should not be extended to include cases where it does not clearly appear that the exception constitutes a part of the enactment defining the offense. The subject is extensively discussed in Ex parte Hornef, 154 Cal. 355, 97 Pac. 891, where a number of authorities are reviewed. See, also, People v. Grinnell, 9 Cal. App. 238, 98 Pac. 681.

[2] As to the second point, the rendition of judgment after the lapse of two days succeeding the verdict was not an act in excess of jurisdiction, but merely an error in procedure, which defendant was entitled to have reviewed on appeal and a new trial granted on account of such error. Section 1449, Penal Code, applicable to justices' courts, is almost identical with section 1191, applicable to like procedure in the superior court. By the amendment of section 1202 of the Penal Code, it was provided that, in case of a failure to pronounce judgment within the time required by section 1191, the trial court should, upon application therefor, grant defendant a new trial. If denied, the remedy is an appeal from the judgment, in the absence of which, however, the judgment remains in full force and effect as though rendered within the time prescribed. So far as affecting the jurisdiction of the court, this amendment is unimportant. Such was the ruling of the court in the case of Rankin v. Superior Court, 157 Cal. 189, 106 Pac. 718. In our opinion, the court had jurisdiction of the defendant and subject-matter of litigation, and therefore jurisdiction to pro-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

nounce judgment, though it might do so erroneously by failing to follow the statutory provision. Defendant availed himself of his right to appeal to the superior court, which granted him a new trial de novo, wherein judgment was properly rendered, thus protecting him in every right to which he was entitled.

The writ is denied, and petitioner remanded to custody.

We concur: ALLEN, P. J.; JAMES, J.

18 Cal. App. 602

NELSON v. NELSON. (Civ. 926.)

(District Court of Appeal, Third District, California. April 2, 1912.)

1. Divorce (§ 93*) — Grounds — "Extreme Cruelty"—Wrongfulness.

While, under Civ. Code, § 94, defining "extreme cruelty" as being the "wrongful" infliction of grievous bodily injury or grievous mental suffering on the other by one party to the marriage, a complaint for divorce on that ground must show that the cruelty was wrongful; but it is not necessary that the pleader adopt the exact language of the statute.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292–307; Dec. Dig. § 93.*

For other definitions, see Words and Phrases, vol. 3, pp. 2630–2634.]

2. Divorce (§ 101*)—Complaint—Cruelty—Wrongfulness.

A cross-complaint for divorce for extreme cruelty specified acts of cruelty, in that on one occasion plaintiff told cross-complainant that they would go to a dance that night; that when she started to go plaintiff seized her violently by the arm and, in an angry voice, uttered an oath, and, pushing her back into the house, seized her by the throat and choked her until their little son struck him, when he desisted, and at the same time he accused her of wanting to go to the dance to meet another man. It was further alleged that plaintiff, while away from home, on two separate occasions, contracted a venereal disease, for which he was under the care of a physician for many months, and falsely accused cross-complainant of giving it to him and with going out with B., and that in June, 1910, he further charged cross-complainant with unfaithfulness, and in his complaint charged her with conspiracy with B. against plaintiff, to humiliate and injure her good name with the general public and with her friends and neighbors. *Held*, that such allegations sufficiently showed that the acts of cruelty alleged were "wrongful," without being so specifically alleged.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 322–327; Dec. Dig. § 101.*]

3. Divorce (§ 101*) — Cruelty—Cross-Complaint — Construction—"Said Acts and Conduct."

A paragraph of a cross-complaint for divorce for cruelty alleged that for five months last past plaintiff, by a uniform course of conduct, had been cruel to defendant, and had inflicted on her, through his harsh conduct, great mental cruelty. A later paragraph alleged that, by reason of "said acts and conduct" on the part of plaintiff, defendant had suffered, and did still suffer, great physical and mental suffering. *Held*, that the words "said acts and conduct" comprehended the whole picture of plaintiff's dereliction as alleged in the complaint; and that the first paragraph was not objectionable, because it charged that the conduct produced "great," instead of "grievous," mental suffering.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 322–327; Dec. Dig. § 101.*]

4. Divorce (§ 108*) — Trial—Findings of Fact.

Under Civ. Code, § 130, providing that no divorce can be granted on the default of the adverse party, or on the uncorroborated statement, admission, or testimony of the parties, and Code Civ. Proc. § 632, providing that on the trial of a question of fact by the court its decision must be given in writing and filed with the clerk within 30 days from submission, a fact relied on as a ground for divorce must not only be proved, but must be found by the court, though it is not denied by the adverse party.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 349–352; Dec. Dig. § 108.*]

5. Divorce (§ 150*) — Trial — Findings of Fact.

Findings in a suit for divorce on defendant's cross-complaint that plaintiff had treated defendant with extreme cruelty, had often applied to her opprobrious epithets and made false accusations against her morality and virtue, and for more than five years, by a uniform course of conduct, had been cruel to her, and had inflicted on her, through his harsh and ungentlemanly conduct, great mental suffering and cruelty, but not finding the specific acts of cruelty, either as alleged in the cross-complaint or otherwise, to be true, and failing to find that any act of brutality inflicted on defendant "grievous bodily injury or grievous mental suffering," were insufficient to sustain a decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 499–508; Dec. Dig. § 150.*]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Action by James I. Nelson against Anna May Nelson. From an interlocutory judgment awarding defendant a divorce on her cross-complaint, plaintiff appeals. Reversed.

S. K. Dougherty, for appellant. T. J. Butts, for respondent.

BURNETT, J. This is an appeal by plaintiff from an interlocutory judgment of divorce awarded defendant upon her cross-complaint. Appellant declares that "whether the cross-complaint herein states a cause of action, or whether the findings made upon it support the judgment for the defendant, are the two principal points made by appellant on this appeal." The alleged insufficiency of said cross-complaint is predicated of the failure to aver that the acts of cruelty set out *wrongfully* inflicted upon defendant *grievous* mental suffering, and the findings are assailed for a similar omission.

[1, 2] Of these in the order presented by appellant in his brief. Section 94 of the Civil Code defines "extreme cruelty" as being the "wrongful infliction of grievous bodily injury, or grievous mental suffering, upon the other by one party to the marriage." Appellant is therefore right in his contention that the element of *wrongfulness* must appear in the complaint. It would, of course, be unreasonable to hold that every infliction of grievous bodily injury or mental suffering should be a sufficient ground for divorce. Such injury or suffering might result from the inadvertent or justifiable conduct of the other party to the marital relation. The law does not, manifestly, contemplate such a contingency, but properly demands that the deprecated act be wrongful. We do not understand, however, that the pleader is required to adopt the exact language of the statute. It is sufficient if, by appropriate averments, the said qualification appears. Here, we think, the only rational inference from the allegations of the cross-complaint is that the "infliction" was "wrongful." The acts of extreme cruelty are specified; and they are described in such terms as to carry necessarily the implication of *injustice* or *wrongfulness* on the part of plaintiff. For instance, it is averred that, on one occasion, plaintiff said to defendant, "Get supper early, and we will go to the dance to-night;" that defendant went home and, after doing her housework, got ready to go to the dance, and when she started to go he seized her violently by the arm and, in an angry voice, uttered an oath, and said to her, "You're not going to take that baby out," and shoved her back into the house and seized her by the throat and choked her until their little son struck him, when he desisted; and, at the same time, he accused her of wanting to go to the dance to meet one Bishop. It is further alleged that plaintiff, while away from home, on two separate occasions, contracted a venereal disease, for which he was under the care of a physician for many months, and that he falsely accused defendant of having given him said disease; "that in the month of June, 1910, the plaintiff told the defendant that some one had placed a deer hide in his barn, and then and there said to defendant: 'Damn you, you know more about this deer business than you have told; I will shoot Bishop and you too.'" That the charges of adultery made in plaintiff's complaint are without foundation, and were made by said plaintiff for the purpose of injuring the good name of defendant with her neighbors and friends, and that in his complaint he "has falsely and willfully charged this defendant with the crime of conspiracy, committed with one Martin Bishop, against the said plaintiff, which said accusation is false and untrue, and was made by the said plaintiff for the purpose of humiliating and injuring the good name and reputation of this defendant with the general public and with her friends and neighbors." It seems to us apparent that the addition of the qualifying word "wrongfully" is not required in order to stamp with that characteristic the foregoing acts as thus detailed in the cross-complaint. If used, it would have constituted a mere redundancy.

[3] The criticism of the pleading as to the other point, we think, is equally destitute of merit. In paragraph 9, it is alleged "that for five years last past the said plaintiff has, by a uniform course of conduct, been cruel to defendant, and has inflicted upon her, through his harsh and ungentlemanly conduct, great mental cruelty." The contention is that "great" is not equivalent to "grievous." We may pass this, however, as, in paragraph 12, we have the following allegation: "That, by reason of said acts and conduct on the part of said plaintiff, said defendant has suffered, and still does suffer, great and *grievous* physical and mental suffering." Appellant seeks to limit the application of this to a portion of the asserted acts of cruelty; but no such arbitrary construction is admissible. "Said acts and conduct" grammatically comprehends the complete picture of plaintiff's dereliction that appears in the cross-complaint.

Summarizing, then, on this branch of the case, we have, in the said pleading, a general allegation that plaintiff has treated defendant "with extreme cruelty," followed by a specification of acts that necessarily imply unlawfulness, cruelty, and brutality and culminating with the positive averment that, by reason of these acts, "defendant has suffered, and still does suffer, great and grievous physical and mental suffering." If this does not present a case of "the wrongful infliction of grievous bodily injury or grievous mental suffering," we have totally misconceived the language employed. The cases cited by appellant are in harmony with what we have said. For instance, in Smith v. Smith, 124 Cal. 651, 57 Pac. 573, it is held that "a complaint, which merely alleges that defendant has treated the plaintiff in a cruel and inhuman manner, that he has applied coarse epithets to her, which are described, and has accused her of a want of chastity, without alleging either grievous bodily injury or grievous mental suffering as the result of the cruelty alleged, does not state a cause of action." It is grounded upon the position that "grievous bodily injury or grievous mental suffering is the ultimate fact, and should be alleged." No such omission, as we have seen, is found here.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

If there was any defect in the cross-complaint, it constituted only what could be reached by special demurrer. No demurrer however, was interposed, nor was the cross-complaint answered by plaintiff; and this latter consideration is urged by respondent as a sufficient reply to appellant's contention as to the incompleteness of the findings.

[4] It is no doubt well settled, as a general rule, that facts averred in the complaint and not denied in the answer are not required to be found by the court. Fox v. Fox, 25 Cal. 587; Grossini v. Perazzo, 66 Cal. 545, 6 Pac. 450; Walker v. Brem, 67 Cal. 599, 8 Pac. 320; Johnson v. Vance, 86 Cal. 110, 24 Pac. 862. But the reason is that there is no fact in issue, and therefore no fact to be proved. Wherever a fact is to be established by evidence, however, the rule is different. This is indicated clearly enough by section 632 of the Code of Civil Procedure. It provides that "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." Ordinarily there would be no "trial of a question of fact," where the fact is admitted by the failure to deny it; but, where the asserted fact is the ground upon which a party relies for divorce, it must be established as though denied, since "no divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission or testimony of the parties," etc. Section 130, Civ. Code. This must be taken into account in connection with section 131 et seq., providing that "in actions for divorce, the court must file its decision and conclusions of law as in other cases," etc.

It is true that the Fox Case, supra, was an action for divorce, but the allegation therein, not denied, related to the fact of marriage; and it was held that no proof was required of this, since "the marriage is in no sense a ground for the divorce," and that proof was required by the statute only "of the facts alleged as the grounds for a divorce." The court, therefore, through Mr. Justice Rhodes, said: "The fact of the marriage is fully established by the defendant's failure to deny it in her answer; and that is equivalent to the most direct proof." It was accordingly determined that there was no necessity for a finding of the fact of marriage; the court saying: "That fact was not in issue between the parties, and therefore was not required to be found by the court."

In Bennett v. Bennett, 28 Cal. 600, a question of finding was not involved; but it was claimed that it was not necessary to prove the fact of residence, since it was not denied, and the Fox Case was cited as authority for the contention. The Supreme Court held, though, that there is a marked distinction between the fact of *marriage* and of *residence*, stating that "residence, though it does not enter into the statute causes of divorce, does enter into the 'grounds' of divorce, or constitutes rather the sole ground upon which a decree dissolving the marriage relation in any given instance can be regarded otherwise than as a piece of judicial usurpation. But, over and beyond this, residence is palpably within the mischiefs against which it was the object of the statute to guard; and therefore it must be proved."

[5] We conclude that, since it was incumbent upon defendant to prove the alleged facts upon which she relied for a divorce, they should be embraced within the decision of the court. As to this, the following is the only attempted finding of fact: "That for more than 10 years last past the said plaintiff has treated the defendant with extreme cruelty and in a cruel manner, and has often applied to her opprobrious epithets, and has made false accusations against the morality and virtue of said defendant; and the said plaintiff, for more than five years last past, has, by a uniform course of conduct, been cruel to defendant, and has inflicted upon her, through his harsh and ungentlemanly conduct towards her, great mental suffering and cruelty." It is to be observed that not a single specific fact alleged in the cross-complaint is found to be true. The finding is most general in its character, and might with equal propriety be based upon evidence of facts entirely different from those alleged. We may suspect and surmise that the court intended to find that the cruel conduct of plaintiff was "as alleged in the cross-complaint"; but it is not so declared. Again, the said finding is almost entirely a conclusion

of law, and is objectionable in that respect. It is obviously not sufficient to find that "the plaintiff treated the defendant with extreme cruelty," as that is a legal conclusion for the court to reach from certain facts. But another vice is the failure to find that any act of brutality inflicted upon defendant "grievous bodily injury or grievous mental suffering." Waiving any distinction between grievous" and "great" mental suffering, we observe that "it was through his harsh and ungentlemanly conduct" that he inflicted upon her "great mental suffering and cruelty." There is no intimation as to what facts constituted this "harsh and ungentlemanly conduct"; and it is manifest that the expression is too vague and speculative for a suitable finding.

It is stated by the Supreme Court, in Franklin v. Franklin, 140 Cal. 609, 74 Pac. 155, that "we recognize that it is the province of the trial court to find the fact as to whether or not grievous bodily injury or grievous mental suffering results from the acts of the defendant in a case such as this. Barnes v. Barnes, 95 Cal. 171 [30 Pac. 298, 16 L. R. A. 660]; Fleming v. Fleming, 95 Cal. 430 [30 Pac. 566, 29 Am. St. Rep. 124]; Andrews v. Andrews, 120 Cal. 184 [52 Pac. 298]; Curl v. Curl, 130 Cal. 638 [63 Pac. 65]." In brief, to satisfy the requirement of the law, there should be found at least some of the acts of cruelty embraced within the evidence, and that these acts wrongfully inflicted upon defendant grievous bodily injury or grievous mental suffering, or both. It is apparent, as already seen, that the findings here fall far short of this requirement.

It may be added that there is a mistake in the decree in the description of the real property which is set apart to defendant. Of course, this will be corrected in the event of a new trial and a similar decree in behalf of defendant.

The judgment is reversed.

We concur: CHIPMAN, P. J.; HART, J.

(18 Cal. App. 543)

PEOPLE v. HAYDON. (Cr. 167.)

(District Court of Appeal, Third District, California. March 25, 1912. Rehearing Denied by Supreme Court May 24, 1912.)

1. Homicide (§ 254*) — Evidence — Sufficiency.

Evidence *held* to sustain a conviction of second-degree murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 533–538; Dec. Dig. § 254.*]

2. Criminal Law (§ 747*) — Trial—Province of Jury.

The jury may upon full consideration reject testimony contradictory to that of a given witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. § 747.*]

3. Criminal Law (§ 1159*) — Appeal—Review—Findings.

In order that evidence be improbable or unbelievable, so that a judgment of conviction based thereon will not be sustained, it must involve an assertion that something was done which would not seem possible under the circumstances, or involve conduct which only a person of seriously calentured mentality would be likely to do.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

4. Criminal Law (§ 1169*)—Appeal—Harmless Error—Admission of Evidence.

Accused and decedent's father owned adjoining cattle ranges, and the state claimed that decedent was shot while attempting to drive accused's horses off of decedent's range. The state offered evidence by decedent's brother that his father had sent him to the place where the homicide occurred a few days before it happened with a message to his brothers as to cattle which had strayed from the range, written on a post card received from the owner of an adjoining range, giving information as to the whereabouts of the cattle, on which decedent's father wrote a message that, if they saw the writer of the post card, to be sure and thank him for telling him about the cattle. *Held*, that any impropriety in introducing evidence as to the post card on the ground that it was introduced in anticipation of an attack by accused on the decedent's family generally, and was intended to show the family's good standing among the neighbors, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137–3143; Dec. Dig. § 1169.*]

5. Witnesses (§ 280*) — Argumentative Questions.

In a homicide case in which the defense claimed that the first shot fired by accused at decedent missed him and struck his brother, decedent's brother was asked on cross-examination, "And as you ran anywhere from this cross [a mark referred to on a map of the surroundings used in the trial] to the point directly north of the pine tree—in fact, all of the time your left side was directed to him [accused] wasn't it?" the question being asked to show that decedent's brother was shot accidently as claimed, and not while running away from the place where decedent was shot. *Held*, that the question was not objectionable as being argumentative.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 993; Dec. Dig. § 280.*]

6. Criminal Law (§ 1170*) — Appeal — Review—Harmless Error.

The exclusion of the question could not have prejudiced accused where from witness' description of the position of himself and accused at the time of the killing, taken in connection with the map used in the trial, there could be no difficulty in determining whether witness had his left or right side to accused when the latter fired at him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

7. Criminal Law (§ 404*)—Evidence—Demonstrative Evidence.

The over and undershirts which decedent wore when he was shot, though spattered with blood, were admissible in evidence to show the point of entrance of the bullet into the body, that being material, and also to show accused's intention to inflict a mortal wound.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891–893; Dec. Dig. § 404.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

8. Criminal Law (§ 661*)—Scope of Evidence.

In proving guilt, the people need not anticipate the contentions or admissions which accused intended to make, or assume that matters showing guilt will not be disputed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 758, 1606; Dec. Dig. § 661.*]

9. Criminal Law (§ 1169*)—Appeal—Review—Harmless Error.

A member of the coroner's jury testified in a homicide case, without objection, that accused did not testify at the coroner's inquest, and was then asked whether accused appeared at the scene of the homicide where the inquest was held while it was being held, and answered, "No." *Held* that, while it was immaterial whether accused testified at the coroner's inquest, any error in admitting evidence as to whether he was present thereat, in answer to the last question, was rather favorable to the accused than unfavorable, since it tended to explain the prior statement that he had not testified at the inquest.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137–3143; Dec. Dig. § 1169.*]

10. Witnesses (§ 282½*)—Cross-Examination.

Where a witness had examined the ground around the place of the killing for empty cartridge shells, and had been asked three or four times how far he had gone from decedent's body looking for shells, and answered once that he went no further than eight or ten feet therefrom, and another time that he went ten or fifteen feet, the question was properly excluded on cross-examination as to what distance from the body he had ceased to look for cartridges.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 928, 990–992; Dec. Dig. § 282½.*]

11. Witnesses (§ 372*)—Cross-Examination—Rebuttal.

A witness who had testified in a homicide case that the decedent's general reputation for peace and quiet in the community where his family resided was bad could be questioned on cross-examination to show that for years the residents of the community were divided into factions, arising from controversies on local matters, and among whom the feeling of hostility was bitter, so that the witness was properly allowed to answer that the people had been divided on a fight over the liquor question, and a good deal of gossip had resulted, though the state did not directly show that decedent's family were identified with any of the hostile factions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192–1199; Dec. Dig. § 372.*]

12. Criminal Law (§ 1169*)—Appeal—Review—Harmless Error—Admission of Evidence.

Any error in admitting evidence as to the people being divided on a fight over the liquor question was not prejudicial to the accused, being rather favorable to him if anything, because of the district attorney's failure to affect the witness' direct testimony as to decedent's bad reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137–3143; Dec. Dig. § 1169.*]

13. Witnesses (§ 344*)—Examination—Credibility.

A witness who had testified to a material conversation occurring a few weeks before the killing was properly asked whether he had not been under the influence of intoxicants during practically the whole time of the trial; his answer admitting that he had, showing that the question was not asked merely to prejudice the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. § 344.*]

14. Witnesses (§ 269*)—Cross-Examination.

A witness who had testified in his direct examination that decedent's reputation for peace and quiet in the community was good could not be asked on cross-examination whether witness ever heard of decedent being accused of robbing a safe; his direct testimony not referring to the traits of character involved in a crime, such as robbery, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949–954; Dec. Dig. § 269.*]

15. Homicide (§ 163*)—Evidence—Character Evidence.

In a prosecution for homicide, evidence of decedent having been accused of robbing a safe was not admissible; only his reputation for peace and quiet being admissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310–317; Dec. Dig. § 163.*]

16. Criminal Law (§ 376*)—Evidence—Character Evidence.

Character evidence should be confined to the trait of character which is in issue or which bears some analogy to the nature of the act charged.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 836–839, 841, 843; Dec.Dig. § 376.*]

17. Witnesses (§ 374*)—Bias—Rebuttal Evidence.

In a prosecution for killing decedent while he was driving accused's horses off of decedent's range as claimed by the state, a witness who had given material evidence for accused admitted upon direct examination that, after his marriage with decedent's sister, his relations with her family had been unfriendly, but stated on cross-examination that his feeling toward them was not very bitter, but he merely had no use for them. When he was asked whether he did not sell the ranch adjoining defendant's ranch to accused because he believed accused would kill decedent and his brothers, and stated that he did not do so, and was then asked if he did not have a conversation with E. in which he said that he had sold to the right man because accused would shoot decedent and his brothers the first time he caught them running his horses, and witness admitted a conversation with E., but had no recollection of making such a statement, although he admitted that he might have made it. *Held*, that the state could show by E. that witness did make the statement claimed by him in the conversation for the purpose of showing that witness was more hostile to decedent's family than he had admitted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1201, 1202; Dec. Dig. § 374.*]

18. Witnesses (§ 370*)—Bias.

If a witness who admits an unfriendly feeling towards the opposite party undertakes to convey the impression that such feeling is not one of deep animosity, the real extent of his enmity may be shown by the other party.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. § 370.*]

19. Criminal Law (§ 824*)—Trial—Instructions—Request—Purpose of Evidence.

If accused desires that evidence admitted as impeaching testimony be limited to that purpose and not be considered as substantive evidence, he should request a charge expressly limiting its consideration for the purpose for which it was admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824.*]

Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Thomas P. Haydon was convicted of murder in the second degree, and from the judgment and an order denying a motion for new trial he appeals. Affirmed.

Rehearing denied by Supreme Court, 123 Pac. 1114.

C. Wm. White and Bush & Hall, for appellant. U. S. Webb, Atty. Gen., and J Charles Jones, for the People.

HART, J. There are, generally speaking, but two points upon which reliance is based for a reversal of the judgment and order, from which the defendant, convicted of murder of the second degree, prosecutes the appeal to this court, viz.: (1) That the evidence does not justify and support the verdict; (2) that the court committed a series of serious and prejudicial errors in the allowance and disallowance of answers to certain questions propounded to the witnesses.

The defendant was prosecuted for the crime of murder on an information, filed in the superior court in and for the county of Trinity, by the district attorney of said county; it being therein alleged that he unlawfully and with malice aforethought destroyed the life of one Morris H. Norgard.

The only witness to the homicide, other than the defendant himself, was a brother of the deceased, Cervera Norgard, a lad of a little less than 13 years of age at the time of the homicide. His, therefore, was the only direct testimony received on behalf of the people. The circumstances of the killing as detailed by him do not accord, as might naturally be expected, with the circumstances of the homicide as related by the defendant, and thus there arises a sharp conflict in the evidence bearing upon the circumstances under which the act of killing was committed. But counsel for the appellant, with full appreciation of the rule which admittedly has always heretofore been applied and which we think still applies where a verdict is challenged for insufficiency of evidence to sustain it and there exists a substantial conflict in such evidence, contend, nevertheless, that the testimony of young Norgard is, upon its face, so plainly improbable or unbelievable that this court, which, so it is asserted, must, of necessity, thus view the boy's version of the homicide and its attendant circumstances, is compelled to say that there is in fact no evidence worthy of belief which is in any measure contradictory to the defendant's story of self-defense, and that, therefore, the result reached by the jury is wholly without substantial support.

[1] 1. The homicide occurred on the 21st day of December, 1910, in a region of Trinity county known as Long Ridge. The deceased, at the time of his tragic death, was about 20 years of age, and was the son of Chris. Norgard, who, with his family, resided at Covelo, in Mendocino county. The latter was, however, the owner of a stock range adjoining that of the defendant in Trinity county. The defendant, about one month previously to the day on which the killing occurred, purchased from one John D. Wathen the latter's stock range. Shortly thereafter the defendant drove his band of horses to the Wathen range, and, with his family, took up his residence on said place. At about the same time the defendant, with one J. S. Rorobough, entered into an agreement whereby the first named was permitted to graze his stock on the latter's range, comprising a large area of land situated in the neighborhood of the Norgard range, and which said land he (defendant) was making preparations to buy under his said agreement with Rorobough. Upon the Norgard range was a cabin, situated about two miles from the Wathen place, and in which the Norgard boys lived when engaged in looking after and caring for their father's stock grazing upon the latter's range. It appears that a feeling of intense hostility had developed between the Norgards and John D. Wathen, who sold, as seen, his range to the defendant. Wathen had married the daughter of Chris. Norgard against the latter's wishes, and, while this fact was the ostensible genesis of the ill feeling between them, it was the theory of the defense that the real motive for the hostility of the Norgards against Wathen was to so annoy and pester the latter as to inspire in him a desire to leave that region of country and thus, hoped the Norgards, they would be able to secure the ownership of the Wathen range, which they had for a long time coveted, for a price much below its actual value. The Norgards, so the defendant contends, therefore, kept up a persistent persecution of the Wathens by various trespasses and other annoyances up to the time that the latter sold their range to the defendant. Actuated by a similar motive, so the theory of the defense proceeded, the Norgards, after the sale of the Wathen range to the defendant, transferred their ill will and persecution to the latter, and prosecuted a systematic and relentless harassment of the defendant (by running and stampeding his horses whenever they came across them) up to the day of the homicide. The evidence discloses that up to approximately a month prior to the death of the deceased the latter had been engaged in some employment in Shasta county. His father, however, having requested him to return home and assist in looking after his stock on the Trinity county range, the deceased returned to Covelo, taking with him a new automatic "five-shot" rifle. A few days thereafter the deceased

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

went to his father's range, and with his brother, Elmer, there took charge of affairs and remained until the day of the homicide. Cervera Norgard, the day before the homicide, went to the range, taking with him for his brothers and from his father a message, calling attention to the whereabouts of certain cattle belonging to the Norgards which had strayed from their range; information as to the whereabouts of said cattle having been communicated to Chris. Norgard by a neighboring landowner through a postal card.

As to the circumstances immediately leading to and ending in the homicide, Cervera Norgard testified, in substance, as follows: That on the afternoon of the day of the homicide he and the deceased mounted their horses and started out over the range to look after their cattle. The deceased carried the automatic rifle referred to in a scabbard attached to his saddle. After traveling about the range for some time, and just before sundown, they came across the horses of the defendant, grazing on their range. They at once proceeded to drive the horses off the range in the direction of the Wathen place. They had not gone far when they were fired upon by Haydon, who had suddenly and unexpectedly made his appearance "across the gulch," at a distance of about 100 yards from the boys. Haydon fired twice at the boys at this time, but without effect. The witness declared that neither his brother nor himself paid any attention to this circumstance, neither accelerating their speed by reason of the shooting, nor making any preparation to defend themselves, but proceeded, indifferently and leisurely, with the driving of the horses toward the Wathen place. The only comment upon the shooting at this time was made by the deceased, who remarked to the witness, "They [meaning the bullets] came close."

The witness said that they drove the horses "up the hill" to a trail leading to the Wathen range. After traveling over said trail for a short distance, they came to a "flat," where they "let the horses go," and themselves started across the flat. They had proceeded only a very short distance when they again saw Haydon, this time standing behind a pine tree, with his gun in his hand. The deceased was riding ahead of the witness, and, as they approached the pine tree, Haydon stepped out and called either the witness or his brother "a black s——n of a b——h." Haydon used some other bad language which the witness could not recall. However, neither of the boys made any reply to the defendant, and started on in the direction of a pasture on their father's range, some 200 or 300 yards from the pine tree mentioned. Haydon, although holding his gun in his hands, made no effort to use it at the pine tree. While the boys proceeded toward the pasture referred to, Haydon walked out to the edge of the flat, still holding his gun and watching the young men. After looking over the pasture from the hillside to which they had gone from the flat, the boys turned their horses and retraced their steps toward the flat and in the direction of the point at which the defendant was standing. When they had reached a point about 50 yards from the point on the hill from which they had viewed the pasture, the deceased removed his rifle from its scabbard, and delivered it over to Cervera, saying: "Here is my gun, Cervera. I ain't afraid of Haydon, and don't want any trouble with him." When the boys reached the "flat," Haydon had returned to the pine tree behind which he stood when the boys first came into the "flat," and, as they were in the act of passing him, Haydon, addressing them, said: "Are you going to keep on driving my horses?" to which the deceased answered, "Yes; I will, if you are on our land," whereupon the defendant fired at the deceased. At this time the witness was about 20 feet behind the deceased. Immediately after the first shot was fired, the deceased turned toward his brother and exclaimed, "Run, Cervera, good-bye." A second shot was fired by Haydon, immediately following which the deceased fell from his horse. A third shot was fired by Haydon, and Cervera's horse then commenced to rear. Cervera noticed blood flowing from the neck of his horse after the third shot. The witness, after the third shot, quickly dismounted, and, with the rifle previously handed him by deceased, as noted, started to run toward the trail leading to the Norgard camp. The witness testified that the defendant fired two shots at the deceased and two or three at him. One shot took effect on the body of deceased, striking him in the breast and producing immediate death. The witness was shot twice in the right arm, fracturing it. One of these shots entered the forearm and the other in the upper arm. The horse upon which the witness was riding at the time of the shooting also bore two wounds in the neck, neither, however, being of a serious nature. Cervera declared that neither he nor the deceased shot at the defendant, nor did they attempt to do so. He testified that, before meeting Haydon, the deceased fired a shot from his rifle at a quail and also one at a woodpecker.

The defendant's story of the shooting is, briefly, as follows: That at about 3 o'clock on the afternoon of the day of the homicide he left the Wathen place on horseback, taking with him a 25-35 Winchester rifle. He went "over on the ridge, west of the creek," where he could look down Eel river. After having been on the ridge a short while, he saw "somebody get around and put the dogs after" his horses, and start them in the direction of the point at which he was standing. As the horses approached him, he saw that Cervera and the deceased were driving them. When the boys came near where the defendant stood, the latter, addressing them, said, "I want you fellows to quit running my horses," to which the deceased replied: "You go to h——l, you old s——n of a b——h, I will run your horses to h——l, you old s—n of a b——h." He then accused the boys of running the horses off the Rorobough land (under lease to defendant), and the deceased made a reply in language similar to that in which he first addressed the defendant. The boys then left Haydon and went "around the hill the way the horses went," and in about five minutes thereafter returned to the point where they left Haydon. The latter was still standing at said point, holding his rifle in his hands. The deceased, so the defendant proceeded, had his rifle in his hands, and, passing Haydon a short distance, suddenly wheeled his horse so as to face the latter, and, speaking to the defendant, said: "You old s—n of a b——h, you get out of here," and then fired a shot at the defendant. Haydon attempted to return the fire, but, there being no cartridge in his rifle, his weapon did no more, as under such circumstances it could, of course, do no more than to "snap." Immediately he placed a cartridge in the rifle and fired, both he and the deceased shooting at the same time. Again Haydon shot at the deceased, and the latter thereupon fell from his horse to the ground mortally wounded. Cervera, continued the defendant, then jumped to the ground from his horse, picked up his brother's rifle, and attempted to shoot. The defendant stepped behind a tree, and, as he did so, Cervera fired a shot. The defendant then yelled to Cervera, "You go on," and the lad thereupon left the scene of the trouble in the direction of his father's cabin. The defendant then left for the Wathen place.

We have now given a synoptical statement of the testimony of Cervera Norgard, upon which the state chiefly relied for the establishment of its case and upon which the jury in the main manifestly based their verdict, and also the story of the defendant as to the circumstances directly leading to and attending the shooting.

There was, it is true, other testimony introduced on both sides relating to the number of shots fired and heard by persons who at the time of the homicide were in the vicinity of the place where it occurred, and also involving certain declarations of the parties relevant to the issues before the court. This testimony, like that of Cervera Norgard and of the defendant as to the circumstances of the shooting, was conflicting.

But, as stated, the principal contention of the appellant with regard to the evidence is that the testimony of Cervera Norgard is inherently improbable, and that the jury, therefore, were unwarranted, in believing it or basing a verdict against the accused upon it. This contention grows out of a number of apparent inconsistencies developed by the cross-examination of the witness and of certain weaknesses which appear to inhere in the very story itself, as related by the boy. For illustration, much in favor of the defendant is sought to be made out of those portions of the boy's testimony in which he declared that without warning or saying a word, the defendant first shot at them; that they (the witness and the deceased) paid no attention to those shots, but proceeded up the hill slowly and leisurely without making any reference to the incident, save the single observation by the deceased that the bullets "came close"; that neither looked back to see whether Haydon was following them, and that they did not, after that incident, cease driving the defendant's horses; that they returned from the pasture to the flat, going in the direction of the spot at which Haydon stood, whereas the evidence shows that they could then have avoided him, "either by continuing along the natural way across the flat, which would have carried them some ninety feet to the north of the tree where the defendant stood, or by going further to the north across the hill, or by going south along a good trail under the flat." It is further pointed out as indicative of the inherent weakness and unreliability of Cervera's story that he testified that when the shooting commenced and the first shot was fired by Haydon, which evidently missed the deceased, the latter turned in his saddle to the left, and, looking toward the witness (who had testified that at that time he was to the right of deceased) said, "Run, Cervera, good-bye," and then, having no weapon, turned, and, again facing the defendant, received the shot that resulted in his death. "It is a tax upon one's credulity," say counsel, "to believe that, thus being assaulted, the deceased made no effort to defend himself, but, upon being fired upon, turned his back toward his assailant and bid his brother good-bye, and then turned calmly to receive his death wound." These and many other like apparent and perhaps real contrarieties in Cervera's testimony, as well as contradictions of certain portions of his testimony by other witnesses, are set out and elaborated upon in the argument of counsel to justify a declaration by this court that the verdict of the jury is barren of a sufficient foundation to uphold it.

But, while the alleged variances or inconsistencies apparent in Cervera's testimony and the contradictions referred to undoubtedly afforded opportunity for a persuasive argument to the jury against the reliability of Cervera's testimony, we see in them nothing from which a reviewing court could justly conclude that his entire testimony is per se unbelievable, and that it was therefore the jury's duty not only to wholly disregard it, but to accept the defendant's story of self-defense or at least find that the latter's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt.

It rarely happens that a case is presented on appeal in which some inconsistencies in the testimony of certain witnesses may not be discovered. These inconsistencies may be due to various causes. It is perhaps quite true that in some instances they are occasioned by the deliberate untruthfulness of witnesses, but more often they are due, we apprehend, to the forgetfulness of witnesses or perhaps to the fact that the occurrences to which they have testified have come about under circumstances that have put the witnesses in such a state of excitement as to cause them to view the incidents which they are required to describe as occurring in a somewhat different way from that in which they may have actually occurred. It is commonly known that there seldom arises a case upon the circumstances of which the witnesses precisely agree in all respects, and yet it by no means necessarily follows that in such cases some one or more of the witnesses have willfully given false testimony relative to the matter to which they have testified. Some one or more may be mistaken, or, as often happens, some might have observed circumstances that others did not. But, whatever may be the cause of such differences, it is true that they occur in nearly every case of disputed questions of fact. If, therefore, every case taken to the appellate courts were to be reversed because of discrepancies or contradictions in the testimony of witnesses without whose testimony a verdict of a jury or the findings of a court could not be sustained, there would, indeed, be few cases in which a reversal would not be compelled upon the ground of the insufficiency of the evidence to support such verdict or findings. Reviewing judges are, obviously, in no position to determine the credit which should be accorded to witnesses or to weigh their testimony.

As has often been repeated, it is for this reason that our Constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is not a review of a question of fact, but purely one of law. In consonance with the spirit and intent of this constitutional provision, the Legislature has ordained that the jury are the exclusive judges of the credibility of witnesses (Code Civ. Proc. § 1847), and are the judges of the effect and value of evidence addressed to them, except in those instances where it is declared by the law that it shall be conclusive proof of the fact to which it relates (Code Civ. Proc. § 2061).

[2] And, as a necessary corrollary of the rules above noted, the jury in this case were authorized, if they conscientiously felt warranted in so doing, after full and fair consideration thereof, to reject any testimony which might have been contradictory to that of the witness Cervera Norgard, (People v. Phelan, 123 Cal. 557, 56 Pac. 424; People v. Wright, 4 Cal. App. 706, 89 Pac. 364; People v. Turpin, 10 Cal. App. 530, 102 Pac. 680; Clark v. Tulare L. D. Co., 14 Cal. App. 414, 432, 112 Pac. 564), and therefore to disbelieve the testimony of the defendant and accept that of Cervera as to the immediate circumstances of the shooting, however weak in places the latter's testimony may have been made to appear, or however sharply his testimony on other important points might have conflicted with the testimony of other witnesses.

But counsel for the defendant declare that the recent amendment to the Constitution (section 4½, art. 6) has enlarged the power of appellate tribunals with respect to the review of evidence, and asseverate that the effect of that amendment has been (to use their language) "to revolutionize proceedings on appeal," and that "it is now the duty of appellate courts to weigh the evidence where the appellant relies upon the insufficiency of such evidence to warrant a conviction." There is nothing in this record demanding from us, even if this court were disposed to undertake the task, an interpretation of the meaning, intent, purpose, and scope of the constitutional amendment to which counsel advert, and we shall, therefore, not attempt to do so; but, if there is one proposition in connection therewith of which we entertain no feeling of uncertainty, it is that said amendment was not intended to change, nor has it changed, the very sensible rule prescribed by the Constitution, and for so many years strictly adhered to in this state, that, in the exercise of their appellate jurisdiction, the appellate courts are restricted to the consideration of questions of law alone, and that, therefore, as before stated, the matter of evidence does not constitute a subject of review by those tribunals, except where there necessarily arises from the evidence or is presented thereby, from its very nature, a question of law.

Guided by the rules as we thus understand them, we have examined the record in this case, and therefore, as to the testimony of Cervera Norgard, we are justified in saying that we perceive nothing in his statements that he and the deceased paid no special attention to the alleged first shots fired by Haydon, and that after such shots were fired they proceeded leisurely up the hill, driving Haydon's horses, without looking back to observe the defendant's movements, so startling as to render that portion of his testimony "inherently improbable," so that it may be held by an appellate court that thus, upon his evidence, upon which the verdict was chiefly founded, a question of law is presented. It may readily be conceded that it would seem unreasonable that the witness and the deceased, having been shot at twice by the defendant, made no preparation to defend or to shelter themselves against further assault by their antagonist. In other words, it would no doubt be regarded as unusual conduct upon the part of any sensible person to do and act as the witness testified that he and the deceased did and acted under the circumstances mentioned. But, on the other hand, it is not in a sense uncommon to find persons so imperturbable to physical fear that they will unflinchingly and desperately and, very often, unnecessarily, pursue a course of conduct involving the greatest physical peril to themselves and which the average person would not be guilty of. Yet we cannot see how it could be held, from the mere statement itself disclosing such conduct, that such statement is not true or is improbable upon its face.

[3] A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable per se, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do. Again, let it be conceded that Cervera told an untruth when he said that he and his brother paid no heed to the shots first fired by Haydon; that he lied when he said that, after those shots, they proceeded up the hill without looking back to see what the defendant was doing; that he falsified when he said that, just before the fatal shooting, the deceased delivered to him the automatic rifle carried by the former in a scabbard; that it was not true that Haydon shot twice or three times at him (the witness) while the latter was fleeing over the trail leading to the Norgard camp, or that he shot at him at all; that the testimony of the witness at the trial was at variance in certain particulars with statements previously made by him or with his testimony at the preliminary hearing—yet those untruths, if untruths they were, and discrepancies between his testimony at the trial and that previously given, cannot be justly said to stamp the story of the witness as to the immediate circumstances of the fatal shooting of Morris Norgard by Haydon as improbable or inherently unbelievable. The matters referred to were, as stated, for the jury to consider in their determination of the ultimate question submitted for their decision, viz., whether the life of the deceased was taken under such circumstances as to make the act one of murder or manslaughter or whether they disclosed no crime at all. Haydon admitted shooting and mortally wounding the deceased, and the main controversy was as to the circumstances under which he did that act—whether he wantonly or without excuse shot and killed him or did the act in defense of his own person. If, therefore, the jury, as manifestly they did, believed the testimony of the witness Cervera Norgard in the main, if, indeed, they believed only that portion of his testimony bearing upon the immediate circumstances of the killing, and thus became satisfied beyond a reasonable doubt of the defendant's guilt, it was, of course, within their province to plant their verdict upon that particular portion of his testimony, although they might have regarded the statements of the witness on other points as of doubtful verity. Under our view of the evidence the verdict is amply supported.

[4] 2. Cervera Norgard, having been asked by the district attorney why he went to Long Ridge a few days prior to the homicide, explained, in reply, that his father had sent him there with a message to be delivered to his brothers, relating to certain of his cattle that had strayed from his range—a circumstance to which we have already adverted. This message was in the form of a postal card which had been received by Chris. Norgard at Covelo from the owner of a range situated in the neighborhood of the Norgard range, informing Norgard of the whereabouts of said cattle, and on which Chris. Norgard, addressing his sons, had written these words: "If you see Holtorf [the writer of the postal card] be sure and thank him for telling us." The postal card, in connection with Cervera's testimony, was offered by the people, and, over objection by the defendant, admitted in evidence by the court. That portion of the postal card particularly objected to involved the request by Chris. Norgard that Holtorf be thanked for giving the information concerning the strayed cattle, and the argument directed against it is that the prosecution, having anticipated an attack by the defense against the character of the Norgard family generally, hoped to impress the jury that said family maintained a good standing with their neighbors from the fact that one of such neighbors had taken the pains to notify them of the whereabouts of their strayed cattle. We have not been able to discover any particular or substantial purpose that could be subserved by the introduction of the postal card in evidence, since there is nothing in the record to indicate that Cervera went to the range for any other purpose than that stated by him, and since it is an undisputed fact that he was on the range on the day of the shooting and witnessed the fatal affray. Yet it is very clear that the mere fact that it was thus made to appear that Chris. Norgard desired that his gratitude be expressed to a neighbor for voluntarily giving him information concerning

his missing cattle would not necessarily establish, nor could it even have a very strong tendency to establish in the minds of the jury, a general good reputation for the Norgard family either for honesty and integrity or peace and quiet in the neighborhood in which the latter's range was situated. In our opinion the postal card, as evidence, was without any force in any direction, except in so far as it tended to corroborate Cervera Norgard as to the purpose for which he went from Covelo to Long Ridge a day or two prior to the shooting; and for that purpose, it was, under the record, as already suggested, altogether unnecessary. There is no reference to the defendant in the postal and no language therein intimating that he was in any way concerned in the subject-matter thereof, and from whatever angle the ruling admitting the card in evidence may be viewed, we can discover no possible harm that could have resulted to the defendant therefrom.

[5] 3. To the following question, propounded on cross-examination to Cervera Norgard by one of the attorneys for the defendant, the court sustained the objection that "it is purely argumentative": "As you ran anywhere from this cross [referring to a point marked on the map used at the trial] to the point directly north of the pine tree—in fact, all of the time your left side was directed to him (defendant), wasn't it?" The evidence disclosed, it will be remembered, that Cervera received two wounds in the right arm, his testimony being, as it will also be recalled, that, after mortally wounding Morris Norgard, the defendant shot at Cervera while the latter was running from the scene of the killing. The theory of the defense at the trial was, and it is so argued here, that the first shot fired by the defendant at the deceased, having missed the latter, struck Cervera, who was near the deceased at the time of the firing of said shot and in range of the bullet from defendant's rifle. The object of the cross-examination of Cervera in that particular was therefore to show that he did not tell the truth in his recital of the circumstances under which he received his wounds; that, as a matter of fact, instead of being shot while fleeing from the spot where his brother met his death, he was accidentally shot by the defendant as above related.

[6] We do not think the question was improper or is amenable to the objection upon which the court disallowed an answer thereto, yet we think that the ruling was without prejudice for the following reasons: A map of the immediate vicinity in which the homicide occurred and on which all the important physical objects thereabouts were delineated and on which the cardinal points of direction and the distances from one to the other of the several important physical objects were noted was received in evidence and used in illustrating the testimony. By this map the witness Cervera gave his testimony, pointing out thereon the respective positions of the defendant, the deceased, and himself at the times of the firing of the several shots. He thus illustrated the position of the defendant and the direction in which he himself claimed to have been going at the time, as he testified, the defendant fired at him. He testified that he did not know whether his left side was toward defendant at the time of the firing of the shots or not, but it is very clear that, from his description of the respective positions of himself and defendant at that time, by the use of the map referred to, there could be no difficulty in determining whether his left or his right side was toward the defendant at the time the latter fired at him. Even, therefore, after showing on the map where the defendant stood and where and in what direction he was running at the time he was shot at, he should have given an answer to the disallowed question contradictory to the description of their relative positions as the same were pointed out by him on the map, the jury would have readily discovered the discrepancy, and, under the circumstances, would not necessarily have ascribed it to any intention on the part of the witness to lie about it. If, in other words, the witness, relying upon his own unaided recollection, had said that his right side was toward the defendant, and then by pointing out their respective positions on the map showed that his left side must have been toward the defendant, the jury would doubtless, under such circumstances, have conceived the discrepancy to have been the result of a mistake and not a desire on the part of the witness to lie about the matter. But, as shown, the fact is that the witness said that he was not certain whether his left or his right side was toward the defendant. The ruling was absolutely harmless.

[7] 4. The court did not err by allowing to be received in evidence the over and undershirts worn by the deceased at the time he was shot. These articles were introduced in connection with the testimony of Cervera Norgard. Counsel for the defendant complain that, since there was no dispute as to the character of the wound inflicted upon the deceased by the defendant and from which death ensued, and there being, therefore, no necessity for placing those articles, "gory and gruesome" from matted blood, before the jury, the result of the ruling allowing them to be exhibited at the trial was only to greatly prejudice the jury against the defendants. But, whatever might have been the tendency of the gruesome exhibits, apart from the legitimate purpose for which they were offered and received, it is clear that the people in making their original case were entitled to thus corroborate the testimony of the witness Cervera with regard to

the manner in which his brother came to his death. People v. Hower, 151 Cal. 645, 91 Pac. 507.

[8] The people, in the maintenance of the burden cast upon them of proving the guilt of one charged with crime, are not supposed to anticipate the contentions or concessions, if any which the defendant intends to make, or, in other words, to assume that certain matters or theories supporting the hypothesis of guilt will not be disputed by the defendant. By the garments received in evidence the point of entrance of the bullet into the body of the deceased could be approximately shown, and thus would Cervera not only be corroborated as to the shooting, but (the shot having taken effect in a vital part of the body) the intention of the defendant to inflict a mortal wound to some extent disclosed. At any rate, as declared, the people had the right to establish their original case by the introduction into the record of any relevant fact, circumstance, or physical object having a tendency to prove the death of the deceased by violent means, and that the act causing death was criminal.

[9] 5. The witness Travis, who was a member of the jury summoned by the coroner to inquire into the cause of the death of the deceased, was asked by the district attorney whether the defendant testified at the inquest, and whether there was anything said about taking his testimony. No objection was interposed to these questions, and the witness answered them in the negative. He was then asked whether Haydon appeared at the scene of the homicide, where the inquest was held, while the investigation was in progress. To this question an objection on general grounds was made and overruled. The answer was that the defendant was not present at the inquest. It is here argued that the ruling was erroneous and prejudicial. It was, in our opinion, immaterial whether Haydon did or did not testify at the coroner's inquest, so far as the fact itself was concerned, but, the witness having been permitted, without objection, to say that he did not testify at that investigation, it would seem to be the more reasonable view that, if having any effect upon the jury at all, the answer to the question complained of was favorable rather than unfavorable to the accused. To be more explicit, the statement that he did not testify at the inquest, if not satisfactorily explained, as manifestly it was by the answer to the question objected to, might have been construed by the jury in a light unfavorable to the defendant—as, for illustration, the jury might and probably would have concluded, had they not been made acquainted with the fact that the defendant was not present at the inquest, that his failure to voluntarily explain or offer to explain to the coroner's jury how the homicide happened was due to a consciousness of guilt.

[10] 6. The same witness having, shortly after the homicide, appeared at the scene of the shooting and with others examined the ground thereabouts in search of empty cartridge shells, was asked on cross-examination at what distance from the point where the body of the deceased lay he ceased looking for shells. To this question an objection by the people was sustained on the ground that the same question had been asked by counsel for the defendant and answered by the witness several times previously. The ruling was proper. The witness had before been asked some three or four times how far from the body he had gone looking for shells. Once he answered that he went no further than eight or ten feet from the body. At another time he said that he went "ten, twelve, or fifteen feet." It is evident from these answers that the witness could not have given the distance any more accurately than was thereby given, and the question to which objection was sustained could, therefore, have accomplished no more in that regard than was disclosed by said answers.

[11] 7. The witness Ornbaum, testifying on behalf of the defendant, declared that the general reputation of the deceased for peace and quiet in Round Valley, Mendocino county, where the Norgard family reside, was bad. On cross-examination the district attorney sought to show by the witness that for many years the residents of Round Valley were divided into factions growing out of differences of views on matters of local concern, and between which factions intensely bitter feelings of hostility had been developed and were sustained for a long period of time, the result of which was that members of the respective factions constantly carried on a sort of warfare of criminations and recriminations. It was not directly shown that the Norgard family was identified with either of these factions, but the object of this cross-examination was presumably to show that the Norgard family, including the deceased, did belong to one of said factions, and that the adverse criticisms or derogatory statements from which the witness formed his conclusion as to the general reputation of the deceased in Round Valley were merely those that were directed generally against the faction of which the Norgard family were members rather than from anything generally said derogatory of the character of the deceased for peace and quiet. The specific objection to this line of cross-inquiry was that it had not been shown that the testimony thus sought to be brought out had any application to the deceased or his family. The objection was disallowed. We suppose the real ground of the objection counsel intended to make was that the Norgard family, more particularly the deceased, had not been shown to have belonged to one of the factions referred to. We think the cross-examination was pertinent and proper. It will not be denied that the district attorney was authorized to

secure from the witness the facts constituting the basis of his statement regarding the general reputation of the deceased so as to show, if thus he could, that the witness' testimony upon that question was founded upon remarks or statements of neighbors of the deceased having no particular reference to the latter or no more reference to him than they had to others belonging to the same faction to which he belonged. The answer of the witness was that the people of Round Valley had been divided on a "wet and dry fight" (the liquor question, we apprehend), and that there had been "a good deal of gossip around there lately" growing out of that question. It is to be conceded that the district attorney did not directly show that the deceased or his family were in any manner connected with either of the factions arraying themselves against each other on the "wet and dry fight," and consequently made a very slight showing toward the establishment of the point he thus attempted to develop; yet his failure to show what he thereby sought to prove argues nothing against the propriety of such cross-examination or any cross-examination having a legitimate tendency to disclose that there existed no real foundation for the direct testimony of the witness that the general reputation of the deceased in Round Valley for the traits referred to was bad. The objection, it seems to us, is rather to the evidentiary value or weight of the testimony thus sought to be elicited than to its competency.

[12] At any rate, the answer could have resulted in no harm to the defendant. If, as the defendant insists is true, the testimony thus brought out did not tend to show that the witness had grounded his testimony as to the general reputation of the deceased upon the aspersions cast generally upon a faction to which the deceased belonged by the members of an opposing faction, it had no tendency to show anything, either favorable to the prosecution or unfavorable to the defendant. Indeed, if having any force at all, one way or the other, the effect of the failure of the district attorney to break down the force of the witness' direct testimony relative to the reputation of the deceased would be favorable rather than unfavorable to the defendant.

8. What we have said with respect to the rulings on the cross-examination of the witness Ornbaum disposes of the exceptions to the rulings of the court permitting a similar cross-examination of the witness Lacy Gray, who testified on his examination in chief that the reputation of the deceased for peace and quiet in Round Valley was bad.

[13] 9. It is contended that the court erred to the prejudice of the defendant by allowing the district attorney to go into the question, on cross-examination of the witness Palmer (stepfather of John Wathen), whether the latter had been, during practically all the time in which the trial had been in progress, greatly under the influence of intoxicating liquors. The witness in behalf of the defendant had testified that a few weeks prior to the day on which the homicide occurred and about six months previously to the trial of this case he had a conversation with Chris. Norgard, in Covelo; that he (the witness) called on Norgard for the purpose of selling or offering to sell him the Wathen place; that Norgard said that he would not buy the place, and that, if any other person bought it, he would continue to run Long Ridge, as he had "come as near" doing "as any man that has been on Long Ridge"; that he would "send the boys, my fighting men down," etc. The purpose of the questions propounded to Palmer by the district attorney was to show that, from an inordinate use of alcoholic stimulants, the memory of the witness had become unreliable, and thus it was designed to disclose either that he might not have accurately recollected what Norgard actually said to him on the occasion mentioned or that, Norgard not having then made the implied threats to which the witness testified, the latter had committed to memory, for the purpose of the trial, a fabricated story of the former's part in the conversation. There are two answers to the exceptions registered here to this line of cross-examination. In the first place, it is only the statement of an elementary proposition when it is said that a party may with perfect propriety propound any proper questions to an adverse witness for the purpose of testing his memory as to the facts or circumstances to which he testifies. Indeed, whether a witness is of good or bad memory constitutes one of the common tests by which the jury are enabled to determine the amount of weight which they should give his testimony. Therefore any legitimate line of inquiry, prosecuted in good faith, or for which there exists a reason, bearing upon the question of the witness' memory or want of memory, is eminently proper. The examination of Palmer on this line by the district attorney developed that there existed legitimate ground for the inquiry. To the first question asked him as to his conduct with regard to his condition for sobriety (or inebriety), he replied that he had been drunk "pretty near all of the time, I guess." This answer, it is true, was stricken out on motion of the defendant to give him an opportunity "to put in an objection" to that course of cross-examination of the witness. But the answer, nevertheless, disclosed that the question was asked not merely to prejudice the witness, but because there was a substantial reason for asking it. Later, however, the district attorney put to the witness this question: "You say you have been drunk about ever since you have been here?" to which the witness replied: "All the time I wanted to."

There was no objection to this question, nor was there a motion made to strike out the answer, and this suggests the second reason why the exception urged here on this line of inquiry can avail the defendant nothing. The assignment of error to which counsel excepts in his brief refers to the first question and answer relative to the condition of the witness, but, as the court struck that answer from the record, as we have shown, on the motion of the defendant, and as there appeared a reason for that line of cross-examination—that is, that there was justification for that line of inquiry and that it was not conducted for the purpose merely of degrading the witness in the estimation of the jury—there is, therefore, nothing of which the objection can be predicated or on which it can properly be pressed on this appeal.

[14, 15] 10. The witness Reid, having testified that the general reputation of the deceased for peace and quiet in the Mad river section of Trinity county was good in the years 1903, 1904, and 1905, was asked the following question on cross-examination by counsel for the defendant: "Did you hear of his being accused of robbing the Mason & Thayer safe at Douglas City?" To this question an objection by the district attorney was sustained. It it now argued with apparent earnestness that the ruling was erroneous and prejudicial. But we cannot take that view of said ruling. In the first place, the witness was asked nothing concerning the general reputation of the deceased for those traits of character essentially involved in the crime of robbery, of larceny or of burglary. In the second place, in view of the nature of the charge upon which the defendant was on trial, it would have been manifestly improper to have prosecuted an inquiry on the direct examination of the witness for the purpose of developing the general reputation of the deceased for honesty and integrity. The question was, therefore, neither proper cross-examination, nor in any sense relevant. It does not follow, as the question necessarily assumes, that, because a person may be wanting in honesty and integrity, he cannot at the same time be of a quiet and peaceable disposition in the sense in which the last-mentioned traits become important on an issue as to which of two combatants in a physical encounter was the aggressor or culpable party. Testimony relative to the reputation for peace and quiet borne by the actors in an affray leading to the prosecution of one or both for a criminal offense necessarily involving those traits is generally introduced only where the case is a close one upon the question whether the accused was or was not justified in committing the act, and the issue thus submitted is not, obviously, whether the party is honest and of integrity, but whether he is or is not of a quarrelsome and pugnacious character and readily or not readily open at all times and at any moment to a physical combat without just or any reason. The utter untenableness of the contention of appellant may be illustrated by the absurd result to which it would logically lead, for, if testimony of the good reputation of a person for peace and quiet may properly be rebutted by testimony of his bad reputation for honesty and integrity, then, by parity of reasoning, his bad reputation for peace and quiet may properly be overcome by evidence that he bears the general reputation of being a person of honesty and integrity.

[16] But the true rule as to character evidence is that such testimony ought always to be confined to the trait of character which is in issue, or ought to bear some analogy and reference to the nature of the charge. 3 Greenl. on Ev. (12th Ed.) § 25; Phil. on Ev. p. 490; State v. Beal, 68 Ind. 345, 34 Am. Rep. 263; State v. Marks, 16 Utah, 204, 51 Pac. 1090. The question asked the witness here and disallowed by the court called for testimony, as we have shown, bearing no analogy to the charge or any of the elements thereof against the accused, and, since the party whose character was under attack was not a witness and therefore his credibility as such not put in issue, the testimony thus sought to be brought out was not relevant for any purpose. State v. Marks, supra.

[17] 11. We now come to the last point involving rulings on the evidence upon which we feel impelled to bestow special attention. The proposition thus presented is the most important of the many submitted on this appeal, and its solution will require a careful review of the circumstances giving rise to it. It will be recollected that John D. Wathen intermarried with the daughter of Chris. Norgard, and that on account of said marriage a feeling of hostility was generated between the Norgards and Wathen. The latter, while used for certain purposes as a witness for the people, was also called to testify in behalf of the defendant. Testifying for the latter, he said that he saw the deceased and his brother, Elmer, a few days before the homicide; that they passed his house at a distance of about 25 feet therefrom, and that neither addressed him; that each carried a rifle encased in a scabbard, which was strapped or attached to the stirrups of his saddle; that on the afternoon of the day of the homicide, and a short time prior to the shooting, he and his half-brother, Palmer, rode over to Bald Mountain, and that at that time they saw the defendant's horses (those driven to the flat by the deceased and his brother, Cervera) grazing on the Rorobough land, which, as shown, was under lease by Haydon; that, when he last saw the horses (about an hour and a quarter before the shooting), they were going further in on the Rorobough land. He further testified that in going in a direct line from the Norgard pasture, to which the deceased and his brother went after driving defendant's horses to the point already referred to on "the flat," to the Norgard camp it was not necessary to go nearer than about 75 feet to the spot where the deceased's dead body lay or where the shooting occurred. In other words, he said that the natural direction from the pasture to the Norgard cabin was 75 feet distant and north of the precise spot where the shooting took place, and that there was no natural trail passing right by the body. Manifestly the purpose of all the foregoing testimony was to show that the deceased himself was seeking trouble with the defendant and that he drove Haydon's horses off the Rorobough range, on which they were entitled to graze, and unnecessarily put himself in the way of the defendant for no other reason than to precipitate a physical conflict of some character with the latter.

Wathen admitted, on his direct examination, that, although on friendly terms with the Norgard family prior to his intermarriage with Norgard's daughter, after that event his relations with his wife's family had always been unfriendly; but, on cross-examination, the district attorney asked him whether his feeling toward the Norgards was not very bitter, to which question he replied in the negative, saying, however, that he merely had "no use" for the Norgards. To show the intensity of his hostility toward the Norgards, the district attorney questioned the witness as follows: "Q. Did you send for Tom Haydon to come in there and take your property off your hands? A. No, sir; I didn't. * * * Q. Didn't you induce Mr. Haydon to come in there, and induced him to take the land off your hands because you believed he would kill the Norgard boys? A. No, sir; I did not. Q. You wanted some man to take hold of that land that you believed would kill them, didn't you? A. No. Q. That thought never entered your mind? A. No." The witness was then asked if he recalled having a conversation with one Dan English, near the post office, in Covelo, in the latter part of November, 1910, and prior to the homicide, and in the course of which he declared that he "had sold out to the right man, all right," and that "Haydon would no stand for what you (the witness) had stood for, and the first time that Haydon caught these Norgard boys running these horses he would shoot them off their horses"? The witness admitted having a conversation with English at the time and place mentioned, but said that he had no recollection of making the statement concerning Haydon and the Norgard boys embraced within the question, although he admitted that he might have made it. No objection was made by the defense to any of the foregoing questions so propounded to Wathen. In rebuttal the people called said English to the stand, and, over the objection of the defense, were permitted to ask him the following question, to which he made an affirmative answer: "I will ask you whether or not he (referring to Wathen) stated to you on that occasion (the time and place having been given) 'that he thought he had sold out to the right man, all right, and that the first time that Haydon caught the boys running his horses he would shoot them off their horses'"? The specific objection to this question was that it called for testimony relating to a collateral matter, brought out by the people themselves, and by which they were bound. The asserted theory upon which the question was propounded and an answer thereto allowed was that it was in impeachment of Wathen on a matter which was material because it affected or involved the question of his credibility as a witness.

While we think that the district attorney could perhaps have well rested this phase of his case on the statement of Wathen that, at the time of the trial and for some time before the homicide he was on unfriendly terms with the Norgards, we are of the opinion, after a careful analysis of Wathen's testimony in the particular under consideration, that the testimony of English was proper as in impeachment of Wathen on the point to which it related. It is true, ordinarily, that the admission of a witness that he was not friendly with the party against whom he had testified in chief would be a sufficient predicate for an argument or, possibly, an inference that his testimony was or might be biased or that he might have exaggerated the nature and importance of the circumstance or circumstances to which he had testified. But it will be observed that Wathen said that he was not "bitterly unfriendly against" the Norgards, but that merely he had "no use for them," that he did not "know anything against them," which statements would imply that his unfriendly feeling toward the Norgards was of an indifferent character; that is to say (to present the idea more clearly), that, while his relations with that family were not amicable, still he harbored no feeling of resentment or revenge against them and entertained no such sentiments toward them as would induce him to treat them unfairly or unjustly in this case, or, for that matter, under any circumstances. This is undoubtedly the view that the district attorney and the court took of his testimony addressed to the point under consideration.

[18] Now then, we do not think that the proposition can be doubted that, where a witness who admittedly entertains a feeling of unfriendliness toward the opposing party undertakes to convey the impression to the jury, or the judge, if the facts are so tried, that such feeling does not reach that degree of animosity or that point of violent hatred that, in view of human frailties, may safely be said will ordinarily lead a witness to color or exaggerate statements calculated to injure his adversary, the extent or degree of enmity that really exists in the breast of such witness against his opponent, or the person

against whom he has testified, may properly be shown. In other words, the district attorney was not compelled to accept as conclusive what appears to be the natural and reasonable import of Wathen's testimony that, while he was unfriendly with the Norgards, his feelings in that respect were merely of an apathetic character, but was entitled to show that the witness entertained a very bitter feeling against the Norgards and thus furnish all possible aid to the jury in determining how much, if any, weight Wathen's important testimony against the theory of the defendant's guilt as contended for by the prosecution was deserving of. It may be true, as counsel for the defendant assert, that English's testimony had a much more far-reaching effect upon the jury than that of the only purpose for which it was admissible, viz., to impeach the testimony or the credibility of Wathen, yet this is not and never has been a ground on which impeaching evidence may be excluded.

[19] It is doubtless true that in very many instances impeaching testimony has brought before a jury matters which could not be made the subject of independent or substantive proof, but, in such cases, if the party against whom such testimony is received, would avoid, as far as possible, any damaging effect it might have and which it was not designed to produce, he should request an instruction expressly limiting its consideration by the jury to the purpose for which it was admitted and is admissible. People v. McCrea, 32 Cal. 98; People v. Collins, 48 Cal. 277; People v. Estrado, 49 Cal. 171; People v. Ah Yute, 53 Cal. 613.

But Wathen admitted, in answer to questions to which no objection was interposed, that he might have made the remarks which English declared that he made in the conversation mentioned, and from that admission the jury could have reasonably inferred that he at least entertained the opinion which English said he expressed as to what Haydon would do with the Norgard boys if the circumstances indicated arose. No person will, ordinarily, admit that he might have expressed an idea or an opinion to which he has no recollection of giving utterance if that idea or opinion had never entered his mind, and the average mind would so construe such an admission. Under this view, the testimony of English, even if it might correctly be held to have been improperly allowed, could not have had the effect of damaging the defendant much, if any, more than Wathen's admission that he might have made the remarks attributed to him by English.

We have now given special attention in this opinion to all the assignments of error growing out of the rulings on the admission and rejection of evidence, with the exception of those numbered 2, 6, 7, 8, 9, 10, 14, and 15 in the order in which these assignments are discussed in the defendant's opening brief. As to the last mentioned assignments, it may be remarked that we have given each of them careful consideration and have found nothing therein prejudicial to the accused, or that seems to entitle them to special notice.

We have with equal care and much patience examined the whole record, consisting of eight large volumes of the stenographer's transcription of the testimony and the voluminous briefs, exhaustively and ably treating the numerous points pressed upon us for a reversal of the judgment and the order of the trial court, but we have thus discerned no just reason for declaring that the defendant was not fairly and legally tried and justly convicted.

The judgment and order are therefore affirmed.

I concur: CHIPMAN, P. J.

I concur in the judgment: BURNETT, J.

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18 Cal. App. 543

PEOPLE v. HAYDON. (Cr. 1,738.)

(Supreme Court of California. May 24, 1912.)

In Bank. Appeal from Superior Court, Trinity County; James W. Bartlett, Judge.

Thomas P. Haydon was convicted of crime, and the conviction was affirmed on appeal by the Court of Appeals (123 Pac. 1102), and he applies for a rehearing. Denied.

C. Wm. White and Bush & Hall, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

PER CURIAM. The petition of defendant for a rehearing of this cause in the Supreme Court is denied. The opinion of the district court of appeal contains the following passage concerning section 4½, art. 6, recently added to the Constitution: "But if there is one proposition in connection therewith of which we entertain no feeling of uncertainty it is that said amendment was not intended to change, nor has it changed, the very sensible rule prescribed by the Constitution and for so many years strictly adhered to in this state, that, in the exercise of their appellate jurisdiction, the appellate courts are restricted to the consideration of questions of law alone, and that, therefore, as before stated, the matter of evidence does not constitute a subject of review by those tribunals, except where there necessarily arises from the evidence or is presented thereby, from its very nature, a question of law."

This court regards this statement as wholly unnecessary to the decision of the case. The denial of the petition for a rehearing is not to be understood as an indication of approval or disapproval of said statement by the Supreme Court.

162 Cal. 621

NELSON v. KELLOGG. (L. A. 2,909.)

(Supreme Court of California. May 17, 1912.
Rehearing Denied June 14, 1912.)

1. ARREST (§ 9*)—CIVIL ACTIONS—PERSONS LIABLE—PRIVILEGES.

An arrest of a female on civil process is illegal under any circumstances under Code Civ. Proc. § 861, declaring that no female can be arrested in any action, and a magistrate may not on any state of facts acquire jurisdiction to issue a warrant for a female's arrest.

[Ed. Note.—For other cases, see Arrest, Cent. Dig. §§ 20–32; Dec. Dig. § 9.*]

2. DAMAGES (§ 46*)—FALSE IMPRISONMENT—EXPENSES INCURRED—NECESSITY OF ACTUAL PAYMENT.

One falsely imprisoned may recover as special damages, when properly pleaded, liability incurred, but not paid, for legal services to secure release from the arrest.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 99, 251; Dec. Dig. § 46.*]

3. FALSE IMPRISONMENT (§ 34*)—DAMAGES—ELEMENTS—EXPENSES INCURRED.

Where a female illegally arrested on civil process was released on bail, and thereafter surrendered and finally discharged, and in the meantime an attorney had performed services in advising her concerning her discharge, the liability incurred by her to pay for such services was a loss proximately caused by the false arrest for which the wrongdoer was liable to the extent of the reasonable value of the legal services performed.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 111; Dec. Dig. § 34.*]

4. FALSE IMPRISONMENT (§ 13*)—CIVIL LIABILITY—DEFENSES—PROBABLE CAUSE.

A defendant who procured the arrest on civil process of a female is not exonerated from liability by the fact that the magistrate issuing the warrant advised the arrest, since the defense of probable cause is inapplicable to an action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 6, 7, 31, 59; Dec. Dig. § 13.*]

5. FALSE IMPRISONMENT (§ 4*)—GOOD FAITH OF DEFENDANT—DAMAGES.

In an action for false imprisonment, the good faith of defendant is material only on the question of punitive damages.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. § 16; Dec. Dig. § 4.*]

6. FALSE IMPRISONMENT (§ 36*)—EXCESSIVE DAMAGES.

In an action by a woman for false imprisonment, based on an arrest on civil process, a recovery of $500 was not so excessive as to warrant setting it aside on appeal; she having incurred liability for legal services to the amount of $150.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 110, 113–115; Dec. Dig. § 36.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Edith M. Nelson against William Kellogg and another. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Hester, Merrill & Craig, for appellant. Bernard Potter and Adams & Mahan, for respondent.

SHAW, J. In an action for false imprisonment plaintiff recovered judgment for $500 against Wm. Kellogg and J. T. Whaley. Kellogg alone appeals.

The arrest complained of was made upon a warrant issued in a civil action instituted by Kellogg against the plaintiff. Among the errors complained of are the rulings of the court in giving instructions to the jury to the effect that the affidavit upon which the warrant was issued was defective because the allegations therein were made solely on information and belief, it being claimed by appellant that they were positive in form, and in instructing the jury that a check for $300 accepted by the justice in lieu of an undertaking was not a compliance with the law requiring an undertaking or a cash deposit, and that for these reasons the arrest was illegal.

[1] We do not find it necessary to consider either of these points. One of the grounds upon which it was alleged the arrest was illegal was that the plaintiff, Edith M. Nelson, is a woman. This fact was admitted by the answer. The arrest was made under the provisions of section 861 of the Code of Civil Procedure, the last clause of which section is as follows: "No female can be arrested in any action." Consequently the arrest was illegal under any circumstances. The court might have instructed the jury to that effect, and any instructions or rulings which it made regarding its illegality in other respects are unimportant and could not have caused prejudice to the appellant, whether erroneous or not.

[2] Plaintiff alleged as special damages that she had incurred a liability for $150 for the services of an attorney employed by her to secure her release from the arrest. The proof was that the liability was incurred, but that no payment thereof had been made. Defendant objected to the evidence on the grounds that a mere liability for services in that behalf was not an element of damage, unless the attorney's fees had been paid. He also asked an instruction to the same effect. The objection was overruled and the instruction refused. In support of this objection the appellant relies on Elder v. Kutner, 97 Cal. 495, 32 Pac. 563, Willson v. McEvoy, 25 Cal. 169, and similar cases, holding that in suits on attachment bonds, injunction bonds and like undertakings, attorney's fees for procuring a dissolution of the attachment or injunction cannot be recovered as damages, unless they have been actually paid. This is the rule established in this state with regard to actions on contracts of that kind, although the decisions in many other cases are to the contrary. But the rule

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

established both in this state and elsewhere in actions for damages for tortious injuries is that the recovery may include special damages properly pleaded, consisting of a liability incurred, but not paid, for reasonable and necessary expenses caused by the wrongful act complained of, such as the fees of an attorney employed to obtain a discharge from an illegal arrest, physician's bills incurred for a cure of bodily injuries, and the like. Donnelly v. Hufschmidt, 79 Cal. 74, 21 Pac. 546; McLaughlin v. San Francisco, etc., Co., 113 Cal. 590, 45 Pac. 839; Bonesteel v. Bonesteel, 30 Wis. 515; Walker v. Pittman, 108 Ind. 345, 9 N. E. 175; Minneapolis T. M. Co. v. Regier, 51 Neb. 408, 70 N. W. 934. The distinction was recognized and stated in Willson v. McEvoy, supra, 25 Cal. 173, as follows: "In actions for injuries to the person, in many decisions, it is held that the defendant is answerable, not only for the damages actually sustained by the plaintiff, but also for certain liabilities the plaintiff has incurred by reason of the wrongful acts of the defendant—such as * * * extra costs incurred in procuring a release from an arrest made without reasonable cause; and the courts hold that the plaintiff may recover a reasonable compensation for those liabilities, without proof of payment."

[3] The claim that the liability in part was for other services rendered after plaintiff's discharge from the arrest is not sustained by the facts. She was released on bail before the services were performed, but she was still answerable to the charge, and a few days afterwards she was surrendered by her bail. Thereupon she was finally discharged. In the meantime the attorney had performed services in advising her concerning her discharge. The liability incurred for such services was a loss proximately caused by the false arrest, and the defendant was liable therefor to the extent of the reasonable value of the services performed in securing the discharge. The jury was properly instructed by the court to determine from the evidence the sum to be allowed on this account.

[4] The defendant is not exonerated from liability by the fact that, before filing his affidavit for the arrest, the magistrate who issued the warrant, being informed of the facts, advised him that there was sufficient cause for the arrest. In actions for malicious prosecution, advice of counsel, given under proper circumstances, or the decision of a magistrate holding the party to answer upon a criminal charge may be sufficient evidence of probable cause for the prosecution, and may therefore serve to establish a good defense. But the defense of probable cause is not applicable in actions for false imprisonment. Neves v. Costa, 5 Cal. App. 111, 89 Pac. 860.

[5] In false imprisonment, the good faith of the defendant is material only on the question of punitive damages. Id. The case of Dusy v. Helm, 59 Cal. 189, went upon the ground that, where the affidavit for arrest contains direct statements of facts which constitute some evidence of every fact which the statute requires to be shown therein, the magistrate to whom it is presented has jurisdiction to pass upon its sufficiency, and, if he determines upon such evidence that it is sufficient and thereupon issues the warrant, the party who invokes his decision is not answerable to the defendant in damages if the magistrate errs in his judgment of such evidence. This principle can have no application to the arrest on civil process of a person shown to be a female, since such arrest is not allowed on any state of facts and the magistrate can under no circumstances acquire jurisdiction to issue the warrant. See Fkumoto v. Marsh, 130 Cal. 66, 62 Pac. 303, 509, 80 Am. St. Rep. 73, where the case of Dusy v. Helm is thus distinguished. See, also, Ex parte Fkumoto, 120 Cal. 316, 52 Pac. 726.

[6] It is claimed that the damages are excessive, but, in view of the well-established rule concerning the power of this court to review the question of excessive damages, we cannot say that the court or jury abused their discretion in that regard. Diller v. Northern C. P. Co., 123 Pac. 359; Hale v. San Bernardino, etc., Co., 156 Cal. 715, 106 Pac. 83.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

17 Cal. App. 323

Ex parte WOODS. (Cr. 224.) (District Court of Appeal, Second District, California. Oct. 27, 1911.) Application of J. A. Woods for writ of habeas corpus. Denied. See, also, 118 Pac. 792. R. J. Adcock, for petitioner. J. D. Fredericks, Dist. Atty., and B. C. Hanna, Chief Deputy, for respondent.

PER CURIAM. The justices of this court being unable to agree upon a judgment, the application is denied and prisoner remanded.

CALIFORNIA REPORTER

124 PACIFIC REPORTER

(18 Cal. App. 698)

S. M. BERNARD CO. et al. v. CITY OF LOS ANGELES et al. (Civ. 1,127.)

(District Court of Appeal, Second District, California. April 2, 1912.)

1. Municipal Corporations (§ 513*) — Assessments—Action to Annul—Sufficiency of Evidence.

Evidence in an action to annul an assessment for the widening of a street *held* to sustain a finding that notices of the passing of an ordinance declaring an intention to make the improvements were posted pursuant to statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1188–1206; Dec. Dig. § 513.*]

2. Municipal Corporations (§ 483*)—Public Improvements—Assessments—Recording Assessment.

St. 1903, p. 380, § 17, provides that each parcel assessed for street improvements shall be described in the assessment and designated by an appropriate number corresponding with a like number designating upon the diagram the parcel described in the assessment. Section 20 provides that, from the date of the recording of an assessment for street improvements and the diagram thereof, all persons shall be deemed to have notice of the contents of the assessment roll, and that immediately upon such recording the several assessments shall become due and each assessment shall be a lien upon the property against which it is made. Assessment No. 160 described a parcel as the "north 86 feet of lot 4 and lot 5 except west 80 feet," but was recorded "north 86 feet of lot 4 and 5 except the west 80 feet." *Held*, that any error in recording assessment No. 160 in omitting the word "lot" preceding the figure 5 would not invalidate the entire assessment for the improvement; such defect not affecting the notice given by the record to other lot owners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1133–1136; Dec. Dig. § 483.*]

3. Eminent Domain (§ 186*)—Public Improvements—Recording Diagram—Sufficiency of Record.

The diagram of street improvements was recorded by binding stubs of leaves in a book kept in the office of the board of public works wherein the original assessment was copied and to which stubs the original diagram was attached by pasting, but through constant use the diagram became partially detached from the stubs and within a few days after it was detached it was wholly separated and for convenient use kept by the clerk of the board in a drawer. *Held* that, while such practice was not commendable, the recording of the diagram was a substantial compliance with St. 1903, p. 381, § 20, requiring the assessment and diagram to be recorded; the statute not providing how it shall be recorded.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 500–504; Dec. Dig. § 186.*]

4. Eminent Domain (§ 240*)—Street Improvements — Proceedings — Notice of Hearing.

Acts 1903, p. 379, § 11, as it existed on April 7, 1907, when the report of the referee was filed in proceedings to condemn land for widening a street, did not require notice of any kind to be given of the time fixed for the hearing of the report except to persons who had answered in the action, but the section was amended by Act April 21, 1909, effective June 20, 1909 (St. 1909, p. 1039, § 6), so as to provide for notice by publication of the time and place set for hearing the report, the publication of which notice should commence at least 10 days before the time appointed for hearing, and further provides that all proceedings pending when the amendment took effect should, from the stage of any such proceedings then commenced, be conducted under the amended act. *Held* that, where all notices of the time and place of the hearing of a referee's report were duly given before May 8, 1909, the date fixed for the hearing, so as to vest the court with jurisdiction to hear the report, it had power to continue the time for hearing which was the next stage of the proceedings without giving further notice by publication or other notice than was required by the section as it existed when jurisdiction was acquired.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 550; Dec. Dig. § 240.*]

5. Eminent Domain (§ 246*)—Street Improvements — Abandonment of Proceedings—Validity of Ordinance.

St. 1903, p. 379, § 14, as amended by act approved April 21, 1909, effective June 20, 1909 (St. 1909, p. 1040, § 8), provides that the city council, at any time before the entry of an interlocutory judgment in proceedings to condemn land for street improvements, may abandon the proceedings by ordinance and may cause the action to be dismissed without prejudice, and further provides that proceedings pending when the amendment of the act took effect should thereafter be conducted under it. *Held* that, where the interlocutory decree in proceedings to condemn land for street widening was not entered until December 22, 1909, an ordinance passed on December 27, 1910, attempting to abandon the proceedings and dismiss the action was void; the city council then not having power to abandon the proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 647–657; Dec. Dig. § 246.*]

6. Municipal Corporations (§ 514*)—Street Improvements — Assessment — Reassessment—Reciting Protests.

St. 1903, p. 381, § 19, provides that all objections to an assessment for street improvements shall be filed with the city clerk within the time prescribed in the notice given pursuant to section 18, and that at the next regular meeting of the council after the expiration of the time for the filing of objections the clerk shall lay the assessment and all objections before the council and, at said meeting or any time to which hearing may be adjourned, it shall pass upon such assessments and may confirm, modify, or correct the same, or may order a new assessment. *Held*, that the attempted enactment by the council of an ordinance abandoning proceedings for the widening of a street after protests to the assessment were filed by property owners operated to sustain the protests, so as to authorize the council to order a new assessment, even if a decision on the protests is necessary before ordering a new assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207–1215; Dec. Dig. § 514.*]

7. Municipal Corporations (§ 514*)—Street Improvements—Assessments — Protests—Decision on Hearing.

While if a city council does not hear a protest to an assessment for street improvements at its regular meeting after the expiration of the time for filing objections as stated in the notice of hearing required by St. 1903, p. 380, § 18, and does not make an order postponing hearing, it loses jurisdiction to act upon the assessment except on a republication of the notice of hearing, it may render its decision on the hearing at any time without any order continuing it and order a new assessment upon sustaining the protest.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1207–1215; Dec. Dig. § 514.*]

8. Municipal Corporations (§ 514*)—Public Improvements—New Assessment.

Even if a city council lost jurisdiction to act on an original assessment for benefits for land condemned for widening a street, it had power to order a new assessment since St. 1903, p. 379, § 14, prohibits it from abandoning the proceedings after the entry of the interlocutory decree in the condemnation proceedings.

[Ed. Note.—For other case [illegible] Corporations, Cent. Dig. §§ 1207–1215; Dec. Dig. § 514.*]

9. Appeal and Error (§ 843*)—Review—Scope.

Upon affirming a judgment for the city in an action to enjoin an assessment against plaintiff's property, any error in denying plaintiff's application for an injunction pendente lite became immaterial and need not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3342; Dec. Dig. § 843.*]

Appeal from Superior Court, Los Angeles County; F. E. Densmore, Judge.

Action by the S. M. Bernard Company and others against the City of Los Angeles and others. From a judgment for defendants and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

Trippet, Chapman & Biby, Lewis Cruickshank, and Valentine & Newby, for appellants. John W. Shank and Myron Westover, for respondents.

SHAW, J. Action to have declared null and void a certain assessment levied against the property of plaintiffs to pay the cost of widening Eighth street from Main street to Central avenue in Los Angeles, and to restrain the threatened sale of such property on account of delinquency in the payment of such assessment. Judgment went for defendants, from which, and an order denying their motion for a new trial, plaintiffs appeal.

On March 8, 1907, the city council, pursuant to the provisions of the street opening act of 1903 (Stats. 1903, p. 376), duly adopted an ordinance declaring its intention to widen Eighth street between the points named by adding thereto a strip of land 20 feet in width on the southerly line thereof from Main street to San Pedro street, and a strip of like width on the northerly line from San Pedro street to Central avenue, held in private ownership, and at the same time fixed the exterior boundaries of an assessment district, the property included within which was declared to be benefited by the contemplated improvement and which it was proposed to assess for the expense thereof. Pursuant to ordinance authorizing the same, an action was instituted to condemn the strip of land required for the proposed improvement, and on or about December 22, 1909, an interlocutory judgment was entered therein fixing the awards of damage to those whose property was required for use in widening the street. Thereafter the cost and expense of the improvement was duly assessed upon all of the lots and lands within the assessment district, which assessment was duly filed with the city clerk on July 29, 1910, and notice of such filing given by the clerk as required by section 18 of the street opening act.

Within the time allowed therefor, protests and objections against the assessment were filed by a number of persons owning property within the district. These protests were regularly set for hearing on September 13, 1910, and continued from time to time until November 15, 1910, on which date the city council adopted an ordinance directing the abandonment of the proceedings upon condition that the property owners interested in such action should pay to the city treasurer a sum of money required to reimburse the city for expenditures theretofore made in the performance of the work. The property owners complied with this condition, and on December 27, 1910, the city adopted an ordinance whereby it declared the proceedings for widening the street abandoned. Thereafter on January 3, 1911, parties in interest applied to this court for a peremptory writ of mandate to be directed to the city council commanding it, notwithstanding the adoption of the ordinance declaring the proceedings abandoned, to proceed in said matter as required by section 19 of the act and confirm, modify, or correct the assessment filed July 29, 1910, or order a new assessment to be made. The writ was issued as prayed for, and in compliance with such mandate the city council ordered a new assessment which was made, and on April 6, 1911, filed with the city clerk, who gave the notice required by law of the filing of the same. Protests filed objecting to this new assessment were denied, and the assessment confirmed on May 23, 1911.

Appellants concede the proceedings in all respects regular and legal except as to the irregularities specifically pointed out in their briefs. These specifications are as follows: First. The alleged failure to post notices of the passage of the ordinance of intention as required by section 3 of the act. Second. Uncertainty in describing one lot or parcel of land designated on the diagram and in the assessment as No. 160. Third. The alleged failure to record the diagram and assessment as required by section 20 of the act. Fourth. Failure to publish notice of the time fixed for hearing the report of the referees appointed in the condemnation suit pursuant to section 8 of the act as required by section 11 thereof as amended in 1909. Fifth. It is claimed the adoption by the city council of the ordinance abandoning the proceedings terminated the same and rendered the subsequent assessment null and void. Sixth. Conceding the action of the city council in abandoning the proceedings was without warrant and in contravention of statutory provision, it is nevertheless claimed that no action was had upon protests to the first assessment, and the making of the new assessment was unwarranted and is illegal for the reason that it was not made at the next regular meeting of the city council after the expiration of the time for filing objections, nor at any time to which the hearing of such objections was adjourned, and by reason thereof the city lost jurisdiction to act in the matter.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] 1. As to the issue joined upon the alleged failure to post notices of the passage of the ordinance of intention in accordance with section 3, the court found in favor of defendants. Upon this question of fact the affidavit made March 18, 1907, by one Blanchard, showed that on said date he properly posted the notices along Eighth street between the points named, but there were a number of cross streets as to the posting of which the affidavit was silent. Thereafter on January 19, 1911, another affidavit, amendatory of the first and showing the posting on March 18, 1907, of notices upon all streets within the assessment district, as required by section 3, was made by Blanchard. In addition to the prima facie case made by these affidavits was the testimony of Blanchard which clearly tended to prove that notices were properly posted on the date named in the affidavits upon all streets within the assessment district. There was also testimony of other witnesses to the effect that they saw notices upon some at least of these side streets. As against this showing was the testimony of several witnesses on behalf of plaintiffs wherein it was stated they had opportunity to observe and did not see notices posted upon certain of the cross streets. At most there was a conflict of evidence upon which the determination of the trial court must be deemed conclusive. While it may be true, as contended by appellants, that Blanchard's testimony, in so far as it is inconsistent with the first affidavit, should be accorded little weight, nevertheless, conceding the omission to mention the cross streets not in harmony with the amended affidavit and testimony of Blanchard, it was for the trial court to determine the weight to be given the evidence. The case bears no analogy to that of Pierce v. City of Los Angeles, 15 Cal. App. 702, 115 Pac. 746, cited by appellants.

[2] 2. Section 17 of the act provides that each lot or parcel of land shall be described in the assessment and designated by an appropriate number which shall correspond with a like number designating upon the diagram the lot or parcel of land so described in the assessment. Assessment No. 160 described a parcel of land as "north 86 feet of lot 4 and lot 5 except west 80 feet." As recorded, this assessment was made to read: "North 86 feet of lot 4 and 5 except the west 80 feet." By reason of this fact, appellants insist the entire assessment is void. Clearly the property was described as required by section 17. The error, if it be such, was due to the omission of the word "lot" preceding the figure "5" in recording the assessment and diagram as required by section 20 of the act, which provides that, "from the date of such recording, all persons shall be deemed to have notice of the contents of such assessment roll. Immediately upon such recording the several assessments contained in such assessment roll shall become due and payable, and each of such assessments shall be a lien upon the property against which it is made." Under this provision, when recorded, each one of the several assessments contained in the assessment roll constitutes a lien upon the particular piece of property against which it is made. The purpose of the recording is to impart notice, by an inspection of the record, to the owners of the lots assessed, as well as to others interested in transactions concerning the property. Where the record shows such uncertainty in describing a lot that an inspection thereof fails to impart notice of the existence of the lien, it is fatal to such claim. Labs v. Cooper, 107 Cal. 656, 40 Pac. 1042; Blanchard v. Ladd, 135 Cal. 214, 67 Pac. 131. The alleged error in recording was confined to one piece of property, the assessment of which was No. 160. It does not appear that any one interested therein is contesting the validity of the alleged lien, indeed, from all that appears to the contrary, the assessment has been paid. Under these circumstances, since the property of appellants assessed for their proportionate part of the cost of the improvement is not affected by the alleged erroneous record of assessment numbered 160, they are not in a position to complain. We find no authority in the act or elsewhere which would warrant us in holding the entire assessment void upon the ground stated. The case is unlike those wherein the entire assessment is held void on account of omitting from the diagram marks or data indicating the points of the compass, or where for other reasons it is impossible to determine the land it is sought to subject to the lien.

[3] 3. It is insisted that the evidence shows

a failure to record the diagram in accordance with the provisions of section 20 of the act, as found by the court, and without which the assessment would not constitute a lien upon the property. It appears that a book was prepared and kept in the office of the board of public works wherein the original assessment as made was copied; that following a number of pages, estimated to be sufficient for copying the assessment, were inserted and bound in this book stubs of leaves one and one-half to two inches in width, to which the original diagram was attached by pasting the same to these stubs; that through constant use and handling the diagram became loosened and partially detached from the stubs, and within a few days from the time it was so attached it was wholly separated therefrom, and for more convenient use was kept by the clerk of the board in a drawer until a few weeks before the trial, when it was again attached to the stubs in this book of record. The contention of appellants is that, since the statute does not prescribe the manner in which the diagram shall be recorded, it must be transcribed by copying in the book kept for such purpose the lines, figures, and other data appearing upon the original. On the other hand, respondents insist that attaching the original diagram to the stubs in the record book, thus making it a part thereof, was a sufficient recording thereof within the meaning of the statute. The question involved is not one of constructive notice to plaintiffs, but whether or not the lien was perfected by making the record. Hence, if the pasting of the document in the book kept for that purpose constituted a recording thereof, the fact that in a few days it became separated therefrom and was detached from its holdings is unimportant, for the statute provides that *immediately* upon such recording the lien attaches. Under the provisions of section 20, when the assessment and diagram are recorded, with the certificate of the date of the recordation, such record, not the original, constitutes the assessment roll. The street improvement act of 1885 (St. 1885, p. 147), commonly known as the Vrooman act, provides that the warrant, assessment, and diagram, after the recording thereof, shall be delivered to the contractor doing the work. Here, however, there was no contractor and, so far as we are able to perceive, the original assessment and diagram, since the record thereof constitutes the assessment roll, performed no function whatever after the recording of the same. The statute is silent as to any provision prescribing the manner in which the diagram shall be recorded. From the nature of the case, it is intended to answer a purpose speedily accomplished. Every purpose of recording is fully subserved by binding or otherwise fastening the original documents in a book kept for the purpose. In our opinion, while the practice is not to be commended, the use of the original in the manner stated constituted a substantial compliance with the provisions of section 20 requiring the assessment and diagram to be recorded. While it may be true, as claimed by appellants, that the word "recorded" in ordinary usage signifies to copy or transcribe into some permanent book (Cady v. Purser, 131 Cal. 552, 63 Pac. 844, 82 Am. St. Rep. 391), such meaning of the word, in the absence of statutory direction, should attach only in those cases where the record is intended to perform functions throughout a long period of time, such as that of a deed or judgment. In such case reason exists for requiring the record to be made in durable form.

In Hager v. Melton, 66 W. Va. 62, 66 S. E. 13, the court, in holding the pasting of the original ordinance for street improvement in the minute book to be a sufficient recording thereof, said: "Whether actual transcription is necessary to effect a recordation depends, in our judgment, upon the character of the record. There is a manifest difference between a record intended to subserve purposes or perform functions throughout a long period of time, such as that of a deed, judgment, decree, or statute, and one intended only to subserve a mere temporary purpose. In the former case there is a reason for requiring the record to be made in durable form, and hence there may be a presumption of legislative intent to require it. * * * Here the object is to put in force an ordinance for an improvement intended to be made and the cost thereof collected in a short period of time. After that has been accomplished, it performs no useful purpose. * * * We think the pasting of the ordinance and affidavit in the journal is a substantial and sufficient compliance with the requirements of the charter." In order to sustain appellants' contention, when it thus clearly appears there has been a substantial compliance with the requirement whereby every right intended to be protected is secured, we must ignore the express declaration of the Legislature that "this act shall be liberally construed to promote the objects thereof."

[4] 4. The referees in the condemnation suit, appointed by the court to ascertain the value of the property required for use in widening the street, filed their report in the action on April 7, 1909. The court appointed May 8, 1909, as the time for hearing the same, notice of which was duly given as required by section 11 of the act as it then existed. On said date the court, having acquired jurisdiction of all parties entitled to be heard, continued the hearing to May 24th, followed by orders duly and regularly made continuing the hearing from time to time until June 30, 1909, upon which date the hearing was commenced and proceeded to a conclusion. Under section 11 of the act as it

existed on April 7, 1909, when the report of the referees was filed, no notice of any kind was required to be given of the time fixed for the hearing of the report other than to persons who had answered in the action. Those who had made default were not entitled to notice of any kind. This provision remained in force down to June 20, 1909, on which date section 11, as amended by act of the Legislature approved April 21, 1909 (St. 1909, p. 1035), took effect. As amended, the section, in addition to the notice prescribed by the original section, provided for notice by publication of the time and place set for hearing the report, the publication of which notice should commence at least 10 days before the time appointed for hearing the report. The amendatory act provided that all proceedings pending at the time the amendment took effect should, from the stage of any such proceedings or action then commenced and in progress at the time the act took effect, be conducted under the provisions of the act as amended. All notices of the time and place of the hearing of the report required to be given by the provisions of section 11 were duly given prior to May 8, 1909, the date fixed for the hearing, on which date the court was fully vested with jurisdiction to hear the report. The acquisition of such jurisdiction, the proceedings to obtain which were complete on May 8, 1909, marked the close of that stage thereof wherein the acts required to confer such jurisdiction were done and performed. Jurisdiction having vested, the court had the right to continue the time for hearing the report, which was the next stage in the proceedings, without further notice than that required by section 11 as it existed at the time jurisdiction was acquired.

[5] 5. It is next urged that the effect of adopting the ordinance on December 27, 1909, declaring the proceedings abandoned, was to nullify and vacate all proceedings theretofore had and taken. The ordinance of intention was adopted on March 8, 1907. Under the law as it then existed (section 14 of the act), the city was authorized to abandon the proceedings and cause a dismissal thereof at any time prior to the payment of the compensation awarded in the condemnation suit to property owners. By act of the Legislature approved April 21, 1909, said section 14 was amended so as to read as follows: "The city council may at any time prior to the entry of interlocutory judgment, abandon the proceedings by ordinance and cause such action to be dismissed without prejudice." This amendatory act took effect on June 20, 1909. It was provided therein that proceedings pending at the time when it took effect should, from such stage thereof, be conducted under the provisions of the amended act. The interlocutory decree was not entered until December 22, 1909, some six months after the amendment took effect, and during all of which time the city council might have dismissed the action prior to the entry of such decree and abandoned the proceedings. It did not avail itself of such right, but continued to prosecute the proceedings until long after the entry of the interlocutory decree was made, when on December 27, 1910, and after the making and filing of the first assessment, it attempted to abandon the proceedings and dismiss the action contrary to the provisions of section 14 as amended. The case of Title Insurance & Trust Co. v. Lusk, 15 Cal. App. 358, 115 Pac. 53, is authority for holding that the ordinance providing for the abandonment of the proceedings was void and of no effect, for the reason that the council was at the time without power to abandon the same. It is unnecessary to restate the reasons for so holding set forth in that opinion; suffice it to state that we adhere to what was there said in discussing the point involved.

[6] 6. It is claimed that no action was ever had by the city council upon the protests interposed to the first assessment, and that the city council had no power to order the new assessment. This contention is based upon the provisions of section 19 of the act, which, in substance, provides that all objections to the assessment shall be filed with the city clerk within the time prescribed in the notice required to be given by section 18, and that, at the next regular meeting of the city council after the expiration of the time for filing objections, the clerk shall lay the assessment and all objections thereto before the city council, and at said meeting, or at any time to which the hearing may be adjourned, it shall hear such objections and pass upon the assessment and confirm, modify, or correct the same, or it may order a new assessment. It appears from the record that, after the original assessment was filed with the city clerk, he gave the notice thereof as required, and that within due time various protests were filed by property owners objecting to the assessment; that a time was duly appointed for hearing the same, and from time to time, to which the hearing was adjourned, such objections were heard and considered; the decision thereon being likewise from time to time postponed. On November 15, 1910, the ordinance directing the abandonment, subject to the property owners reimbursing the city for expenditures theretofore made in the matter, was adopted, and, such payment being made, the ordinance of December 27, 1910, declaring the proceeding abandoned, was passed. We find nothing in the record which shows that the city council in terms acted upon and by order formally made sustained the protests as found by the court. If such order was necessary, the action of the city council in abandoning the proceedings must be deemed a sufficient compliance with that requirement. The result of the abandonment, effective to such extent, was to sustain the protests. However, there is nothing in the act which requires the city

council in terms to pass upon the objections. The section provides that, after hearing the same, it "shall pass upon such assessment and may confirm, modify, or correct said assessment, or may order a new assessment." The city council had jurisdiction to hear the protests; it did accord a full hearing and did, as it was authorized to do, order a new assessment.

[7] It is insisted, however, that, by reason of the failure of the city council to continue the hearing of the protests, it lost jurisdiction to order a new assessment. It is true, we think, that where the council fails to hear or act upon protests interposed to an assessment at its regular meeting after the expiration of the notice required by section 18, and neglects to make an order postponing such hearing, it loses jurisdiction to act upon the assessment except upon a republication of the notice. Stoner v. City Council of Los Angeles, 8 Cal. App. 607, 97 Pac. 692. The property owners filing objections must be heard at such regular meeting or at some other time to which the hearing is *at such regular meeting* adjourned. The law provides no other means of imparting notice of a postponement of the hearing other than knowledge of the action of the city council then had and taken. While the power of the council in hearing objections is thus limited, we do not consider the section as imposing like limitations upon it as to the time when it may render its decision upon the objections. Having accorded the protestants a full hearing, it may, in the absence of an order continuing the hearing, render its decision thereon at any time and confirm, modify, or order a new assessment.

[8] Moreover, if, as claimed by appellants, the city council had lost jurisdiction to act at all upon the original assessment, by reason whereof it was functus officio, and since it could not abandon the proceedings, it was clearly within its power to order a new assessment, "upon which order like proceedings (are) had as in the case of an original assessment." To sustain appellants' contention would permit the city council, by neglecting to perform an act enjoined upon it by law, to thus indirectly nullify the provisions of section 14 which prohibit it from abandoning the proceedings after the entry of the interlocutory decree.

[9] 7. The record includes an appeal from an order of court denying plaintiffs' application for an injunction pendente lite and dissolving a restraining order theretofore made. Under the conclusion reached upon the merits of the case, no purpose could be subserved by passing upon this alleged error. Had it been granted, its only function would have been to stay the threatened acts until a trial was had upon the merits, at which time, since the judgment therein was in favor of defendants, it would perforce of such fact have been dissolved. The sustaining of the judgment by this court renders the alleged error a moot question. The appeal from this order is therefore dismissed.

It follows that the judgment and order denying plaintiffs' motion for a new trial should be affirmed, and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

MacMULLAN v. KELLY, County Treasurer. (Civ. 936.)

(District Court of Appeal, First District, California. April 17, 1912.)

1. Taxation (§ 904*)—Personal Property Tax—Collection—Excess—Trust Fund.

Pol. Code, §§ 3820, 3821, 3823, authorize the county assessors to collect taxes on personal property prior to the actual fixing of the rate of taxation for the fiscal year, when, in their opinion, such taxes will not be sufficiently secured by a lien on real property of the taxpayer; and section 3824 declares that when the rate is fixed, if a sum in excess of such rate has been collected, the excess shall remain in the county treasury and be repaid to the taxpayer or his assignee on demand. *Held*, that the moneys so paid into the county treasury in excess of the tax rate finally fixed do not belong to the county, but, in the aggregate, constitute a trust fund of which the county is the custodian, and the treasurer but a bailee holding the money, to be paid to the rightful owners on demand.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1727; Dec. Dig. § 904.*]

2. Limitation of Actions (§ 66*)—Accrual of Cause of Action—Trust—Excess Taxes.

Under Pol. Code, § 3824, providing that excess taxes on personal property, collected before the fixing of the rate, shall remain in the county treasury, to be repaid to the taxpayer, or his assignee, on demand, a trust of such excess so created was an express trust, continuing until the individual amounts making up the excess are called for by the taxpayers or their assignees; and hence limitations do not run against the taxpayer's right until demand, under the rule that limitations do not run in favor of a defendant chargeable as a trustee during the life of the trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 353–375; Dec. Dig. § 66.*]

3. Taxation (§ 904*)—Collection of Taxes—Excess.

Pol. Code, § 3824, providing that excess personal property taxes, collected before the fixing of the rate, shall remain in the county treasury and be paid by the county treasurer to the person from whom the collection was made, or his assignee, on demand, contemplates that each successive county treasurer shall account for the excess tax fund which may be accumulated in the county treasury and reported as a continuing fund, subject to depletion solely by the demands of the owners thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1727; Dec. Dig. § 904.*]

Appeal from the Superior Court, Alameda County; William H. Waste, Judge.

Action by Charles S. MacMullan against M. J. Kelly, as Treasurer of Alameda County. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Brewton A. Hayne, for appellant. Wm. H. Donohue, for respondent.

LENNON, P. J. In this proceeding the petitioner sought by mandamus to compel the respondent, in his official capacity as treasurer of Alameda county, to pay to the petitioner, upon assigned claims, several amounts of money, totaling the sum of $42.09, which had been paid into the treasury of said county by various persons as taxes on unsecured personal property for the fiscal year 1902–03, and which sums of money, it is alleged, are still in said treasury, subject to the demands of the plaintiff's assignors.

Petitioner's cause of action is founded primarily upon the fact that his assignors, in the year 1902, had paid, in accordance with the provisions of chapter 8 of the Political Code, the several sums of money sued for as taxes on personal property, based upon the rate of taxation fixed for the preceding year; and that in each instance the sum so paid was in excess of the amount which subsequently actually became due for such tax.

The petition for writ of mandate was not filed in the superior court of Alameda county until February 7, 1910; and it affirmatively appears from the allegations of the petition that no demand for the return of the money paid as taxes in excess of the amount required by the rate of taxation for the fiscal year 1902–03 was made upon the treasurer of Alameda county until January 19, 1910.

Respondent interposed a demurrer to the petition for a writ of mandate, which, among other grounds, specified that the action was barred by the provisions of section 343 and subdivision 1 of section 338 of the Code of Civil Procedure. The demurrer was sustained, with leave to amend, but petitioner declined to amend; and judgment was rendered and entered in favor of respondent, from which petitioner appeals upon the judgment roll.

It is conceded that the demurrer was sustained solely upon the ground that the action was barred by the statute of limitations; and the correctness of the court's ruling in this particular is the only point presented for decision upon this appeal.

It is the duty of county assessors to collect taxes on all personal property at the time the assessment is made, or at any time before the first Monday of the following month of August, when, in the opinion of the assessor, such taxes will not be sufficiently secured by a lien upon the real property of the taxpayer. The amount of personal property taxes which must be so collected depends upon and must be governed by the rate of taxation on personal property fixed for the previous year in the state and county and the several districts in which the personal property is taxable (Pol. Code, §§ 3820, 3821, 3823); and "when the rate is fixed for the year in which such collection is made then, if a sum in excess of the rate has been collected, such excess shall not be apportioned to the state, but the whole thereof shall remain in the county treasury, and must be repaid by the county treasurer to the person from whom the collection was made, or to his assignee, on demand therefor." Pol. Code, § 3824.

It is the duty of the county auditor to note on the assessment book, opposite the name of each taxpayer, the amount collected for taxes; and when the rate of taxation for the year has been fixed he must enter opposite the name of each taxpayer the amount of the excess or deficiency, if any, in the tax as collected by the assessor. Pol. Code, §§ 3827, 3828.

It is the contention of petitioner that the fund of excess taxes which may be accumulated in the county treasury, in accordance with the sections of the Political Code herein quoted and referred to, constitutes a continuing trust fund, against which the statute does not commence to run until there has been a demand by the owner for the return of the money, and a refusal by the treasurer to pay the same.

[1] We are of the opinion that this contention is well founded; and that the lower court erred in sustaining the respondent's demurrer, upon the ground that the cause of action stated in the petition was barred by the statute of limitations. The purpose and effect of section 3824 of the Political Code, under which county assessors are empowered to collect taxes on personal property in advance of the actual fixing of the rate of taxation for the fiscal year in which such taxes are collectible, have been distinctly defined by our Supreme Court, in the case of Corbett v. Widber, 123 Cal. 154, 55 Pac. 764. It was there said, in effect, that the moneys paid into the county treasury in excess of the tax rate finally fixed did not belong to the county, but in the aggregate constitute a trust fund of which the county is the custodian, and the treasurer but a bailee who holds the moneys so paid, subject to the demands of the rightful owners.

Subject to the provisions of section 852 of the Civil Code, an express trust is created "as to the trustor and beneficiary by any words or acts of the trustor indicating with reasonable certainty (1) an intention on the part of the trustor to create a trust; and (2) the subject, purpose and beneficiary of the trust * * * and as to the trustee, by any acts or words of his indicating with reasonable certainty (1) his acceptance of the trust, or his acknowledgment, made upon sufficient consideration, of its existence; and (2) the subject, purpose and beneficiary of the trust." Civ. Code, §§ 2221, 2222.

[2] The legislative intent to create a trust, as well as the subject-matter, purpose, and beneficiary of the trust, are clearly indicated by the terms of the several sections of the Political Code, relating to the collection of personal property taxes; and a trust created thereby is undoubtedly an express trust, which continues in existence until the individual amounts which go to make up the accumulated trust fund of excess taxes are called for by the taxpayers or their assigns. Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. 42; McGuire v. Lenneus, 74 Me. 344.

It is a rule of law in this and other jurisdictions that the statute of limitations does not begin to run in favor of a defendant chargeable as the trustee of an express trust during the life of the trust. In order to set the statute in motion, it is necessary that such a trustee, by some act or declaration, positively and unequivocally repudiate the trust, and that notice of such repudiation be brought to the beneficiary. This rule is so well settled and so generally recognized that no argument is necessary to support its reiteration here. There is no conflict of authority upon the subject, and of the many cases which have arisen in this jurisdiction, where the rule has been declared and applied, the following may be cited: Baker v. Joseph, 16 Cal. 173; Ord v. De la Guerra, 18 Cal. 67; Schroeder v. Jahns, 27 Cal. 280; Miles v. Thorne, 38 Cal. 338, 99 Am. Dec. 384; Hearst v. Pujol, 44 Cal. 230; Janes v. Throckmorton, 57 Cal. 368; Zuck v. Culp, 59 Cal. 142; McClure v. Colyear, 80 Cal. 378, 22 Pac. 175; Roach v. Caroffa, 85 Cal. 436, 25 Pac. 22; Fox v. Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Luco v. De Toro, 91 Cal. 417, 18 Pac. 866, 27 Pac. 1082.

[3] Section 3824 of the Political Code clearly contemplates that each successive county treasurer shall account for the fund of excess taxes which may be accumulated in the county treasury, and reported as a continuing fund, which is subject to depletion solely by the demands of the owners thereof; and as the transaction pleaded by petitioner in the present case constituted an express trust, which was not repudiated by respondent until demand was made upon him by petitioner for performance of the trust, the statute of limitations commenced to run only from the date of the demand. Miller & Lux v. Batz, 142 Cal. 447, 76 Pac. 42.

The judgment appealed from is reversed, and the cause remanded, with instructions to the trial court to overrule the demurrer, with leave to the respondent to answer within a designated time.

We concur: HALL, J.; KERRIGAN, J.

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18 Cal. App. 698

DELGER v. JACOBS. (Civ. 904.)

(District Court of Appeal, First District, California. April 17, 1912.)

APPEAL AND ERROR (§ 773*)—DISPOSITION OF CASE ON APPEAL—FAILURE TO FILE BRIEFS OR MAKE ORAL ARGUMENT—EFFECT.

Where no oral argument was made when the appeal in the case was regularly called, and no briefs were filed by either party, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108–3110; Dec. Dig. § 773.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Edward F. Delger against Abe Jacobs. From a judgment for plaintiff, defendant appeals. Affirmed.

L. S. Melsted, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

PER CURIAM. No oral argument having been made when the appeal in this case was regularly called upon the calendar of this court, and no briefs having been filed by either party, it is ordered that the judgment appealed from be affirmed.

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18 Cal. App. 655

RAISCH v. WARREN et al. (Civ. 932.)

(District Court of Appeal, Third District, California. April 6, 1912. Rehearing Denied by Supreme Court June 5, 1912.)

1. EQUITY (§ 44*)—STATE COURTS—SUPERIOR COURT—JURISDICTION.

Code Civ. Proc. § 76, by subdivision 1, gives the superior courts jurisdiction of all cases in equity, by subdivision 2 of all civil actions of a certain nature, by subdivision 3 of all cases at law involving the title or possession of real property, and by subdivision 4 of all matter of probate. Section 78 provides that the process of superior courts shall extend to all parts of the state, while section 1504 provides that a judgment rendered against an executor or administrator upon any claim for money against the estate of his testator only establishes the claim as if it had been allowed by the executor, administrator, and the judge, and the judgment must be that the executor or the administrator shall pay in due course of administration the amount held due. Administration was had upon the property of a decedent in the superior court of Alameda county. *Held* that, as the jurisdiction of the superior courts in equity was exclusive and wholly different from their probate jurisdiction, an action in equity might be begun against the administrator in the superior court of San Francisco county to compel an accounting and to enjoin the disposal of property of the decedent.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 141–145; Dec. Dig. § 44.*]

2. EQUITY (§ 39*)—SUBJECTS OF PROTECTION—JURISDICTION.

Though Code Civ. Proc. § 1504, provides that a judgment against an executor or administrator is only equivalent to an allowance of a claim, a court of equity of a county other than that in which administration of the estate of a decedent was being had, having taken jurisdiction of a suit against the administrator to compel an accounting and to restrain him and other heirs of the decedent from disposing of property transferred to them by gift causa mortis, has jurisdiction to give complete relief regardless of the statute.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104–114; Dec. Dig. § 39.*]

3. PARTNERSHIP (§ 244*) — SETTLEMENT OF AFFAIRS OF FIRM—STATUTES.

Under the direct provisions of Code Civ. Proc. § 1585, it is the duty of the surviving partner to settle the affairs of the firm.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 511; Dec. Dig. § 244.*]

4. PARTNERSHIP (§ 258*) — JURISDICTION — CONDITIONS PRECEDENT.

Defendants' intestate, who was a member of a firm composed of plaintiff and another, attempted to transfer all of his property which was in the stock of a corporation by gift causa mortis so as to exclude the claims of his partners who were his creditors. The corporate stock was not listed as the assets of the decedent, and the administrator refused to consider it as such. *Held* that, it being the duty of the surviving partner under Code Civ. Proc. § 1585, to settle the partnership affairs, the surviving partner might maintain an action against the administrator to enforce an accounting and restrain the disposition of the corporate stock before bringing an action at law, for, while an action at law is usually a condition precedent to such suit, it, being useless in this case, will not be required.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 564–598; Dec. Dig. § 258.*]

5. INJUNCTION (§ 135*)—ISSUANCE—DISCRETION.

Where injunction is justifiable, the issuing of preliminary writ is largely a matter of discretion, and it should be exercised in favor of the party most likely to be injured.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 304; Dec. Dig. § 135.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by A. J. Raisch against Charles A. Warren, Jr., individually and as administrator of Charles A. Warren, deceased. From an order refusing to dissolve an injunction, defendant Warren appeals. Affirmed.

Aylett R. Cotton and Aylett R. Cotton, Jr., for appellant. Peter F. Dunne and C. H. Wilson, for respondent.

CHIPMAN, P. J. Injunction. Upon filing the complaint and executing a bond for $1,000, the court granted the prayer of the complaint for an injunction, further ordering that defendants show cause at a date named "why this order should not be continued in force until the further order of the court in the premises." Before the hearing thus ordered, defendant Charles A. Warren, Jr., served and filed his motion to dissolve and vacate said order of injunction based on the complaint in said action and upon the ground that "said complaint does not state or show that any ground or cause exists or has existed for the making of said order or for the granting of any injunction in this action." At the hearing the court ordered: "(1) That the demurrers to complaint be overruled 10 days to answer. (2) Motion to dissolve injunction denied. (3) Motion to appoint receiver denied without prejudice to renewal of motion." It appears from the record that "said order included the decision of said court upon motions of other parties, as well as said motion of said Charles A. Warren, Jr., and also decisions of demurrers." Defendant Charles A. Warren, Jr., excepted to the order denying his motion "to dissolve said order of injunction and refusing to dissolve said order of injunction as to him." He alone appeals "from the order made and entered * * * refusing to dissolve the injunction granted on the 27th day of January, 1910, * * * and denying said defendant's motion to dissolve said injunction."

The averments of the complaint are substantially as follows: That on March 1, 1903, Charles A. Warren, the defendant Buckman, and plaintiff formed a partnership for the purpose of securing contracts from the United States government and performing said contracts when secured, relating to what is known as the Truckee-Carson Project of Nevada, and that said partnership continued until the death of said Charles A. Warren which is alleged to have occurred on December 24, 1908; that defendant C. A. Warren Company now is and since April 2, 1903, has been a duly organized California corporation, as also is and has been the San Francisco Construction Company since January 8, 1900; that, from the beginning of said partnership to its termination aforesaid, "the two corporations last mentioned were controlled, operated, and used by such partnership to facilitate, carry on, and advance the affairs, work, and business of said partnership, and, acting for and under the direction of said copartners, did duly make to the Secretary of the Interior of the United States certain proposals for doing the construction work in connection with the aforesaid Truckee-Carson Project of Nevada"; that said proposals were accepted and pursuant thereto said corporation, C. A. Warren Company, "for the purposes aforesaid and acting for and under the direction of said copartners, and as an instrument of said partnership to facilitate and carry on its business, did duly make and enter into a certain contract with the United States," engaging to perform certain work relating to said project, for which the said United States agreed to pay said corporation certain sums of money and that said corporation fully completed said work. Then followed averments that the said corporation, the said San Francisco Construction Company, for purposes as above averred, and acting for said copartnership as above averred, entered into another contract with the United States to further prosecute the work on said project for which the said United States agreed to pay said corporation certain sums of money, and that "said copartners, doing business as such in the name of said corporation, San Francisco Construction Company, did duly * * * complete the contract last aforesaid." Then follow also averments relating to a third contract entered into by said last-named corporation for like purposes as above set forth and as in other alleged cases, "acting for and under the direction of said copartners," and "for the purpose of facilitating, carrying on, and advancing the affairs, work, and business of said partnership"; that defendant, Charles A. Warren, Jr., was duly appointed administrator of the estate of Charles A. Warren, deceased, on January 15, 1909; that defendant Buckman assigned to plaintiff all his right and interest in and to all demands against the estate of Warren, deceased, but now claims some interest in the assets of said partnership; that there has never been an accounting between said copartners as to its business, nor has there been an accounting between the surviving members and defendant Charles A. Warren, Jr., the administrator of said estate of said deceased copartner; "that, should an accounting be had of the aforesaid copartnership matters and business, it will be found and ascertained that a large sum of money, to wit, the sum of about $150,000, is due from the estate of said Charles A. Warren, deceased, on account of said copartnership matters and business to this plaintiff"; that plaintiff has demanded of defendant Warren, Jr., administrator of the estate of Warren, deceased, and of defendant Buckman, an accounting of said copartnership business, but said defendants have refused and still refuse to make such accounting; that plaintiff, within the time allowed by law therefor, prepared his contingent claim against the estate of said deceased in which was recited "substantially all the matters aforesaid and stated the particulars of said contingent claim, and demanded that an accounting be had forthwith between this plaintiff and the said administrator of the estate of Charles A. Warren, deceased, and that provision be made for the payment of such sum as may be found to be due this plaintiff on such accounting, and that such payment be made from and out of the assets of the estate of said deceased"; that said administrator rejected said contingent claim; that said administrator has duly returned an inventory of said estate showing the same to be of the value of $8,798.66; that said inventory does not show the true value and character of the entire estate left by deceased; that the said corporation, the Charles A. Warren Company, had a capital stock of $100,000 divided into 100,000 shares of the par value of $1 each, of which deceased at the time of his death was the owner of 60,416 shares; that, immediately before his death, said Warren delivered all his said shares to one Haskell with instructions that, in the event of the death of said Charles A. Warren, Haskell "should then and in that event only deliver said capital stock to the defendants herein, William T. Warren, Charles A. Warren, Jr., and Henry O. Warren in equal shares"; but, should he survive his then illness, said capital stock was to remain the property of said Charles A. Warren "who was to repossess the same and enjoy the income thereof and have all the rights and benefits arising from the ownership thereof"; that, after the death of said Warren, said capital stock was delivered by said Haskell as directed by said Warren, and the said transferees aforesaid are now the holders thereof, and that the defendants Bertha and Claudine Warren claim some interest therein; "that said capital stock is of great value, to wit, of the value of about $1,000,000, and that the same is a part of the estate of said Charles A. Warren, deceased, and is subject to the payment of the debts proven and allowed against said estate"; that said estate of Warren, deceased, and said William T., Charles A., Jr., Henry O., Bertha, and Claudine Warren "have not sufficient property out of which to pay plaintiff's claim unless resort be had to that represented by the capital stock of said Charles A. Warren Company; that, except for said shares of capital stock and the value thereof, the said Warrens (naming them) are each and all of them financially irresponsible"; that they have threatened to sell said shares, in which event "they and each of them would be wholly unable to deliver to Charles A. Warren, Jr., administrator of the estate of Charles A. Warren, deceased, sufficient of the property of said deceased or sufficient money or property of any kind to pay the amount due from said estate to this plaintiff on his aforesaid claim, and that, should said sale or disposition of said stock be made, this plaintiff "would be wholly without remedy in the premises and would suffer great or irreparable injury"; that defendant William T. Warren was by order of court duly appointed guardian of the person and estate of defendant Henry O. Warren, a minor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Plaintiff prays for an accounting of all matters relating to said copartnership, for judgment against said administrator for the amount that may be due plaintiff on such accounting, for a writ of injunction enjoining the sale of said capital stock, for the appointment of a receiver, and such further relief as may be just.

At the hearing of the motion there were read the affidavits of plaintiff and one Church. Plaintiff's affidavit is to like effect as the complaint in the action; he also deposes that the inventory returned by said administrator does not include said shares of said capital stock; that, in the transfer of said stock to said Haskell, "the said Warren did not part with all dominion over the same or pass the same beyond his control for all time; and furthermore that said gift was subject to defeasance in favor of said Warren's creditors, and that as to this affiant, a creditor of said Warren, said gift of said capital stock is wholly void." The affidavit of Church, used at the hearing of the motion, was to the effect that he was a director of the Charles A. Warren Company from its organization to the death of Charles A. Warren; that the affairs of the corporation were "controlled, directed, and managed wholly and entirely by said Charles A. Warren"; that, with the exception of the five shares each issued to the directors, Warren controlled all the shares; that "the business, property, and affairs of said Charles A. Warren were, from the time of the incorporation of said corporation to the 24th day of December, 1908, from time to time during said period, transferred from said Charles A. Warren to said corporation"; that, "at all times from the date of the incorporation thereof to the time of his death, he, the said Charles A. Warren, received the entire income of said corporation and used and disposed of the same as his personal property and according to his personal will and wishes"; that no dividends were declared, but that all of the funds of the corporation and all its earnings were personally controlled by said Warren; that, "according to the best judgment and knowledge of this affiant, all the property owned by said corporation, and all the stock thereof were a part and portion of the estate of Charles A. Warren at the time of his death on or about December 24, 1908."

The estate of Charles A. Warren, deceased, is being administered in the superior court, sitting in probate, in Alameda county, and this action was commenced and is pending in the superior court of the city and county of San Francisco.

Appellant contends that "under section 1504, C. C. P., in an action of this nature, the court has no jurisdiction to provide for the payment of any judgment, and hence no jurisdiction to make any investigation as to what property may belong to an estate, or to make an order enjoining the disposition of, or appointing a receiver of, any property." The argument seems to be that, under section 1504, supra, the judgment only establishes the claim in the same manner as if allowed by the administrator, and the judgment must be that the administrator pay in due course of administration; "that there is no administration running its course in the city and county of San Francisco, where this action is, and it is only the superior court in Alameda county, in which the estate is being administered, that can make application of the assets of the estate so as to pay in the due course of administration"; that the superior court of the city and county of San Francisco "has no jurisdiction to take action, even after judgment, to enforce payment of any judgment, and surely has no jurisdiction to issue an injunction before judgment to restrain the disposition of property"; that a judgment upon a rejected claim is no more effective than a claim allowed by an administrator or the judge—citing Hall v. Cayot, 141 Cal. 13, 16, 74 Pac. 299. Appellant then takes up the general proposition, to which the brief is mainly devoted, that "it is contrary to all the authorities to attempt to interfere by injunction or otherwise with the disposition of property before judgment is obtained, unless the plaintiff has some lien on the property or interest therein"; and none is here alleged. In support of this contention, adjudicated cases and opinions of text-writers are cited from which the general rule is deducible that a simple contract creditor, or a creditor at large, whose claims are not yet reduced to judgment, cannot maintain a creditor's bill, citing 2 High on Injunctions (4th Ed.) §§ 406, 1403; 6 Pom. Eq. Juris., § 882; Ohm v. Superior Court, 85 Cal. 545, 26 Pac. 244, 20 Am. St. Rep. 245, approved in Field, Adm'r, v. Andrada, 106 Cal. 107, 39 Pac. 323; and Shiels, Adm'r, v. Nathan, Adm'r, 12 Cal. App. 604, 108 Pac. 34.

[1] On the question of jurisdiction generally, the Code provides that superior courts "have original jurisdiction in all cases in equity" (Code of Civil Procedure, § 76) and their process extends "to all parts of the state." Id. § 78. The superior court of the city and county of San Francisco has the same jurisdiction as the superior court of Alameda county, and, if the action can be maintained in the latter court, we can see no reason why it may not be prosecuted in the former. The suggested difficulty of enforcing a judgment, should plaintiff recover in the San Francisco court is fanciful rather than real. If on the trial anything is found to be due plaintiff by the estate of Warren, deceased, it is to be presumed that the court would be guided by section 1504, Code of Civil Procedure, in formulating its judgment, whereupon "a certified transcript of the original docket of the judgment" would be "filed among the papers of the estate in court," i. e., in the Alameda county court, as the said section provides. Precisely the same course would be pursued if the action were to be tried in the superior court of Alameda county. The suggestion that there "is no administration running its course" in the San Francisco court, where this action is pending, and that it is only the Alameda court "that can make application of the assets of the estate so as to pay in due course of administration," does not, in our opinion, complicate the case or strengthen appellant's position. The superior court as now constituted has jurisdiction, as we have seen, in all cases in equity (Code Civ. Proc. subd. 1, § 76), and by the same section it is given jurisdiction in civil actions of the class therein described (subdivision 2); in

all cases at law as defined (subdivision 3); of still other actions mentioned and "of all matters of probate" (subdivision 4). In exercise of its jurisdiction "in cases in equity," such as the one here, and its jurisdiction in "matters of probate," such as administering the Warren estate, the proceedings of the superior court are as distinct and as dissociated as if there were two separate and different courts exercising these powers. So far, therefore, as the question of jurisdiction is concerned, the superior courts of the two counties stand on the same footing. The right to have the case transferred for trial to the Alameda court, if such right exists, is not to be confounded with the right to bring the action in the city and county of San Francisco.

[2] In his reply brief appellant complains that respondent has not pointed out any way of escaping the supposed dilemma in which he may find himself, should he secure judgment for some amount, which, when secured, the court cannot enforce; that counsel should have explained "what would be the fate of the injunction in this case when such judgment would be made, inasmuch as the court's power to act in the case would terminate on making such judgment; and have explained what would or could have been accomplished by the issuing of an injunction restraining the disposition of the property." As these supposed difficulties are advanced in aid of the argument that the court had no power to make the order, we cannot overlook them, though unnoticed by respondent.

The action proceeds on the assumption that the estate of plaintiff's copartner Warren will be shown to be indebted to him, on a fair accounting, in a large sum of money; that the property of the estate returned by the administrator in his inventory is wholly insufficient to meet this claim; that certain of the defendants, among them the administrator himself, hold certain property, to wit, the alleged shares in the Warren corporation, which rightfully belongs to the estate and should be applied to discharge the debts of the estate and should be turned over to the estate for the benefit of its creditors, plaintiff among others. The administrator is a party defendant in the action, and also in his individual capacity; so also are all the persons having any claim upon the subject of the action—the said corporation shares. The court may or may not find it necessary to appoint a receiver, but, should such appointment be made, we can see no such dire result ensuing as appellant predicts; that, upon the court's allowing plaintiff's claim, "the whole scheme would collapse, * * * as the power of the court under section 1504, C. C. P., would thereupon be exhausted, and the receiver would be left stranded with the stock in his possession without having a court to protect him. * * * The court would be without power to make any disposition of the stock to satisfy the claim." Appellant's error is in assuming that the power of the court is limited by section 1504, Code of Civil Procedure. "When a court of equity has once obtained jurisdiction, it will do complete justice by deciding the whole case." Watson v. Sutro, 86 Cal. 500, 528, 24 Pac. 172, 25 Pac. 64; Van Zile on Eq. Pl. & Pr. § 11. Just what course the court may pursue in its disposition of the said corporation shares, after having found that they belong to the estate, need not be anticipated. It may order their sale and the proceeds to be paid to the administrator to be applied to the payment of creditors of the estate (Emmons v. Barton, 109 Cal. 662, 668, 42 Pac. 303; Shiels, Adm'r, v. Nathan, Adm'r, 12 Cal. App. 604, 108 Pac. 34), or it may direct the defendant, administrator of the estate, to take possession of them as property of the estate and dispose of them for the benefit of the creditors of the estate. We fail to see how a receiver, if appointed, is in danger of being "stranded" or the court left with its hands tied, "without power to make any disposition of the stock to satisfy the claim" of plaintiff.

[3-5] We pass to the proposition advanced by appellant, to wit, that plaintiff cannot maintain the action because he has not yet reduced his claim to judgment. It may be conceded at once that the general rule as to a creditor's bill is as claimed by appellant. But, like many other salutary rules, it has its exceptions and, we think, the present case presents an example where other rules, firmly established by the courts, come into play and remove it from the operation of the general rule. Indeed the action cannot strictly be called a creditor's bill; it is an action primarily for an accounting and incidentally to cause property belonging to a deceased partner to be subjected to administration for the benefit of creditors. The case here is that of an administrator who is administering the estate of a deceased partner of a copartnership; he has no power as such administrator to settle the affairs of the partnership; the surviving partners are charged with that duty (Code Civ. Proc. § 1585); averments in the complaint show the necessity for an accounting, a suit in equity (Smith v. Smith, 88 Cal. 572, 26 Pac. 356), and it cannot be effected by an action at law; the third partner, Buckman, has assigned to plaintiff all his interest in any claim against their copartner's estate; it is alleged that there is valuable property belonging to the estate of the deceased partner which the administrator refuses to recognize as such or to include it in his inventory —property which by gift causa mortis deceased caused to be placed in the hands of certain of the defendants—the administrator is one of the transferees of this property claiming an interest in it adversely to plaintiff and other creditors; in the very nature

of the situation he cannot as administrator sue himself as such claimant, and assuredly would not, if he could, for he denies all claim of the estate to the property; he in common with his cotransferees, it is alleged, threatens to and will, if not restrained, so dispose of this property as to prevent plaintiff and other of the creditors of the deceased partner from resorting to it for the payment of their claims; that the estate, shorn of this property, is wholly insufficient to meet the demands of creditors; and finally the defendants "are each and all of them financially irresponsible except for said shares of the capital stock of said corporation, and the income and value thereof."

In Case v. Beauregard, 101 U. S. 690, 25 L. Ed. 1004, the court had the rule, contended for by appellant, under consideration. Said the court: "But after all the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form, 'Bona, sed impossibilia non cogit lex.' "

"Where the claim of complaint is purely equitable and such as the chancellor will take cognizance of in the first instance, he will go the entire extent and inquire into obstructions in the road of enforcing the demand, and the complainant therefore, when he goes into equity to assert and liquidate his claim, may, in addition to the assertion of his claim, ask relief against the fraudulent acts of the debtor in attempting to place his estate beyond the reach of creditors." 5 Ency. Pl. & Pr. p. 463. The rule "is not so strict as to deny to a party the interposition of the equity power of the court when the situation is such as to render impossible the aid of a court of law in taking the preliminary steps ordinarily treated as a condition precedent to the application for equitable relief." 20 Cyc. pp. 692, 701.

The superior court, sitting in probate, cannot go into an accounting of the copartnership nor determine the ownership of the shares of the Warren corporation, for as yet they form no part of the estate, and the administrator refuses to take the steps necessary to determine their ownership. The equity court alone can and will afford relief where the powers of the probate court are inadequate to do justice. 1 Woerner Am. Law of Adm. (2d Ed.) *p. 356. Plaintiff should not be required to resort to a court at law where he could obtain no remedy. In Emmons v. Barton, 109 Cal. 662, 42 Pac. 303, it was held that "ordinarily an action to recover property fraudulently conveyed by a decedent in his lifetime should be brought by his executor or adminstrator, and such an action by a creditor will not lie unless he shows that he has exhausted all means to procure such an action to be brought by the proper person, but, where the alleged grantee is the executrix, a suit in equity will lie in favor of the creditor to set aside the fraudulent conveyance." Syllabus. Appellant distinguishes this case from the one here because in the case cited the creditor had an allowed claim against the estate. But plaintiff did all he could to secure the allowance of his claim, and it was rejected. The administrator here is one of the grantees of the property in question. We do not think, under the circumstances here appearing, that plaintiff was called upon to do more than he did to entitle him to bring the action, which is in fact the only adequate remedy available to him. It was held in the Emmons Case, supra, that sections 1589 and 1590, Code of Civil Procedure, which provide for the commencement of actions by the administrator or executor, in cases such as this, do not furnish the only remedy. Said the court: "There may be cases in which the statutory proceedings would not afford an adequate remedy—'exceptional cases in which it appears that equity must be invoked because legal remedies are unavailing.' Herrlich v. Kauffman, 99 Cal. 271 [33 Pac. 857, 37 Am. St. Rep. 50]. In such case the Code provisions may be departed from, for it is the province of equity to relieve where legal remedies fail. * * * A demand upon the appellant to bring the suit would have been fruitless."

The facts, in our opinion, warranted the issuing of the injunction. By no other means could the property have been preserved to await the result of the accounting. Code Civ. Proc. § 526; Civ. Code, § 3422; 3 Pomeroy, Eq. Juris. [1st Ed.] § 1339. Where an injunction is justifiable, the issuing of the writ is, in a large degree, a matter of discretion, "and should be exercised in favor of the party most likely to be injured." Paige v. Akins, 112 Cal. 401, 412, 44 Pac. 666. The order is affirmed.

We concur: HART, J.; BURNETT, J.

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18 Cal. App. 668

OLSON, MAHONEY LUMBER CO. v. MAXWELL et al. (Civ. 954.)

(District Court of Appeal, First District, California. April 8, 1912.)

1. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

The allowance of leading questions rests largely in the discretion of the trial court, and it is not such an abuse of discretion to allow a leading question, which only calls for cumulative evidence, as to require a new trial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845, 849-851; Dec. Dig. § 240.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. TRIAL (§ 163*)—NONSUIT—GROUNDS.

A defendant's motion for nonsuit is properly overruled, where no grounds were stated in support thereof.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 371; Dec. Dig. § 163.*]

3. MECHANICS' LIENS (§ 111*)—RIGHT TO LIEN—ABANDONMENT OF WORK.

Under Code Civ. Proc. § 1200, providing that, where a contractor abandons the work, the sum available to the liens of mechanics and materialmen is the difference between the value of the work done and payments made in accordance with the contract, a builder is not entitled to any deduction for sums advanced to the contractor, although not yet due him.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 144-146; Dec. Dig. § 111.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Olson, Mahoney Lumber Company against William Maxwell and others. From an order granting defendants a new trial, plaintiff appeals. Order reversed.

Henry A. Jacobs, James M. Oliver, and C. W. Lynch, for appellant. T. J. Crowley, for respondents.

LENNON, P. J. This action was instituted to foreclose a mechanic's lien for a balance due plaintiff for lumber delivered to the defendant Union Construction Company, to be used, and which was actually used, in the construction of a certain building which was erected upon a lot of land in the city and county of San Francisco belonging to the defendant Henrietta Steinegger. The defendants Peter B. McDonough and Thomas McDonough were copartners, doing business under the firm name of McDonough Bros. They were the lessees of the land, and the contract for the erection of the building was between them and the defendant Union Construction Company. Judgment was rendered and entered foreclosing plaintiff's lien in the sum of $1,418.61 upon the interest of the McDonough Bros. in the premises and building in question. A personal judgment for the same amount was also entered in favor of the plaintiff and against the individual members of the defendant the Union Construction Company. The defendant Henrietta Steinegger, the owner of the land, posted a notice prior to the commencement of the work that she would not be responsible for the erection of the building, and as a consequence no judgment was rendered against her. The trial court, upon motion of the defendants McDonough Bros., granted a new trial as to them. Alleged errors of law occurring during the trial, the insufficiency of the evidence to justify the decision, and that the decision was contrary to the evidence and the law, were the grounds urged for a new trial. From the order granting a new trial, which was general in its terms, the plaintiff has appealed upon a record composed of the pleadings in the case which were used and referred to upon the hearing of the motion, and a bill of exceptions likewise used upon the hearing of the motion, which purports to contain the proceedings and the evidence had at the trial, and in addition sets out in full the findings of fact, the conclusions of law, and the judgment based thereon, which was originally rendered and entered against the defendants McDonough Bros.

[1] It is not disputed that the order granting a new trial must be sustained if it can be justified on any of the grounds which form the basis of the motion for a new trial; but appellant in support of the appeal claims that the record does not show the existence of a single valid ground upon which the order granting a new trial can be supported. This contention, we think, must be sustained.

The first ground of defendants' motion for a new trial involves alleged errors of law occurring during the trial, and in support thereof numerous rulings of the trial court were assigned by the defendants as error in the statement used upon the hearing of the motion. Here, however, but three rulings of the court in the admission of evidence are relied upon by the defendants to justify the order granting a new trial. The first relates to the testimony of the secretary and yard foreman of the plaintiff, who was called and sworn as a witness for the purpose of showing that the lumber ordered from the plaintiff had been delivered at the place where the building was being erected. One question, among many others, asked this witness was objected to upon the ground that it was leading and argumentative and called for incompetent evidence. The question undoubtedly suggested the answer desired, and the objection might have been properly sustained upon this ground alone. The question was not argumentative; but, in addition to being leading, it was ambiguous. The answer of the witness, however, was equally ambiguous, and had but slight, if any, tendency to establish the fact sought to be shown by the question. Moreover, the witness had been previously fully examined upon the subject of the delivery of the lumber, and even if he had answered the question as counsel for the plaintiff desired, his testimony would have been merely cumulative of that already given. Ordinarily, objections to leading questions should be sustained; but it is the established rule in this state that the allowance of such questions rests largely in the discretion of the trial court, and that a new trial will not be ordered merely because leading questions were permitted over objection, unless it plainly appears that in so doing the trial court abused its discretion. In the present case we find no abuse of discretion in permitting the question complained of to be answered. The mere fact that the evidence sought to be elicited by the question was negative in its nature did not make it incompetent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

With reference to the two remaining assignments of error in the rulings of the trial court, it appears that the witness under examination was unable to answer one of the questions objected to; and as to the other question there is some confusion in the record as to whether or not it was ever answered; but assuming that it was answered, the question called for relevant, material, and competent testimony, and the objection therefore was properly overruled.

[2] The trial court did not err in denying defendants' motion for a nonsuit. No grounds were stated in support of the motion, and for that reason, if for no other, a nonsuit was properly denied. The claim of counsel for defendants that he was not given an opportunity to state the grounds of the motion cannot be maintained in the face of the record, which shows that counsel "did not take the pains to trespass upon the court's time to state the grounds of the motion." Aside from this, plaintiff had introduced sufficient evidence to make out at least a prima facie case; and it would therefore have been error to have granted a nonsuit. Upon an examination of the entire record, we do not find that the court, in its rulings upon the rejection or admission of evidence, or otherwise, erred to the prejudice of the defendants, and therefore the order granting a new trial cannot be justified upon the ground that the record shows errors of law occurring during the trial.

[3] Passing from the alleged errors of law to a consideration of the second ground of the motion for a new trial, viz., that the findings are contrary to and not supported by the evidence, the record shows without conflict the following facts: The contract price was $9,100, payable in four installments, the first, second, and third each in the sum of $2,200, and the final in the sum of $2,500. The first installment, $2,200, was paid strictly in accordance with the contract. The second installment, $2,200, was not due when the contract was abandoned. In other words, at the time the contractor abandoned the contract, the work had not progressed to the point at which, under the terms of the contract, the second installment was payable. Nevertheless the owner had from time to time made payments to the contractor in such sums that, when the contract was abandoned, the sum of $2,200 had been prematurely paid to the contractor. This made a total of $4,400 paid to the contractor before the abandonment of the contract, of which sum, as above indicated, $2,200 was not yet due when the contract was abandoned. The work under the contract had not advanced to the point when the second installment of $2,200 was payable. No notice under section 1184, Code of Civil Procedure, to withhold the second payment, was ever served upon McDonough Bros. by the plaintiff, or by any other person who had supplied labor or materials to the original contractor.

The court found the value of the work done and materials furnished at the time of the abandonment of the contract by the contractor, including the materials then actually delivered and on the ground, estimated as near as may be by the standard of the whole contract price, to be the sum of $3,640. The court also found that there had been paid to the original contractor pursuant to and under the terms of the contract the sum of $2,200, and no more.

As a corollary of the two foregoing findings, the court found that there remained in the hands of the respondents the sum of $1,440 unpaid under the terms of the contract, and held the same to be applicable to the payment of appellant's lien. In other words, the court refused to give to the owner any credit against the ascertained value ($3,640) of the labor done and materials furnished up to the time of the abandonment of the contract, for the sum of $2,200 confessedly prematurely paid and not yet due or earned at the time of the abandonment of the contract.

It is contended by the respondents that in so doing the court erred; that, as no notice had been served on the owner to withhold any payment, such owner upon the abandonment of the contract was entitled to credit for any payment in fact made, whether due or not, at the time of the abandonment. It is upon this theory that respondents mainly rely to justify the action of the court in granting a new trial. The order granting the new trial cannot be sustained upon this theory.

When the contractor abandons the contract before completion of the work, the measure of the liability of the owner to laborers and materialmen is fixed by section 1200, Code of Civil Procedure, as it existed when this case was tried. Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152; McDonald v. Hayes, 132 Cal. 491, 64 Pac. 850; Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635. In accordance with this section, the court found the value of the labor done and the materials furnished, including the materials actually delivered and on the ground, at the time of the abandonment of the contract, estimated as near as may be by the standard of the contract price, to be $3,640. By the terms of the law there should be deducted from this sum "the payments then due and actually paid, according to the terms of the contract and the provisions of section one thousand one hundred and eighty-three and one thousand one hundred and eighty-four, and the remainder shall be deemed the portion of the contract price applicable to such liens." The only deductions that can be made are for payments then due and actually paid. The sum thus ascertained is available for the payment of the liens of mechanics and materialmen, and is the only fund so available. Hoffman-Marks Co. v. Spires, supra.

In the case at bar the only payment that had become due before the contract was abandoned was the first payment of $2,200, and for this the court gave the owner due credit. Although the amount of the second installment had been paid to the contractor before the abandonment of the contract, it had not become due, and never did become due to the contractor, according to the terms of the contract, or at all. The work not having been performed by the contractor up to the point when the second installment was payable, no part of it ever did become due under the contract.

In the case of an abandonment of the contract, the law fixes as the basis of the liability of the owner to workmen and materialmen the value of the labor done and materials furnished estimated according to the standard of the contract price, and from this there can be deducted only such sums as are "then due and actually paid." No deduction can be made for sums then due and not actually paid, and no deduction can be made for sums actually paid but not then due.

We have been cited to the case of Sweeney v. Meyer, 124 Cal. 512, 57 Pac. 479, and the concurring opinion of Justice Shaw in Valley Lumber Co. v. Struck, 146 Cal. 272, 80 Pac. 405, as to the effect of want of notice to the owner to withhold payments. We do not think that either case controls the decision of the case at bar. In neither of the cases above mentioned was the court dealing with the case of an abandoned contract. Such a case is, as we have shown, governed by the provisions of section 1200, Code of Civil Procedure. Hoffman-Marks Co. v. Spires, supra. Whatever was said in the opinion of Mr. Justice Shaw in Valley Lumber Co. v. Struck, supra, as to the effect of failure to give notice to withhold a progress payment made before it becomes due, has no reference to a payment which, although made, never did become due because of abandonment of the contract. Under the law as we understand it, if an owner chooses to make payments to the contractor before they become due, he takes the risk either that he may be served with timely notice to withhold such payments, or that the contractor may abandon the contract before such payments become due—in either of which cases it is clear that the owner can have no credit for such premature payments as against lien claimants.

Inasmuch as the second payment of $2,200 had not become due before the contract was abandoned, the court correctly found that $2,200 and no more had been paid under the terms of the contract, and that there remained unpaid in the hands of the owner the sum of $1,440.

The order of the court granting a new trial cannot, therefore, be supported upon the insufficiency of the evidence to support the findings attacked. No other finding was proper under the conceded facts and the law as we believe it to be.

This disposes of all the points relied on, as we understand the record, in support of the order granting the new trial.

The order is reversed.

We concur: KERRIGAN, J.; HALL, J.

18 Cal. App. 642

ELLIOTT v. HUDSON et al. (Civ. 917.)

(District Court of Appeal, Third District, California. April 4, 1912. Rehearing Denied by Supreme Court June 1, 1912.)

1. CHATTEL MORTGAGES (§ 150*)—RECORD—EFFECT AS NOTICE.

Although there is no provision of the Civil Code expressly providing that the record of a chattel mortgage shall constitute constructive notice, yet, under section 2963, providing for their recordation with like effect as grants of real property so long as the mortgaged property remains personal property, and is not removed from the county where the mortgage is recorded, the record is notice to all the world, and the mortgagee is protected in his lien against subsequent purchasers.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 246–252; Dec. Dig. § 150.*]

2. FIXTURES (§ 19*)—MORTGAGEE OF LAND AND CHATTEL MORTGAGEE.

The record of a chattel mortgage on personal property, which has been affixed to the land so as to become a part thereof, although it is of such a character that for practical purposes it was necessary to so affix it, is not constructive notice to a subsequent real estate mortgagee of the claim of the chattel mortgagee, since, being a record separate from the real estate records, it is constructive notice that the mortgages recorded therein cover only personal property and do not affect the title to real estate, and hence the subsequent real estate mortgage takes priority over the chattel mortgage.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 42, 43; Dec. Dig. § 19.*]

3. MORTGAGES (§ 473*)—FORECLOSURE—RECEIVERSHIP—DISPOSITION OF PROPERTY BY RECEIVER.

After a foreclosure of a mortgage given by a corporation, a settlement was made between the corporation and its creditors by which it assigned its property to a trustee for the benefit of the creditors, the creditors also assigning their claims. The mortgagee assigned his claim under his deficiency judgment, but reserving any rights which he might have to the rents and profits collected by the receiver in the foreclosure suit, as purchaser of the mortgaged premises, and he testified that the deficiency judgment had been settled, and that he had no deficiency judgment against any one. *Held*, that the mortgagee had no right to the rents, issues, and profits by virtue of his deficiency judgment; his only claim thereto being as purchaser of the premises.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1384; Dec. Dig. § 473.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

4. Judgment (§ 670*)—As Bar to New Action—Identity of Parties.

A judgment in favor of a receiver in his individual capacity is not a bar to an action against him in his representative capacity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1185; Dec. Dig. § 670.*]

Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by M. B. Elliott against Elbert Hudson, receiver of the Lakeport Mill & Lumber Company, and another. From a judgment for defendants and an order denying a new trial, plaintiff appeals. Modified.

Rehearing denied by Supreme Court, 124 Pac. 108.

J. E. Pemberton and Preston & Preston, for appellant. C. M. Crawford and Mannon & Mannon, for respondents.

CHIPMAN, P. J. In appellant's opening brief he states that but two questions are presented:

"(1) Is a chattel mortgage regularly executed and recorded, covering property allowed by statute to be chattel mortgaged, and that still remains in the county, defeated by a real estate mortgage, subsequently executed upon property to which the chattels had become attached, the chattels being of such character as to be worthless, unless attached to real estate?

"(2) In a foreclosure case where the rents, issues, and profits are mortgaged and foreclosed, and a receiver appointed, but where there is no deficiency judgment, can the purchaser at foreclosure sale claim rents, issues and profits, by virtue of his purchase, that were collected prior to foreclosure?"

Defendant Hudson paid into court the funds held by him as receiver, and was dismissed from the action, and defendant Rice was substituted in his place. Judgment passsed that plaintiff take nothing by his action, and that defendant Rice recover judgment for $458.63, being the amount of money turned over by the receiver. Plaintiff appeals from the judgment and order denying his motion for a new trial.

1. The action is for the recovery of possession or the value of certain planing mill machinery, namely, a steam engine and boiler and certain mill machinery which plaintiff claimed were the subject of a chattel mortgage executed to him by C. E. and P. M. Beach on April 29, 1905, recorded as a chattel mortgage May 23, 1905. Beach Bros. installed the property on a certain lot in the town of Lakeport. Subsequently they formed a corporation known as the Lakeport Mill & Lumber Company, the Beaches being the principal, but not all the, stockholders therein, and removed the property in question to another lot in the town, across the street from where it was first used. The title to the lot to which the property was removed stood in the name of the corporation. On February 27, 1907, after the said machinery had been installed on this other lot, the corporation mortgaged the premises to defendant Rice to secure the payment of certain money loaned to the corporation by Rice, and April 23, 1907, the corporation made a second mortgage to defendant Rice to secure a further loan of money, and on May 20, 1907, a mortgage was made by the corporation to replace the first of the above mortgages to correct some informality or defect therein. These mortgages were duly recorded shortly after their execution. The court, on sufficient evidence, made the following finding: "That at the date of each of the said mortgages all the personal property set forth and described in paragraph 6 of plaintiff's complaint herein was firmly affixed and attached to the real property described in and covered by each of said mortgages in such manner that it became and was a part of said real property and was covered and mortgaged by each of said mortgages, and was included in and covered by the judgment and decree of foreclosure and sale and the sale thereunder as hereinbefore set forth."

Defendant Rice testified that, when he took his mortgages, he was shown the property by one of the Beaches as it then stood with the machinery affixed to the land, as the property to be mortgaged; that he had no knowledge or notice or information that there was a chattel mortgage on the machinery, and that he understood he was getting, as security for his loan, the property as it then appeared with the affixed machinery. There were some loose tools to which he makes no claim, but we do not understand that any point arises as to these. The only notice or knowledge he had of the chattel mortgage was such constructive notice as was imparted by its recordation. Hence arises the first question presented by appellant. "Grants, absolute in terms, are to be recorded in one set of books, and mortgages in another." Civ. Code, § 1171. "Except as it is otherwise in this article provided, mortgages of personal property may be * * * recorded in like manner and with like effect as grants or (of) real property; but they must be recorded in books kept for personal mortgages exclusively." Id. § 2963. "A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value; unless: * * * (2) It is acknowledged or proved, certified, and recorded in like manner as grants of real property." Id. § 2957. Instruments affecting the title to real property duly executed, acknowledged and recorded impart notice of their contents (Id. §§ 1207, 1213), and an "unrecorded instrument is valid between the parties thereto and those who have notice thereof" (Id. § 1217).

[1] There seems to be no provision of the Code expressly making the recordation of a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

chattel mortgage constructive notice of its contents. Constructive notice is that "which is imputed by law" (Id. § 18), and "every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which by prosecuting such inquiries he might have learned the fact" (Id. § 19). Section 2963, Civil Code, supra, gives the recordation of a mortgage of personal property like effect with that of grants of real property, and without doubt persons about to purchase personal property which is the subject of a chattel mortgage would be charged with constructive notice of a recorded mortgage of such property if it were not at the time part of realty.

The statute enumerates certain classes or kinds of personal property, and prescribes the conditions on which it may be made the subject of lien by chattel mortgage. So long as it remains personal property, and is not removed from the county where the mortgage is recorded, the mortgage is notice to all the world, and the mortgagee is protected in his lien as against subsequent purchasers from the mortgagor, for they are charged with notice of the mortgage.

[2] But when this same property has been permanently affixed by the mortgagor to land, and its character has been changed from personalty to realty, a different situation arises. As between the mortgagor and the mortgagee, the lien might not be thus defeated. But that is not the case here. Appellant claims that because the personal property in the present case was such as required it, for practical purposes, to be affixed to land, this fact alone was sufficient to put the respondent on inquiry, and made the chattel mortgage constructive notice to him. We cannot give this fact such compelling force. We think that the purchaser of a town lot on which, at the time, there is a building containing a planing mill plant in operation, with its machinery, engines, and boilers and other equipment permanently attached to the land, would have the right to assume that he was purchasing real property regardless of the fact that this equipment was necessarily personal property before it was attached to and became part of the land. The question here must be solved in the light of the facts. Had respondent searched the records of deeds, as was his duty, he would have found, what is conceded, that title to the lot was in the corporation, and nothing more. As he was purchasing from the corporation, had he searched the records of chattel mortgages for the name of the corporation as mortgagor, he would not have discovered the mortgage, for it was not made by the corporation. The statute, as we have seen, requires mortgages of personal property to be separately recorded and in a different book from the record of deeds. The record is constructive notice of transactions authorized to be made matter of record therein but no further. That is to say, the record is constructive notice that the property mortgaged is personal property falling within the class made the subject of chattel mortgage.

In Watkins v. Wilhoit, 104 Cal. 395, 38 Pac. 53, an assignment was made for the benefit of creditors of all the assignor's real and personal property, and was filed for record and recorded in a book entitled "Book G Miscellaneous." A creditor of the assignor subsequently obtained judgment against the assignor, and his contention in the case was that, being a nonconsenting creditor, and the assignment having included real property, it was void as to him because it was not recorded in accordance with the provisions of article 4 of the Civil Code (sections 1213–1217 and section 3466). Speaking through Chief Justice Beatty, the court said: "The whole object of article 4 of the chapter on recording transfers is to prescribe the effect of failing to record upon subsequent purchasers or mortgagees. An assignment of real property for the benefit of creditors ought to be subject to these provisions as much as any other transfer of real property, because it is as much within the policy of the statute as any other transfer of such property. Subsequent purchasers and mortgagees are entitled to the same notice in one case as in the other, and have a right to rely on the same means of knowledge as to the true state of the title when parting with value on the faith of the apparent ownership. But with respect to the creditors of the assignor who do not part with anything the case is totally different and they are not within the policy of these provisions. A transfer may be valid as to them although void as to subsequent purchasers in good faith for value." It is then shown that assignments for the benefit of creditors are not required to be recorded as prescribed in chapter 4, supra, but in accordance with sections 3463 and 3464 of the Civil Code. Thus an assignment of real property for the benefit of creditors is not notice to mortgagees of such property by virtue alone of its being recorded as prescribed by the statute although it is notice as to creditors. Said the court: "To determine what will give such constructive notice [i. e., notice of the transfer of real property] we look to section 1213 et seq. of the Civil Code, but to determine what is recording without reference to the question of notice to subsequent purchasers, we look to section 1170 of the Civil Code," which requires only that the instrument, duly acknowledged, be "deposited in the recorder's office, with the proper officer."

If it be true, as said in the opinion, that "to determine what will give constructive notice" of the transfer of real property "we look to section 1213, et seq., of the Civil Code"—i. e., to the sections embraced in article 4—it must follow that the purchaser need look no further unless, as in the cases of mortgages of real property, which are "conveyances" (sec. 1215), some statute requires it, and we have no such statute. In speaking of sections 1170 and 1213, the court said, in Cady v. Purser, 131 Cal. 552, 556, 63 Pac. 844, 845 (82 Am. St. Rep. 391): "Each must be construed with reference to the purposes for which it was enacted." That is, a conveyance of real property is deemed to be recorded where it complies with the provisions of section 1213. And, so of a chattel mortgage; and, when the statute says, as in section 2963, Civil Code, that mortgages of personal property may be acknowledged and recorded "in like manner and with like effect as grants of real property," it means that the chattel mortgage is constructive notice of what it contains, and cannot be regarded as notice in any wise affecting the title to real property. Possession by the mortgagee of mortgaged personal property is not essential to the validity of his mortgage. In examining the record for prior incumbrances, must he look to the record of deeds of realty? We think not. And, if he looked, what would he find but evidence of the transfer of land and its improvements undescribed? Conversely, the purchaser of land need not look to the record of chattel mortgages.

Chattel mortgages are to be distinguished from conditional sales where title remains in the seller until the article is paid for. Mr. Jones gives considerable attention to the subject. Pointing out that there is some conflict of authority, he says: "The better opinion is that a purchaser of the realty is bound only to take notice of the record title of the realty, and is not in any way bound to examine the records of chattel mortgages, for he is not affected by the record of a chattel mortgage, upon fixtures of such realty." Jones on Chattel Mortgages, § 134. In Pierce v. George, 108 Mass. 78, 11 Am. Rep. 310, the owner of a machine shop gave a chattel mortgage on the machinery therein, before it was set up, but in contemplation that it should be set up and attached to the building. He afterwards, and after it was set up, gave a mortgage on the land and building. Held, that the second mortgagee could hold the machinery against the first mortgagee (syllabus). Brennan v. Whitaker, 15 Ohio St. 446; Case Mfg. Co. v. Garven, 45 Ohio St. 289, 13 N. E. 493; Rowland v. West, 62 Hun, 583, 17 N. Y. Supp. 330. Mr. Bronson, in his work on Fixtures, at section 70a, says: "Constructive notice is not given to a mortgagee of the realty in respect to an existing chattel mortgage upon articles attached to the realty by filing and recording the same as a chattel mortgage, for a purchaser or mortgagee of real estate need only inquire for liens on real estate. The record of a chattel mortgage is constructive notice only of an incumbrance on chattels."

The case of Tibbetts v. Moore, 23 Cal. 208, relied on by appellant, was a case where the mortgagor mortgaged a quartz mill. He afterwards purchased a steam engine and boiler and gave a chattel mortgage thereon, and so placed the machinery in the quartz mill that it became a part of the realty. It was held that the chattel mortgage took priority. The court seems to have placed its decision on the fact that the mortgage on the quartz mill was recorded before the boiler and engine were attached to the mill and formed no part of the security then looked to by the mortgagee. It further appeared as of some apparent consequence, for the court said: "Both mortgages are executed and recorded as chattel mortgages under the statute; and, treating them in that character, there can be no doubt that the Lombard mortgage (the chattel mortgage) has priority over the other so far as relates to the property included in it."

Our conclusion is that the trial court was justified in finding that defendant Rice's mortgage took priority over plaintiff's chattel mortgage.

The rule may work hardship in some cases, but when we consider the numerous classes and kinds of personal property which, by the statute, are made the subject of chattel mortgage and the difficulty that may arise in many cases in identifying the personal property purported to be mortgaged as the same as has been affixed as part of the realty, there would seem to be much to commend the rule as Mr. Jones states it. In Brennan v. Whitaker, supra, the court said: "It devolved upon the chattel mortgagee who sought to change the legal character of the chattels after they were annexed to the realty either to pursue the mode provided by law for incumbering the kind of estate to which it appeared to the world to belong, and for giving notice of such incumbrance, or otherwise, to take the risk of a loss in case it should be sold and conveyed as a part of the real estate of a purchaser without notice."

[3] 2. It appears from the findings that: Defendant Rice commenced his action to foreclose the mortgages executed by the Lakeport Mill & Lumber Company on October 25, 1907, in which action the Lakeport Mill & Lumber Company, M. B. Elliott, plaintiff in the present action, the Collier Bros., copartners, and George J. Foutch, were defendants. On September 16, 1908, Rice, as plaintiff, recovered judgment, and on January 9, 1908, defendant Hudson was appointed receiver in said foreclosure action. He qualified as such receiver on January 14, 1908, and acted in that capacity until April 18, 1910, and collected the rents, issues, and profits of the mortgaged premises, including the property here in dispute, amounting to the sum of $458.63 after deducting the expenses of his administration as allowed by the court, which said sum is one of the sub-

jects of the present controversy. The court further found that on January 4, 1909, Rice became the purchaser of the mortgaged premises at sheriff's sale; that a deficiency judgment for $528.17 was docketed in his favor which remains unpaid; "that defendant Rice is entitled to have the moneys on deposit in this action applied on account of said deficiency judgment"; that since the commencement of the present action, and on the 2d day of January, 1910, the said Rice "received a sheriff's deed for the whole of the property covered by the two mortgages aforesaid; that thereupon he became the owner in fee and seized in fee, in the possession and entitled to the possession of all of the real property covered by the said two mortgages, including the property described in paragraph 6 of plaintiff's complaint, all of the latter being affixed and attached to and a part of said real property." The court also found as follows: "That the plaintiff herein was at the date of commencement of the said foreclosure action (October 25, 1907) the owner of the unexpired portion of a leasehold estate for two years from and after October 8, 1907, in the real property in the county of Lake, state of California, upon which said personal property was situated, but that said leasehold estate was subject to and subordinate to the liens of the said two mortgages hereinabove referred to, and was foreclosed in the said action brought to foreclose said mortgages." The court also found that in the decree of foreclosure was the following reservation: "All respective adverse claims of plaintiff and of defendant M. B. Elliott in and to the engine, boiler, and machinery described in the answer of said defendant are not determined or adjudicated in this action, or by this decree, but are expressly reserved. But all rights of said defendant Elliott as lessee in and to the lot described in the complaint (exclusive of said boiler, engine, and machinery) are found and adjudged to be subsequent and subject to plaintiff's mortgages, and are foreclosed hereby, while the question whether or not, as between the parties to this action, said boiler, engine, and machinery form part of the realty is also expressly reserved. The rights of said defendants Page B. Collier and William B. Collier, Jr., in and to the part of the premises described in their answer, arising out of any matter prior in date to the execution of plaintiff's mortgages (if any such rights they have), are not adjudicated or determined in this action or by this decree, but are expressly reserved."

It further appeared that on March 5, 1909, a settlement agreement was entered into between the Lakeport Mill & Lumber Company and the Beaches on the one part and the creditors of the said corporation on the other part, whereby the corporation assigned all its property to Herbert V. Keeling as trustee for the benefit of all its creditors. Among the creditors who assigned their claims was defendant Rice in the amount of $528.17, which is the exact amount of his deficiency judgment in the foreclosure suit. Among other paragraphs in this assignment is the following: "Fourth. That no claim be made by said creditors to the rents of the mortgaged premises heretofore foreclosed in the superior court of the county of Lake, state of California, in the action of D. A. Rice v. Lakeport Mill & Lumber Company et al., and which said rents are now in the hands of, or may hereafter be received by, a receiver heretofore appointed by said superior court, saving and excepting such claim hereto as the said D. A. Rice may have by virtue of his right thereto (thereto?) as the purchaser of said mortgaged premises at the foreclosure sale."

It does not distinctly appear that defendant Rice's claim of $528.17 represented his deficiency judgment, but, as he had no other claim and as the amounts are identical, it is not to be doubted that they are the same, and this seems not to be questioned.

Some controversy has arisen over the meaning of this fourth paragraph of the assignment, respondent claiming that "it was intended by Rice to reserve all his rights to the fund now in the hands of the court, and the trial court, after hearing all of the witnesses and documentary evidence before it, found that said assignment did not prejudice Rice's right in said deficiency judgment." Rice testified as follows: "I purchased this property at a foreclosure sale, * * * and I took a deficiency judgment. * * * Since that time the deficiency judgment has been settled. I signed my rights all away to it. There is no deficiency judgment in my favor against anybody." It seems to us that Mr. Rice took the correct view of his own agreement, and that his deficiency judgment was duly transferred to trustee Keeling. Rice reserved only his rights as purchaser under the foreclosure sale, which are no greater than if a stranger to the action were the purchaser. The trial court adjudged that he was entitled to the funds turned over by the receiver, which represented the rents, issues, and profits of the property—both the lot proper and the disputed personal property—by virtue of his deficiency judgment, and not as a purchaser at the foreclosure sale. In this we think the court was in error. He no longer had any rights as a deficiency judgment creditor, for they passed to the trustee, and what, if any, rights he had to this fund as a purchaser at the foreclosure sale, are not ascertained or found by the court. Whether or not Rice's proportion of the funds as such purchaser can be ascertained from the record, as it now stands, would be difficult to determine, and, if it could be determined, we have no power to make a finding as to the amount.

[4] 3. The record contains a copy of the

judgment roll in an action commenced by this plaintiff against Hudson in his individual capacity and defendant Rice. The purpose of that action seems to have been the same as in the present action. The judgment was in favor of defendant Hudson, and a judgment of nonsuit was entered as to Rice, and it is now pleaded in bar. Subsequently the court granted leave to plaintiff to bring the action against Hudson in his capacity of receiver, and that is the present action. We do not think the judgment in the former action was a bar to this action. Hudson individually is not the same person as Hudson receiver. Among other requirements of a judgment pleaded in bar is this—that the action must be between the same parties in the same capacity and the judgment must be "in respect to the matter directly adjudged." Code Civ. Proc. subd. 2, § 1908; Laguna, etc., Dist. v. Charles Martin Co., 5 Cal. App. 172, 89 Pac. 993; Hughes v. U. S., 4 Wall. 232, 18 L. Ed. 303. That a receiver is not liable in his individual capacity was decided in Tapscott v. Lyon, 103 Cal. 305, 306, 37 Pac. 225.

The judgment is affirmed, except in so far as it adjudges the funds turned over by the receiver to belong to defendant Rice, and, as to such funds, the judgment is reversed and the trial court is directed to ascertain to what portion, if any, of such funds Rice is entitled as purchaser at the foreclosure sale and render judgment accordingly, each party to pay his own costs incurred on this appeal.

We concur: HART, J.; BURNETT, J.

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18 Cal. App. 642

ELLIOTT v. HUDSON et al. (S. F. 6,089.)

(Supreme Court of California. June 3, 1912.)

FIXTURES (§ 19*)—RECORDING—EFFECT.

A mortgagee of land is not bound to examine chattel mortgage records to ascertain whether there is any chattel mortgage on fixtures which have been so attached to the land as to become a part thereof.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 42, 43; Dec. Dig. § 19.*]

On petition for rehearing. Petition denied.

For former opinion, see 124 Pac. 103.

PER CURIAM. The petition for a hearing in this court is denied. We are satisfied with the rule stated in the opinion of the District Court of Appeal, to the effect that a purchaser or mortgagee of land need not examine the record of chattel mortgages, so far as it applies to chattels of the character involved in this case. Whether or not the rule applies to all property mortgageable as chattels, growing crops for example, is a question not involved in this case, and upon which we express no opinion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

18 Cal. App. 683

KINSELL v. THOMAS et al. (Civ. 927.)

(District Court of Appeal, Third District, California. April 16, 1912. On Petition for Rehearing, May 15, 1912. Denied by Supreme Court June 14, 1912.)

1. HOMESTEAD (§ 124*) — CONVEYANCES—VALIDITY.

Neither spouse may alienate or incumber the homestead without the joint act of the other, and an offer so to do is a nullity, and will not be validated by the subsequent dissolution of the marriage or termination of the homestead.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 218, 219; Dec. Dig. § 124.*]

2. GIFTS (§ 25*)—PAROL GIFTS OF LAND—VALIDITY.

A parol gift of land, accompanied by possession by the donee and acts by him to carry out the purpose of the gift, is enforceable in equity.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 43–48; Dec. Dig. § 25.*]

3. HOMESTEAD (§ 118*)—GIFTS—EVIDENCE.

Evidence *held* to justify a finding that a gift of a homestead was the joint act of the husband and wife.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 203–209, 216, 217; Dec. Dig. § 118.*]

4. DEEDS (§ 96*)—CONSIDERATION—PRESUMPTIONS.

The amount recited in a deed as the consideration for the conveyance is presumptively the consideration paid, in the absence of rebutting evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 256–260; Dec. Dig. § 96.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. HOMESTEAD (§ 129*)—BONA FIDE PURCHASER—NOTICE.

Where a donee of land constituting the homestead of the donor was in the open, notorious, and exclusive possession under a parol gift in which the wife of the donor joined, a subsequent purchaser from the donor was put on inquiry as to the legal or equitable rights of the donee, and he was not a bona fide purchaser without notice, but his title was subject to the rights of the donee.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 233, 234; Dec. Dig. § 129.*]

On Petition for Rehearing.

6. SPECIFIC PERFORMANCE (§ 85*)—CONVEYANCES—GIFTS—VALIDITY.

Notwithstanding Civ. Code, § 1242, providing that the homestead of a married person cannot be conveyed unless the conveyance is executed and acknowledged by both husband and wife, a parol gift of the homestead made by a husband and wife will be enforced in equity where the circumstances of the gift are similar to those under which a like gift of real property not a homestead will be enforced, though the homestead cannot be conveyed except by a substantially strict compliance with the statutory methods.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 219–222; Dec. Dig. § 85.*]

7. SPECIFIC PERFORMANCE (§ 39*)—VERBAL CONTRACTS OF SALE—JURISDICTION OF EQUITY.

Enforcement by equity of verbal contracts for the sale of real estate rests solely on the theory that one entering into a verbal agreement to convey land to another must not be permitted in equity to refuse to execute the agreement and thereby perpetrate a fraud on the rights of the other party, and this rule applies to the transfer of a homestead of a married person notwithstanding Civ. Code, § 1091, providing that an estate in real property can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 114–119; Dec. Dig. § 39.*]

8. SPECIFIC PERFORMANCE (§ 47*)—PAROL GIFTS OF LAND—VALIDITY.

Where a husband and wife orally agreed to give the homestead to a son on condition that he would establish a home on it, and he accepted the gift on the condition, and purchased a house, removed it to the land, made improvements thereon, and took up his residence there, claiming it as his own for a considerable period prior to the death of the wife and for a greater period before the husband conveyed the land to a third person, and the improvements placed on the land enhanced the value thereof and his claim of ownership was acquiesced in by the husband and wife, equity as against the rights of the third person would protect the title of the son.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 132; Dec. Dig. § 47.*]

Appeal from Superior Court, San Mateo County; Geo. H. Buck, Judge.

Action by Dudley Kinsell against Richard Thomas and another, in which Richard Thomas filed a cross-complaint. From a judgment for defendants, plaintiff appeals. Affirmed.

Vance McClymonds, Mastick & Partridge, for appellant. Ross & Ross, for respondents.

HART, J. This action was brought for the purpose of quieting plaintiff's title to a certain piece or parcel of land situated in the town of Spanishtown, in the county of San Mateo.

The complaint alleges that the plaintiff is the owner in fee of the real property described in the complaint, and that the defendants claim some estate or interest in said property, which claim "is without right or merit, and said defendants have not, nor has either of them, any right, title, or interest in or to said property, or in or to any part thereof." The answer alleges that the property described in the complaint was a portion of a 20-acre tract of land which, for many years prior to the year of 1904, belonged to the parents of the defendant Richard Thomas, the legal title to said land standing in the name of his father, Joseph S. Thomas; that "for more than four years prior to the year 1904 the defendant Richard resided on said parcel of land with his said parents, and during the last four years of his so residing thereon with his said parents, being then of the age of 21 years and upwards, rendered and performed labor and services for his said parents in the care and cultivation of said parcel of land." The answer further avers that the parents of Richard, desiring to compensate the latter for the services so performed by him, proposed to him that they would give him the piece of land described in the complaint, and "that he might and should erect and place improvements on said last-named parcel of land and thereby increase the value thereof, and have a home for himself thereon, and requested the defendant, Richard to take possession thereof and fence the same and place a house and barn and other buildings thereon, and improve said parcel of land." It is further averred that Richard accepted the proposition thus made to him, and that, with the knowledge and consent and active assistance of his parents, he purchased a dwelling house, which was located on the opposite side of the road from the land in question, moved said house to and on said land, made additions thereto, inclosed said land with a fence, erected a stable thereon, "and filled in said lot with soil and gravel, and very largely increased the value of said parcel of land"; that at the time said land was so given to the defendant Richard the same did not exceed in value the sum of $75, but that, by reason of the improvements made thereon by said Richard, as described, and of additional improvements made thereon by him (such as filling it in, sinking a well and the planting of trees and shrubbery thereon), the said land increased in value from the said sum of $75 to the sum of $1,500 or more, that after the gift of said land under the circumstances thus disclosed the defendant Richard, for a period of more than one year, performed for his parents further and other labor and services, for which he received no compensation otherwise than through the gift of said land.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In the month of June, 1909, so the answer proceeds, the mother of Richard died, and thereafter, for a long period of time, the father of Richard went to the home of the latter and there resided, and was cared for and supported by said Richard without compensation therefor. The answer charges that on the 28th day of June, 1909, the said father of the defendant Richard (Joseph S. Thomas) conveyed the land in controversy to plaintiff, and that the last named "took and accepted said conveyance with full knowledge of all the facts hereinbefore mentioned, and then and there knew that the said defendants were in the actual possession of, and residing upon, and occupying, said land, claiming to own the same under and by reason of said gift thereof by the parents of said defendant Richard to him, said Richard." Upon the special defense thus pleaded, the defendant asks for affirmative relief, praying for a judgment and decree of the court "that plaintiff take nothing in said action; that the title of the defendants to said parcel of land be quieted as against the plaintiff in said action; that the plaintiff be enjoined and restrained from asserting any right, title, or interest therein adverse to the defendants, or either of them," etc. The defendant Richard also filed a cross-complaint, the averments of which are substantially the same as those of the answer, but, in addition to the relief prayed for in the answer, he asks for a judgment "decreeing that said plaintiff holds the legal title to said parcel of land in trust for said defendant and cross-complainant; that said plaintiff be ordered and decreed to make, execute, and deliver to said cross-complainant a good and sufficient conveyance of all of said parcel of land; that in the event said plaintiff shall fail or neglect to so execute a good and sufficient conveyance thereof that a commissioner be appointed by this court to make, execute, and deliver to cross-complainant a deed thereof." The court found the facts as alleged in the answer and the cross-complaint to be true, and rendered judgment accordingly, and therein named the clerk of said court as a commissioner for the purpose of executing a deed conveying a legal title to the disputed land to the defendant, Richard Thomas, in case the plaintiff failed to so execute a conveyance of said land. This appeal is brought here by the plaintiff from said judgment on a bill of exceptions.

The plaintiff claims title to the property described in his complaint by virtue of the deed executed by Joseph S. Thomas, the father of the defendant Richard, on the 28th day of June, 1909, conveying said property to said plaintiff. There was a homestead on all the land of which the parcel in dispute was a part, but the deed from Joseph S. Thomas to the plaintiff was executed after the death of the wife of the grantor.

The sole question presented here is whether the evidence supports the vital findings. The principal contention in this regard is founded upon the proposition that, it appearing that the land of which the property in controversy was a part was, at the time of the alleged gift, impressed with a homestead, executed and filed for record by both the parents of Richard on the 13th day of May, 1879, the evidence neither shows that the defendant's mother joined his father in the alleged gift, nor that the latter, after the death of Richard's mother, made the gift, and that, therefore, the purported transfer is absolutely void.

[1] It will, of course, not be disputed as a well-settled legal proposition in this state that "neither spouse can alienate or incumber the homestead without the joint act of the other, and that the effort so to do is a nullity, and will not be validated by a subsequent dissolution of the marriage or termination of the homestead." Lange v. Geiser, 138 Cal. 682, 72 Pac. 343; Gleason v. Spray, 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47; Powell v. Patison, 100 Cal. 238, 34 Pac. 677; Hart v. Church, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; Freiermuth v. Steigleman, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138; Payne v. Cummings, 146 Cal. 431, 80 Pac. 620, 106 Am. St. Rep. 47.

[2] Nor will the proposition be questioned that a parol gift of real property, under certain circumstances or conditions, will be sustained by courts of equity. In Bakersfield v. Chester, 55 Cal. 102, our Supreme Court concisely states the rule as follows: "A gift of real estate may be made by parol if possession is given and taken under such gift and acts done by the donee to carry out the purpose of the gift." In Anson v. Townsend, 73 Cal. 417, 15 Pac. 49, the court says that "it is, of course, settled law that courts will compel the specific performance of parol contracts for the sale of real property where there has been a part performance of the contract, and parol gifts will be enforced under like circumstances and conditions as parol sales." In Neale v. Neale, 9 Wall. 1, 19 L. Ed. 590, the court says: "Equity protects a parol gift of land equally with a parol agreement to sell it if accompanied by possession, and the donee, induced by a promise to give it, has made valuable improvements on the property, and this is particularly true where the donor stipulates that the expenditure shall be made, and by doing this makes it the consideration or condition of the gift." See, also, Freeman v. Freeman, 43 N. Y. 34, 3 Am. Rep. 657; Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Riggles v. Erney, 154 U. S. 244, 14 Sup. Ct. 1083, 38

L. Ed. 976; Townsend v. Vanderwerker, 160 U. S. 171, 16 Sup. Ct. 258, 40 L. Ed. 383; Calanchini v. Branstetter, 84 Cal. 253, 24 Pac. 149.

[3] It is manifestly true that, if the evidence in the case at bar does not show that the parents of Richard joined in the gift of the land in dispute to him, then the position of appellant is correct, since the attempted transfer of property upon which there subsists a homestead, selected by the head of the family, by one of the spouses only would be absolutely void. If, on the other hand, the evidence sustains the findings upon which the decree is planted, viz., that the transfer was by the joint act of the parents, then obviously the judgment cannot be disturbed. The only question, then, is whether the evidence supports those findings. We are of the opinion that it does, as we think must be made plainly to appear by an examination of the facts as proved.

The defendant Richard Thomas, in substance, testified that from the time he was 16 years of age up to the time he was given the land in question, and for several years after he had reached his majority, he worked and performed services for his father; that he had a number of conversations with his father and mother in reference to compensation for such services; that they often said to him, "why didn't I build a house to live in"; that, while he was living on the "Cardoza place," where he was farming seven acres of ground, his father asked him "why did I rent a place like that for? I should be home. I said, 'No; I want to be by myself. I have a horse of my own.' He said, 'You need not do that; I will give you that corner,'" referring to the land in question; that he (the father) "would give it to any one of the boys that would build there, because he wanted to have some of the boys along side of him. *My father and mother told me to go ahead and do it.*" After some hesitation, Richard accepted the gift of the land thus proffered by his father and mother, and thereupon bought from a neighbor a house situated near the land, and moved the same to said land. The house was bought by Richard in the presence of his father, and the latter rendered him some assistance in moving it to the land in controversy. Richard thereafter put some improvements on the house, enlarging it by building an addition thereto, erected a barn on the premises, sunk a well and planted trees and shrubbery thereon, and otherwise and generally so improved the place as to bring its value up to a sum exceeding $1,500, or to a sum in excess of $1,400 more than the testimony shows the land to have been valued at when the same was given to him. The witness said that he had had many conversations with his mother concerning the land, both before and after he put the house up. On one occasion he remarked to her that, having had some angry discussion with his father, "I am kind of afraid there will be some trouble about that lot some day," to which she replied: "Don't you fear; that lot is going to be yours as long as you live, and there is no law that is going to take it away from you." The witness, in this connection, declared that "she told me that she had given me the lot." Richard further testified that, after his mother's death, his father came to his home and lived with him; that on one occasion, after his mother's death, his father said to him that the lot was his (Richard's), and that he could "do with it as you have a mind to."

One Antone Davis, an old resident of Half Moon Bay, in the vicinity of which place the land concerned here is situated, testified that both the father and mother of Richard declared to him that they had given the disputed land to Richard.

There was produced in behalf of Richard other testimony, a detailed review of which in this opinion is unnecessary, tending to sustain his claim that the property had been transferred to him by gift by his parents.

The only oral testimony offered by the plaintiff in contradiction to Richard's testimony was that given by his father, Joseph S. Thomas, who testified that, "about a month or two" after the death of his wife, he had a conversation with Richard in which he proposed that the latter buy the land described in the complaint, and that Richard replied that he would buy it. This testimony was rebutted by Richard, who testified that no such conversation as that to which his father testified ever occurred.

As before stated, in our opinion the evidence, of which the foregoing statement contains a fair conspectus, sufficiently sustains the decision of the trial court.

The testimony clearly enough shows that the parents joined in the gift of the property to Richard in consideration of services theretofore rendered by the donee for them and of an agreement on the latter's part that he would build a house on the premises and otherwise improve them, and that Richard performed his part of the convention. The only contradiction to Richard's testimony as to the gift is found in the testimony of his father, who, as we have shown, referred to a conversation occurring after the death of the latter's wife, with Richard, wherein he (Joseph) proposed that Richard buy the property, and that the latter agreed to that proposition. It will be noted in this connection that Joseph does not directly say that he and his wife did not give the land to Richard under the circumstances as detailed by the latter. His testimony, at the most, may be regarded as merely furnishing a rather remote foundation for the inference that the property had not previously been transferred to Richard. But, in any event, the evidentiary significance of this testimony was a matter for the trial court to determine and its conclusion thereon, as evidenced by its findings, is binding upon us.

It is not disputed that Richard took possession of the property at the time it was given to him, made extensive, and, compared to its value, expensive, improvements thereon and continuously maintained possession and had possession at the time of th pretended conveyance of the land to plaintiff, and, indeed, up to the time of the trial of this action. It further stands as an undisputed fact that the improvements added to the property by Richard and which increased the value thereof from $75 to a sum exceeding $1,500 were made at his own expense or by the expenditure of his own labor and money. The father of Richard was to some extent supported and maintained by Richard at his home after his mother's death without compensation, other than that received through the gift of this land. All these circumstances seem to tend, and no doubt the trial court so viewed them, to corroborate the claim of Richard that the property was jointly given to him by his parents. But, as to the contention that the gift was not jointly made by the parents, we need only to refer to the testimony of Richard wherein he declared that both his father and mother agreed and proposed that the property should be given him, and that, when he accepted the gift and took possession, both acquiesced in it and always thereafter and until the death of his mother and the execution and delivery of the deed to plaintiff by his father treated Richard as the owner of the property. Even after the death of Richard's mother, his father assured him that the property belonged to him (Richard), and thus recognized as valid the joint transfer thereof to Richard by himself and his wife.

But we perceive no necessity for further pursuing a discussion of the facts. It is sufficient to repeat that, upon the whole record, we are persuaded that the trial court was justified in reaching the conclusion, as crystallized in its judgment, that the gift was by the joint act of Joseph S. Thomas and his wife. Moreover, it may be observed that all the equities appear to be with Richard Thomas and against the plaintiff. The consideration for the conveyance to plaintiff and all the circumstances clearly indicate that the plaintiff was not a purchaser in good faith.

[4] There is no evidence in the record rebutting the presumption that the amount recited in the deed as the consideration for the conveyance to plaintiff, viz., the sum of $10, was the sum actually paid by plaintiff to Joseph S. Thomas for the land and its improvements (13 Cyc. 613, and Devlin on Deeds, § 817), and it must, therefore, be assumed that that sum was the amount so paid for the land.

[5] Furthermore, Richard Thomas having been in open, notorious, and exclusive possession of the land at the time of the alleged purchase of the same from and conveyance thereof by Joseph S. Thomas, the plaintiff was, therefore, put upon inquiry as to the legal or equitable rights or both of Richard Thomas, and is presumed to have purchased the land and taken a conveyance thereof from the vendor with full notice of all the legal and equitable rights in the premises of said Richard and in subordination to those rights. Pell v. McElroy, 36 Cal. 271; Scheerer v. Cuddy, 85 Cal. 273, 24 Pac. 713; Security, etc., Co. v. Willamette, etc., Co., 99 Cal. 636, 34 Pac. 321; Stonesifer v. Kilbourn, 122 Cal. 659, 55 Pac. 587; Robinson v. Muir, 151 Cal. 123, 90 Pac. 521; Niles v. Cooper, 98 Minn. 39, 107 N. W. 744, 13 L. R. A. (N. S.) 49; Lowther Co. v. Miller, 53 W. Va. 501, 44 S. E. 433, 97 A. S. R. 1039. As the court says in the Pell Case, supra: "He cannot be regarded as a purchaser in good faith who negligently and willfully closes his eyes to visible pertinent facts, indicating adverse interest in or incumbrances upon the estate he seeks to acquire, and indulges in possibilities or probabilities, and acts upon doubtful presumptions, when, by the exercise of prudent, reasonable diligence, he could fully inform himself of the real facts of the case." The plaintiff here, having purchased land in the possession of a third person, had no right to rest upon the record title alone in making the purchase, but was required to look beyond the record title for the purpose of ascertaining what rights and equities, if any, Richard Thomas, the party in possession at the time of the alleged purchase, had in the premises. Security, etc., Co. v. Willamette, etc., Co., supra. A little inquiry or the exercise of common or ordinary diligence would have readily developed to him, it seems to us, that Richard Thomas either had a valid title to the land, acquired by gift from his parents, or that he was made to believe, and therefore honestly believed, that he owned such a title, and that under such belief he made expensive improvements which, under the circumstances, vested in him an equity in the premises of which he could not wantonly be divested, or of which he could not be deprived without reimbursement or just compensation. Even, therefore, if it be conceded that Richard Thomas did not acquire a title to the land by reason of the failure of one of the spouses to join in the gift, inquiry by the plaintiff would have disclosed circumstances, as certainly such circumstances are shown here, entitling Richard to reimbursement for the improvements he put upon the land as a condition precedent to the right of plaintiff to the equitable relief demanded by his complaint. In other words, having appealed to equity for relief, he could not expect equitable aid without doing or offering to do that equity to which inquiry

must have shown him that Richard was entitled.

From every viewpoint, the judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

[6] The petition points out that in the original opinion herein we did not directly pass upon the contention, urged by counsel for the plaintiff in their brief, "that a homestead cannot be alienated in any manner whatsoever, except as prescribed by the Code," and that, inasmuch as the Code provides that "the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife" (Civ. Code, § 1242), a parol gift of real property upon which the homestead of a married person subsists at the time of such gift is absolutely void, and cannot, therefore, be enforced, notwithstanding that such gift may be the result of the joint act of both spouses for whose benefit such homestead has been declared. While it is true that we did not discuss this precise question in the original opinion, the necessary effect of the decision is that a parol gift of real property by the husband and wife for whose benefit a homestead had been declared thereon and is in existence at the time of such gift may and will be enforced by a court of equity where the circumstances of such gift are similar to those under which a like gift of real property not impressed with a homestead will be so enforced. In our original investigation of the questions presented by this record we conceived the settled rule to be as above stated, and, therefore, regarded a discussion of the point pressed in the petition rather as supererogatory than necessary.

All that counsel say respecting the legal requisites which our Code prescribes shall be observed in order to legally abandon or convey or incumber the homestead of a married person must be conceded to be sound. And, as counsel declare, our Supreme Court, in the cases of Matthews v. Davis, 102 Cal. 202, 36 Pac. 358, Hart v. Church, 126 Cal. 471, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195, and Freiermuth v. Steigleman, 130 Cal. 392, 62 Pac. 615, 80 Am. St. Rep. 138, has very clearly shown that the homestead of a married person cannot be abandoned, conveyed, or incumbered, except by a substantially strict compliance with the methods prescribed by the statute for the achievement of any of those ends. The absolute soundness of the conclusions arrived at in those cases cannot for a moment be questioned.

But, as we view the proposition now submitted in the case at bar, the question discussed and decided in the cited cases does not arise here. The question here is not whether the parents of Richard Thomas undertook to convey a portion of their homestead without the observance of the legal requisites essential to the conveyance of such right or title to the property involved, but whether the circumstances attending their joint gift of said property to their son are such as to justify a court of equity in denying to them the right to repudiate such gift for any legal as distinguished from equitable reason that might, in an action at law, operate to invalidate such an agreement.

[7] The doctrine that verbal contracts for the sale of land, if part performed by the party seeking the remedy, may be specifically enforced, is an elementary principle in equity jurisprudence and of universal application throughout the American states. Indeed, it had its origin in English chancery law, and merely means, where invoked, the application of the doctrine of equitable estoppel to those unconscientious transactions which, though sustainable in law, courts of equity frown upon and will not uphold. In other words, the enforcement by courts of equity of verbal contracts for the sale or conveyance of land does not proceed upon the theory that the statutes requiring contracts for that purpose to be in writing are invalid or should not be strictly adhered to, but solely upon the theory that a party entering into a verbal agreement to convey his land to another should not be permitted in equity to withdraw therefrom or refuse to execute such agreement and to shield such act, if the same be unconscientious and will operate as a fraud upon the rights of the other party, behind the statute. And we have been shown no reason, and we frankly confess that we can conceive of none, why an oral agreement to sell land upon which there subsists at the time of the making of such agreement a homestead of married persons, such agreement having been jointly made by the husband and wife for whose benefit such homestead has been declared, should not as well, when the exigencies of the situation justify it, be subject to the government of equitable principles, appropriate in equity to such agreements, as are such agreements involving real property upon which there is no homestead.

The Legislature obviously conceived and evinced in the statute concerning the transfer generally of real property no less solemnity in the act of conveying such property upon which there is no homestead than in the act of transferring the homestead of a married person, for section 1091 of the Civil Code provides that "an estate in real property other than an estate at will or for a term not exceeding one year can be transferred only by operation of law, or by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing." No less or no more is required for the transfer of a homestead of a married person, and if, as is admitted to be true, an oral agreement for the sale of real property not embarrassed by a homestead may, under certain conditions, be enforced in equity, upon what principle or rational course of reasoning may it be held that such an agreement involving property upon which there is a homestead of a married person may not, under similar conditions, likewise be enforced? None can, in our opinion, be suggested.

As stated, equity does not interpose relief as to such agreements upon the theory that the statutory requirement that they shall be committed to writing in order to be enforceable in law is invalid or should not be complied with. On the contrary, equity regards such statutory requirements as of binding force in law; but, acting in personam and operating directly upon the consciences of the parties to such agreements, equity merely says that a party to such an agreement will be estopped from standing on his legal rights in support of his refusal to carry out his part of the agreement where the circumstances, as here, disclose that such conduct on his part would be unconscientious and work a fraud upon the rights of the other party.

[8] As shown in the original opinion, the court found from sufficient evidence that the parents of Richard Thomas agreed to give him the land in controversy upon the condition that he would establish a home upon it; that he accepted the gift upon that condition, in execution of which he purchased a house, removed it to the land, erected a barn on said land, planted it to trees, filled it in with dirt and otherwise improved and equipped it for the purposes of a home; that he took up his residence on the place and there resided claiming it as his own, for a considerable period prior to the death of his mother and for a greater period before his father executed the conveyance of the land to the plaintiff; that his claim of ownership of the land after he had improved it as described at great expense was acquiesced in by his parents up to the time of the death of his mother; that the improvements he put upon the land so enhanced the value of the property that, whereas it was of no greater value than $75 when it was given to him, at the time of the attempted conveyance of it by his father to the plaintiff in consideration of the sum of $10, it was valued at $1,500. To say that upon these facts a court of equity is too impotent to afford relief or that the findings do not show a case for equitable interference and the application of the doctrine of equitable estoppel against the claim that the gift is nonenforceable because it involved an attempt, futile in law, to transfer the homestead of the donors, would, in our judgment, be a reproach upon that branch of our system of jurisprudence justly distinguished for the efficacy of its remedial power in those cases which, like this, would, but for such interference, stand as exemplars of the rankest injustice sanctioned only by the unyielding obstinacy of legal rules.

We are unable to agree with counsel for the appellant upon the proposition herein discussed, and a rehearing is therefore denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

18 Cal. App. 609

STIERLEN v. STIERLEN et al.

(Civ. 1,019.)

(District Court of Appeal, First District, California. April 2, 1912. Rehearing Denied by Supreme Court June 1, 1912.)

1. Judgment (§ 818*)—Foreign Judgment—Attack.

Where an order by a court of a sister state setting aside a judgment is void for want of jurisdiction, it may be attacked either in a direct or a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1458–1481; Dec. Dig. § 818.*]

2. Judgment (§ 386*)—Setting Aside—Timely Application.

Rev. Code 1905, N. D. § 6884, providing that the court may in its discretion, within one year after notice thereof, relieve a party from a judgment taken against him through his "mistake, inadvertence, surprise or excusable neglect," does not apply to proceedings to vacate a judgment alleged to have been procured by "fraud," and courts of general jurisdiction have inherent power to vacate judgments obtained by fraud where application is made within a reasonable time, though not made within the one year provided by this statute.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 735–744; Dec. Dig. § 386.*]

3. Judgment (§ 822*)—Foreign Judgment—Conclusive Effect.

Where a wife applied to have a divorce decree set aside which had been rendered against her in a North Dakota court, and such court decided that she was not guilty of laches in making her application, this decision was conclusive in her subsequent California suit to set aside her husband's marriage with another woman.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1454, 1488–1490, 1490–1500; Dec. Dig. § 822.*]

4. Marriage (§ 60*)—Annulment—Laches.

Under Civ. Code, § 83, providing that a suit for annulment of a marriage on the ground that the defendant has a former husband or wife living may be brought at any time during their joint lives, a wife's action to annul her husband's marriage with another woman was not barred by laches, though not commenced for nearly seven years after her right to maintain the action was established by the setting aside of a divorce decree obtained by her husband.

[Ed. Note.—For other cases, see Marriage, Dec. Dig. § 60.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Emma Stierlen against George Stierlen and another to annul the marriage of defendants. From judgment for defendants and order refusing new trial, plaintiff appeals. Reversed.

Hearing in Supreme Court denied (124 Pac. 228).

Frank J. Hennessy, for appellant. F. V. Meyers, for respondents.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of defendants, and from an order refusing a new trial, in an action to annul the marriage of the defendants.

In February, 1886, the plaintiff and the defendant George Stierlen were married in San Francisco. There they continuously resided from that time until the month of March, 1896, when George Stierlen left plaintiff, and, after visiting several places, arrived in the state of North Dakota in the following month, where he remained until the following November, when he returned to California and permanently resumed his residence here, having been absent from the state for not more than seven months. While in North Dakota, and in the month of July, he filed in that state a complaint in divorce against the plaintiff herein. Within the time allowed by law she filed an answer, which she subsequently withdrew; and the court, after hearing the evidence introduced on behalf of George Stierlen, on the 17th day of November, 1896, dissolved the marriage. Upon the entry of the decree George Stierlen left the state of North Dakota and returned to California, as above mentioned, where on the 27th day of November, a few days after his arrival here, he married the defendant Rosa Scott. Shortly thereafter he again visited North Dakota, remaining there about six weeks. On the 25th day of September, 1897, Emma Stierlen filed in the North Dakota court a petition to set aside said decree of divorce, whereupon an order to show cause was issued, directing George Stierlen to show cause on October 23, 1897, why the decree of divorce should not be vacated and set aside. The hearing of this motion was continued by consent from time to time until March 14, 1898, when evidence was introduced in support of the motion, which tended to show that George Stierlen was not a bona fide resident of North Dakota, that the decree was obtained on perjured testimony, that Emma Stierlen had a good defense to the action, although her attorney (who was in the employ of her husband) advised her otherwise; that an agreement entered into between herself and her husband setting their property rights, by the terms of which she agreed not to resist the proceeding for a divorce, was the result of false representations as to the merits of her defense and as to her rights, made to her by her attorney and other agents of her husband. Said petition, which was verified, embraced many additional averments of deceit, concealment, and fraud. It may also be mentioned here that at this hearing the court's attention was for the first time called to the fact that George Stierlen in his complaint alleged that he had theretofore, with intent to give his wife a ground for divorce, committed an act of adultery. On March 14, 1898, the said motion was granted, and the decree of divorce annulled. From this order George Stierlen appealed to the Supreme Court of North Dakota, which court on April 18, 1899, dismissed the appeal. Subsequently, on August 19, 1899, the attorneys for George and Emma Stierlen joined in a stipulation dismissing the action. Over three years thereafter, to wit, in January, 1903, Emma Stierlen, represented by a different attorney, brought the present action to have declared null and void the marriage between George Stierlen and Rosa Scott. Other facts pertinent to the appeal will be mentioned in the course of the opinion.

In support of the judgment in the case at bar, and the order denying plaintiff's motion for a new trial, the respondents urge that the order of the court of North Dakota vacating the decree of divorce theretofore rendered by it was and is void, because not made within one year after the moving party in the proceeding to set aside said decree had received notice of the making thereof, and that, therefore, Steirlen's marriage to the plaintiff having been dissolved, there was no impediment to his subsequent marriage to his codefendant, Rosa Scott. The question to be determined by this court then is the validity of the said order vacating said decree of divorce. Section 6884 of the Code of Civil Procedure of the state of North Dakota was introduced in evidence at the trial of this cause, and the part thereof material to this inquiry reads as follows: "The court * * * may also in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment * * * taken against him through his mistake, inadvertence, surprise, or excusable neglect. * * *" As we have seen, the divorce was granted on November 17, 1896. The petition to set it aside was filed September 25, 1897, and it was set for hearing October 23, 1897, but, owing to continuances by consent of the parties, it was not heard until March 14, 1898, at which time the judgment was set aside. It is the respondents' contention that, the motion not having been submitted for decision within one year after the receipt by plaintiff of notice of the decree, the court lost jurisdiction to make its order setting aside the judgment—citing Sargent v. Kindred, 5 N. D. 474, 67 N. W. 826; Gaar, Scott

& Co. v. Collins et al., 15 N. D. 624, 110 N. W. 81. Other cases to the same effect are Knox v. Clifford, 41 Wis. 458; Nicklin v. Robertson, 28 Or. 278, 42 Pac. 993, 52 Am. St. Rep. 790.

[1] It is doubtless true, as stated by respondents, that where an order, made by a foreign court or by a court of a sister state, setting aside a judgment, is void for want of jurisdiction, it is subject to attack either in a direct or a collateral proceeding. Black on Judgments, §§ 275, 278, 289 and 818.

[2] But whether or not the motion to vacate the judgment came within the terms of section 6884, Code of Civil Procedure of North Dakota is unimportant here, for the reason that it was not claimed that the judgment of the North Dakota court was taken against Emma Stierlen by reason of any of the matters enumerated in that section. The attack upon the judgment was based upon an alleged fraud committed both upon the court rendering it and upon the defendant in the action. Hence that section is not controlling. Black on Judgments, § 297 et seq. In this state a void judgment is not governed by section 473, Code of Civil Procedure—our corresponding section to the North Dakota section above cited. Geo. Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59, 108 Pac. 878. The rule is the same in North Dakota. Freeman v. Wood, 11 N. D. 1, 88 N. W. 721; Kitzman v. Mfg. Co., 10 N. D. 26, 84 N. W. 585; Martinson v. Marzolf et al., 14 N. D. 301, 103 N. W. 937. There, as in many other states of the Union, the rule is that the power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction, and that the same may be exercised after the lapse of the statutory time which limits the entertainment of applications based upon surprise, inadvertence and so forth, provided that such motions are made within a reasonable time.

[3] What is a reasonable time is a matter of sound legal discretion in the court in which the motion is made.

In the present case the North Dakota court held that Emma Stierlen was not guilty of laches in making her application. That interpretation of their law is conclusive upon the courts of this state. McGrew v. Mut. Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20; 1 Black on Judgments, §§ 329, 842, 859, 861; Black on Interpretation of Laws, p. 623.

[4] The question of the plaintiff's laches in not bringing the present action until nearly seven years after the rendition or entry of the decree of divorce was decided against the defendants on the former appeal, when it was held that, under the terms of section 83 of the Civil Code, a suit for annulment of a marriage on the ground that the defendant had a former husband or wife living might be brought at any time during their joint lives. Stierlen v. Stierlen, 6 Cal. App. 420, 92 Pac. 329.

The judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 609

STIERLEN v. STIERLEN et al.

(S. F. No. 5,663.)

(Supreme Court of California. June 1, 1912.)

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Emma Stierlen against George Stierlen and another. The District Court of Appeal for the First District reversed a judgment for defendants (124 Pac. 226), and they apply for a rehearing. Application denied.

Frank J. Hennessey, for appellant. F. V. Meyers, for respondents.

PER CURIAM. In denying the application for a hearing in this court after decision by the District Court of Appeal for the First District, it is proper to say that the following, quoted from the opinion, namely: "In this state a void judgment is not governed by section 473, Code of Civil Procedure, our corresponding section to the North Dakota section above cited. Geo. Frank Co. v. Leopold & Ferron Co., 13 Cal. App. 59, 108 Pac. 878"—is not necessary to the decision. In so far as this may be construed as applying to any judgment not void on its face, viz., on an inspection of the judgment roll, we doubt its correctness and withhold our approval therefrom.

The application for a hearing in this court is denied.

162 Cal. 722

UNION LUMBER CO. v. MORGAN et al.

KING LUMBER CO. v. WEBSTER et al.

(L. A. 2,897.)

(Supreme Court of California. May 28, 1912.)

1. MECHANICS' LIENS (§ 277*)—PROCEEDINGS TO ENFORCE—ITEMIZED STATEMENT OF CLAIM—WAIVER.

Code Civ. Proc. § 454, provides that plaintiff in an action to enforce a mechanic's lien must deliver to the adverse party, after demand, a copy of the account, or be precluded from giving evidence thereof. Defendant made a single written demand for the items of three claims, and after plaintiff had delivered a bill, defendant, without applying for any further account, stipulated on the trial that the materials included in the claims were in fact delivered, and were worth the amounts charged, but reserved objection that no proof could be made for want of a bill of particulars. *Held*, that defendant had waived his right to assert that plaintiff was precluded from giving evidence on the claims included in his bill of particulars.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

2. TRIAL (§ 96*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT.

A motion to strike out all the evidence of a witness, on the ground that it was hearsay, was properly denied, where, as to a large part of the testimony, there was no basis whatever for the objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeals from Superior Court, Kern County; Paul W. Bennett, Judge.

Actions by the Union Lumber Company and by the King Lumber Company against A. E. Morgan, Mary E. Webster, and others. Judgment for plaintiffs, and, from the judgment and an order denying their motion for a new trial, defendants Mary E. Webster and another appeal. Judgment and order affirmed.

See, also, 15 Cal. App. 165, 113 Pac. 891.

E. L. Foster, for appellants. W. W. Kaye and F. E. Borton, for respondents.

ANGELLOTTI, J. These are appeals by defendants Mary E. Webster and Rose E. Janes from a judgment and from an order denying their motion for a new trial in two actions for the foreclosure of alleged mechanics' liens on certain real property situated in the city of Bakersfield, which were consolidated in the lower court. The claims of liens were for materials furnished one A. E. Morgan, a contractor, to be used by him in the construction of a dwelling house for defendant Mary E. Webster on said land, the contract between him and said Webster being invalid, because, being for an amount exceeding $1,000, it had not been filed in the county recorder's office, as required by law. Said contractor was a party defendant in said actions, defaulted therein, and has not appealed from the judgment. The only relief granted by the judgment, so far as defendants Webster and Janes are concerned, was the making of the amount found due plaintiffs, with costs, a lien upon the property and the building constructed thereon, and the provision for the sale of such property and the application of the proceeds to the payment of such amounts. It is not questioned that the findings of the court to the effect that the defendant Janes, about the time of the making of the contract by defendant Webster with Morgan, transferred all her interest in said property to said Webster are correct, or that, as declared by the judgment, said defendant Janes "has no right, title, or interest in said premises or any part thereof."

1. The complaint of the Union Lumber Company embraced three causes of action, one being for $180.20 for lumber furnished by it to said Morgan to be used in said building, and the other two being upon claims for materials furnished by others and assigned to it. As to the lumber so furnished by plaintiff, the complaint alleged that the same was in fact used by said Morgan in the construction of said building. The trial court found this allegation to be true. It is claimed that this finding is not sufficiently supported by the evidence. We have examined the evidence upon this point. While Morgan's positive testimony on direct examination, to the effect that all of the lumber was used in the construction of the building, was somewhat shaken on cross-examination as to a portion of the materials, we think that there was enough in the testimony to legally support the conclusion of the trial court.

[1] 2. It is claimed that the trial court erred in allowing the plaintiff Union Lumber Company to introduce evidence concerning its second and third causes of action, embracing the claims of its assignors, Gus Schamblin and the Bakersfield Hardware Company, being respectively for the amounts of $236.27 and $49.15, on the ground that said plaintiff had not complied with the demand in writing of defendants for a bill of particulars. See section 454, Code Civ. Proc. It appears from the record that a single written demand for the items of all three claims was served upon said plaintiff in March, 1909, and that in response to this demand a bill of particulars of the claim of the Union Lumber Company was delivered to the attorney for the defendants. Counsel for said company asserted that the bill included the items of the other claims, and counsel for defendants asserted that he never received a statement of such other items. No application was made by defendants' counsel for any further account, and the trial of the action was not commenced until September 16, 1909. It was stipulated on the trial that the materials embraced in both the Schamblin and the Bakersfield Hardware Lumber Company claims were in fact delivered, and were reasonably worth the amounts charged; the only objection reserved being that no proof could be made of the claims for want of service of a bill of particulars.

It is manifest that no injury was suffered by defendants by reason of the failure to furnish a bill of particulars as to these claims, if there was any such failure. Defendants affirmatively stipulated on the trial that the claims were correct. Admittedly plaintiff Union Lumber Company did not refuse to furnish a bill of particulars. It served a bill which, at least, embraced the items of its own account. This bill so served purported to be in answer to defendants' demand. If it was not as complete as defendants desired it to be, or if it was objectionable in any respect, we are of the opinion that defendants waived their right to have the plaintiff precluded from giving evidence thereon by failing to ask for a further account, or to make any objection to the one delivered. See McCarthy v. Tecarte, etc., Co., 110 Cal. 693, 43 Pac. 391; Graham v. Harmon, 84 Cal. 185, 23 Pac. 1097; Silva v. Bair, 141 Cal. 602, 75 Pac. 162.

[2] 3. The motion to strike out all the evidence of Morgan, given on his direct examination, as to the use made of the lumber furnished by the Union Lumber Company, on the ground that the same was hearsay, was properly denied. As to a large portion

of such lumber, at least, there was no basis at all for the contention that such testimony was open to any such objection.

4. The only objection made to certain "tags" showing lumber sold by the Union Lumber Company to Morgan was that some of them had been changed and altered. The changes and alterations were explained in a manner satisfactory to the trial court; and we cannot say that the court erred in overruling the objection.

5. We are unable to see wherein the lien of the King Lumber Company was defective. We find no other matter requiring notice.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.

(162 Cal. 664)

PACIFIC SASH & DOOR CO. et al. v. BUMILLER et al. (L. A. 2,886.)

(Supreme Court of California. May 24, 1912.)

1. Appeal and Error (§ 1058*)—Harmless Error.

A refusal to permit defendants, in an action to enforce a mechanic's lien, to prove that, after the making of the alterations for which the liens were asserted, the structures were all removed, was harmless, where the same witnesses afterwards testified to the actual date of such removal showing that it was after the liens were filed, and other evidence showed that the building as altered was used for the purposes for which it was intended for a considerable time after the completion of the alterations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

2. Mechanics' Liens (§ 26*)—Right to Lien—Removal of Improvements—Permanency of Attachment.

Where materials were permanently incorporated into the structure of a building without an agreement for their removal between the landlord and any lessee, and the building in its changed condition was put to the use for which it was intended, the right to a lien for the materials used could not be determined by the subsequent removal of that portion of the building comprising the alterations and its restoration to its original state.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 27–29; Dec. Dig. § 26.*]

3. Mechanics' Liens (§ 78*)—Right to Lien — Owner of Premises — Provisions of Lease.

Under Code Civ. Proc. § 1192, which provides that an improvement constructed with the knowledge of the owner shall be deemed to have been constructed at his instance, in the absence of notice within three days after such knowledge that he will not be responsible, posted on the building or land, an owner could not escape liability to materialmen for materials furnished for alterations and repairs, where he did not comply with the statute, though his lease provided that he should not be liable for any alterations or repair made by the lessees, and that no alterations should be made without his written consent.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 111; Dec. Dig. § 78.*]

4. Mechanics' Liens (§ 45*)—Right to Lien—Nature of Improvements—Materials Incorporated in Work.

A mechanics' lien can be asserted for lard oil applied to the threads of joints of pipe used in a structure, insulated or covered electric wire used for drop lights attached thereto, paste for soldering joints, asbestos comprising a part of the electric switchboard, and soapstone used on the inside of pipes as a lubricant to facilitate the pulling of wires through the pipes, as they are materials used in construction.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 48; Dec. Dig. § 45.*]

5. Time (§ 9*)—Mechanic's Lien—Proceedings to Perfect.

Under Code Civ. Proc. § 12, providing that the time in which any act provided for by law is to be done is computed by excluding the first day and including the last unless the last day is a holiday, and section 1190, which provides that a lien will not bind an improvement or structure for a longer period than 90 days after filing, an action begun on June 5, 1908, on a claim of lien filed on March 7, 1908, was in time.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11–32; Dec. Dig. § 9.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Pacific Sash & Door Company and others against A. W. Bumiller and others. From a judgment for plaintiffs and an order denying a new trial, defendants appeal. Affirmed.

O'Melveny, Stevens & Millikin, for appellants. Sheldon Borden, George H. Moore, Wesley H. Beach, and Andrew J. Copp, Jr., for respondents.

SHAW, J. This is an appeal from an order denying the defendants' motion for a new trial. The record shows that four separate actions to enforce laborers' and materialmen's liens upon a building were consolidated and tried together, as provided in section 1195, Code of Civil Procedure. The respective plaintiffs were Pacific Sash & Door Company, Woodill-Hulse Electric Company, Union Iron Works of Los Angeles, and E. J. Johnston. The liens were asserted against the property in Los Angeles known as the Bumiller building, owned by A. W. Bumiller, Edna B. Sullivan, and Stella B. Burks. The materials and labor were furnished and performed at the instance of one Floyd Thompson, who at the time occupied the basement and first three floors of the building under a sublease from a lessee of the owners. The materials and labor were furnished and performed in the making of certain alterations in the building so as to adapt the same for use as a theater. It consisted in putting in a balcony, the front part of which was supported by an iron beam extending across the room and fixed in the walls, and the erection of a stage with the necessary fixtures and adjuncts therefor, and other structures not necessary to mention. Prior to the alterations, the first floor, in which the principal part of the alterations was made, was an open storeroom without partitions or interior walls, and with the usual columns and girders to support the building. The owners were aware of the making of the alterations and of the use of the materials and labor therein. They posted no notice disclaiming responsibility, as it is provided in section 1192, Code of Civil Procedure, that they could have done if they had wished their interest in the building to be exempted from any lien therefor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] 1. The defendants offered to prove that after the alterations had been made the structures composing them were all removed from the building prior to the filing of any liens against it. The court ruled, refusing to allow this evidence. This is assigned as error. The same witness, however, afterwards testified to the actual date of such removal, showing that it was after the liens were filed. The evidence further shows that the building as altered was used as a theater for a considerable time after the alterations were completed. If the ruling upon the question as to the date of removal was error, it is cured by this testimony.

[2] However, we know of no statute or decision declaring that the removal of an alteration to a building, after it is completed and used, destroys the lien which the statute gives to persons furnishing materials or labor for such alteration, even if such removal is made before the filing of the lien. If the materials are actually used in and the work is actually done upon the alteration, and the change made is of such a character that it comes within the terms of the statute giving a lien for alterations upon a building, and it is completed and put to use as altered, we are of the opinion that the lien cannot be defeated by the subsequent removal of that portion of the building comprising the alterations and the restoration of the building to its original state.

[3] 2. The lease between the owners and the original lessee provided that the owners should not be liable or responsible for any alteration or repair made in the building by the lessees, and that no alteration should be made without the written consent of the owners. Defendants claim that this exempts their interest in the property from liability for the liens. We do not so understand the law. Section 1192 of the Code of Civil Procedure provides a mode by which the owner may exempt his interest from liability for any alterations made by his lessee or any other person without his consent. This provision is for the benefit of the owner, and he must avail himself of it, or otherwise, according to its terms, his interest will be liable for the lien. No exception is made in favor of owners who have contracts that the lessee shall be responsible for alterations made and that the owner shall not be responsible therefor. Such contracts are good as between the owner and the lessee and serve to fix the liability as between them, but they do not affect the rights of lien claimants. Ah Louis v. Harwood, 140 Cal. 506, 74 Pac. 41; Hines v. Miller, 122 Cal. 521, 55 Pac. 401. If the owner neglects to post a notice, after knowledge that the work of alteration has begun, as provided in section 1192, he is deemed to consent to such alterations.

[4] 3. The claim that some of the materials for which liens were allowed did not enter into or become a part of the structure is not sustained by the facts. Lard oil applied to the threads of joints of pipe used in the structure, insulated or covered electric wire used for drop lights attached thereto, paste for soldering joints, asbestos comprising a part of the electric switchboard, all constitute parts of the structure and a lien may be asserted therefor. Some soapstone was used on the inside of pipes, as a lubricant, to facilitate the pulling of wires through the pipes. This being a part of the work of construction, we think it may also be considered as a part of the material used in construction, for which a lien may be claimed.

[5] 4. The complaints in some of the actions were filed on the ninetieth day after the filing of the claims of lien. For example, Johnston's claim of lien was filed on March 7, 1908, and his action was begun on June 5, 1908. This was within the time fixed by the Code. Code Civ. Proc. §§ 1190 and 12; White v. Soto, 82 Cal. 658, 23 Pac. 210.

5. The evidence does not support the claim of the defendants that the alterations made were not a part of the building in question. The description we have already given of the character of the alterations made sufficiently shows that they became a material part of the building. It is true, they were afterwards removed and the building restored to its original condition. But it was no part of the contract with the lessee or sublessee that they should be removed, and, in any event, they were so attached to the building as to become not only fixtures, but a part of the structure of the building itself.

No other points are of sufficient importance to require notice.

The order denying a new trial is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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162 Cal. 565

HUSHEON v. KELLEY et al. (S. F. 5,781.)

(Supreme Court of California. May 24, 1912.)

1. Escrows (§ 8*)—Delivery in Escrow—Effect.

Where the grantor of land delivered a deed in escrow, which conveyed the estate in fee subject only to a life estate reserved to himself, retaining no power to withdraw it or exercise any control over it, the title immediately vested in the person named as grantee.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 9, 10; Dec. Dig. § 8.*]

2. Frauds, Statute of (§ 63*)—Conveyance of Land.

Under Civ. Code, § 1091, providing that an estate in real property other than one at will or a term not exceeding one year, can be transferred only by operation of law or an instrument in writing, a mere oral contract will not transfer title to real property.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 83, 97–104; Dec. Dig. § 63.*]

3. Escrows (§ 8*) — Operation—Modification.

A contract entered into between the grantee and grantor of land, who, by deed delivered in escrow, had conveyed the fee to the grantee, reserving a life estate to himself, whereby the grantee should have immediate possession, a stated rent being reserved, does not destroy or modify the effect of the prior delivery in escrow.

[Ed. Note.—For other cases, see Escrows, Cent. Dig. §§ 9, 10; Dec. Dig. § 8.*]

4. Executors and Administrators (§ 135*) —Performance of Decedent's Contract.

A contract entered into between the grantee and grantor of land who reserving a life estate to himself had conveyed a fee to the grantee, whereby the grantee was given immediate possession of the land on the payment of a reserved rent, is not a personal contract which is abrogated by the death of the grantee; the contract providing that the grantee, his heirs, and executors were to have possession.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 551–556; Dec. Dig. § 135.*]

5. Specific Performance (§ 6*)—Right to Specific Performance.

Under Civ. Code, § 3386, providing that neither party to an obligation can be compelled to specifically perform unless the other party has performed or is able to specifically perform, a grantee of land who entered into a contract with the grantor who had reserved a life estate that he should take immediate possession and farm and improve the land, rendering the grantor a reserved rent during his life, is not entitled to specific performance because the grantor could not be granted specific performance; an agreement to farm and improve land not being such as can be specifically enforced.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 9–11; Dec. Dig. § 6.*]

6. Life Estates (§ 3*)—Grant.

Where a grantor of land who had conveyed the fee thereof by a deed delivered in escrow, reserving a life estate to himself, entered into a contract with the grantee, whereby the latter, his heirs, executors, and administrators were to have possession and use of the same during the lifetime of the grantor, on payment of a reserved rent, such contract operates as an immediate grant of a life estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.*]

7. Vendor and Purchaser (§ 89*)—Right of Vendor to Rescind.

As an executed written conveyance of real estate in consideration of the promise by the grantee to perform services cannot be set aside by the grantor on the ground that the grantee's obligation is not such as to be specifically enforceable, an oral conveyance of a life estate, where the case has been taken from out the statute of frauds (Code Civ. Proc. § 1971) by partial performance, cannot be avoided for that reason.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 148, 149, 151, 156; Dec. Dig. § 89.*]

8. Frauds, Statute of (§ 137*)—Contracts Relating to Land—Part Performance.

While Code Civ. Proc. § 1971, provides that no interest in real property other than leases for a term not exceeding one year can be created, assigned, or surrendered other than by operation of law, or conveyances or other instrument in writing, an oral conveyance of a life estate, where the grantee has entered on the land and performed the stipulated services and rendered the reserved rent, is without the statute.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 301–326; Dec. Dig. § 137.*]

9. Ejectment (§ 116*)—Judgment for Defendant—Protection of Plaintiff.

In a suit for possession of land, where the court had sustained defendant's title and right to possession, finding that the fee had been transferred by a deed delivered in escrow, and that a present life estate had been granted under an oral contract whereby a stipulated rent was reserved, the decree should protect the right of the grantor by provisions for the continued payment of rent.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 360; Dec. Dig. § 116.*]

Department 1. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Action by Patrick Husheon against Mrs. J. W. Kelley, in which she intervened as administratrix of the estate of J. W. Kelley. From a judgment for defendant and intervener, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

J. F. Quinn and L. F. Puter, for appellant. Mahan & Mahan, for respondent.

SLOSS, J. Patrick Husheon brought this action against Mrs. J. W. Kelley to recover the possession of a tract of land in Humboldt county; the plaintiff alleging that he was the owner of said land and entitled to its possession. The defendant answered and filed a cross-complaint. In the capacity of administratrix of the estate of James W. Kelley, deceased, she also filed a complaint in intervention, in which she set up the same affirmative matter theretofore alleged in the answer and cross-complaint. The nature of these allegations will sufficiently appear from the following summary of the findings, which were in accordance with the pleadings interposed by the defendant and intervener.

The court found these facts: Patrick Husheon was the uncle of James W. Kelley. In 1899 Husheon, who was then the owner of the land in controversy, in consideration of love and affection, made, signed, and acknowledged a grant, bargain, and sale deed, whereby he conveyed said lands to said James W. Kelley. In the following year,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1900, Husheon delivered said deed to C. H. Boynton, with instructions to hold said deed until his, Husheon's, death, and then to deliver the deed to James W. Kelley. At the time of such delivery to Boynton, Husheon surrendered the absolute control and dominion over the deed, and delivered it to Boynton, without any power to withdraw the deed or exercise any control or dominion over it. Boynton accepted the deed and held it until April, 1906, when Husheon wrongfully and without the consent of Boynton or Kelley obtained possession of the deed and destroyed it.

In 1904 Husheon, who was then 71 years of age and physically weak and infirm, represented to James W. Kelley, his nephew, that the lease then covering the land would expire on January 1, 1905, and that he, Husheon, did not care to again lease said land, but, in consideration of the love and affection he bore toward said Kelley, he desired Kelley, together with his family, consisting of his wife and four children, to go upon said land, and occupy and possess the same during the remainder of the lifetime of said Husheon, and cultivate and improve said land, and pay said Husheon the sum of $500 per year as long as Husheon lived, and, upon the death of said Husheon, the absolute title to said land would, by virtue of said agreement to be entered into and said deed so delivered to Boynton, vest in said James W. Kelley, his heirs, executors, and administrators. Pursuant to said representation, Husheon agreed with said Kelley that if Kelley would enter into the possession and occupancy of said lands on or about January 1, 1905, and farm and conduct the same and improve said land and pay the said Husheon the sum of $500 per year during the lifetime of said Husheon in consideration thereof the said James W. Kelley, his heirs, executors, and administrators were to have the possession of, occupy, use, and enjoy said land, together with the profits thereof, during the lifetime of said Husheon, and on the death of said Husheon the absolute title in fee simple to said lands would vest in said James W. Kelley, his heirs, executors, administrators, or assigns. Said James W. Kelley accepted said agreement, and in consideration thereof and in accordance therewith he with his family entered into the possession and occupancy of said lands and made extensive permanent and valuable improvements thereon, and at all times until his death fully performed the terms of the agreement on his part to be performed. James W. Kelley died on December 26, 1907. At that date he was in possession of said lands with his wife and children, under and by virtue of said agreement. The heirs of said James W. Kelley have at all times since his death continued in possession and use of said land, and have continued to improve it, and have fully performed all the terms of said agreement on their part to be performed, except that they have not paid the said Husheon the sum of $500 for the year 1909, for the sole reason that said Husheon has at all times since January 1, 1909, refused to accept the said sum of $500, but the heirs of James W. Kelley and his administrator have at various times tendered to said Husheon $500, in accordance with the terms of said agreement. There is a further finding that James W. Kelley, at the time of his death was the owner in fee of the lands in question, "subject to a life estate of Patrick Husheon therein." The court drew conclusions of law as follows: That James W. Kelley at the time of his death was, under and by virtue of the deed delivered to Boynton, the owner in fee of the land, subject to a life estate of Patrick Husheon therein; that James W. Kelley was at the time of his death entitled to the possession of said lands during the lifetime of said Patrick Husheon upon payment to said Husheon during his lifetime of the sum of $500 per year; that Patrick Husheon has no right, title, or interest in or to said lands, except the right to the payment of $500 per year during his life, and, in default of such payment, then to the immediate possession of said lands and to the continued possession thereof during his life; that the plaintiff should be enjoined and debarred from asserting any claim to said land, except the right last stated. It is also declared that the defendant and intervener are entitled to a decree requiring plaintiff to make, sign, and acknowledge a grant, bargain, and sale deed to replace the destroyed deed heretofore deposited with Boynton, and to have such deed deposited in escrow with a bank designated by the court, to be held by said bank upon the terms and conditions governing the original deposit of the deed with Boynton.

Judgment was entered in accordance with these conclusions, and the plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

[1] There is no attack upon the sufficiency of the evidence to support any of the findings, except the one which declares that the title in fee, subject to a life estate in Husheon, belongs to James W. Kelley. The same declaration is also found among the conclusions of law. Whether it be treated as a fact found by the court, or as a legal conclusion drawn from the other facts, we do not doubt that it correctly declares the ownership of the land. It is found, upon evidence whose sufficiency, as we have said, is unchallenged, that in 1900 Husheon deposited in escrow his deed conveying the premises, with instructions to deliver the same, upon his death, to Kelley, the grantee named. He retained no power to withdraw the deed or to exercise any control over it. Since the decision in Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, it has

been settled law in this state that a transaction of the kind outlined has the effect of vesting the title immediately in the person named as grantee in the deed, subject only to a life interest in the grantor. Moore v. Trott, 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131.

[2] The title thus vested in Kelley was not limited or otherwise affected by the agreement made four years later. A mere oral contract cannot operate to transfer title to real property. Civ. Code, § 1091; Cranmer v. Porter, 41 Cal. 462.

[3] Furthermore, the agreement of 1904, fairly construed, was not intended to destroy or modify the effect of the prior delivery in escrow. On the contrary, the later transaction recognized the validity of what had been done, and sought to amplify it by providing for something additional; i. e., the transfer of the right of possession during the grantor's life. The case is, therefore, readily distinguishable from Keyes v. Meyers, 147 Cal. 702, 82 Pac. 304, where the later agreement was in writing, and contained provisions inconsistent with the grantee's present ownership of a remainder or other title in the land.

[4] The only other questions in the case relate to the right of possession, and the solution of these questions depends upon the effect of the agreement of 1904, and of the things occurring after the making of that agreement. We do not think the contract required the performance by James W. Kelley, personally and individually, of the obligations to occupy, farm, and improve the lands within the meaning of the rule that contracts to perform personal acts are discharged by the death or disability of the person who was to perform the acts. 9 Cyc. 631; Spalding v. Rosa, 71 N. Y. 40, 27 Am. Rep. 7. The rule does not apply where the services are of such a character that they may be as well performed by others (Janin v. Browne, 59 Cal. 37), nor where the contract, by its terms, shows that performance by others was contemplated. The ability to comply with the obligation to pay the plaintiff $500 per year was, of course, not limited to Kelley alone. And the framework of the entire agreement evidences an intent that the parties were looking to the occupancy and farming of the lands, not merely by Kelley, but by his family as well. While the agreement was made with Kelley, it seems sufficiently clear that the plaintiff desired to provide a home, not only for his nephew, but for the wife and children of the latter. Some support is afforded this construction by the circumstance that, for several years after Kelley's death, Husheon accepted annual payments of $500, and during this time made no objection to the occupancy of the lands by Kelley's heirs, or to their performance of the obligations assumed by him. We are not to be understood as saying that the occupancy, improvement, and cultivation of the lands could be turned over to strangers, but, merely that the contract would be satisfied if either Kelley or the surviving members of his family executed these functions.

[5] The case, therefore, presents this situation: The defendant is in possession under an oral agreement binding Kelley and his successors to do certain things, which they have done so long as the plaintiff would accept, and are willing to continue to do. If the relief sought by the defendant and intervener, and granted by the decree, is the specific performance of an agreement to execute a lease for the life of the plaintiff, the difficulties in the way of sustaining the granting of such relief are serious, if not insurmountable; for, even though the obligation to farm and improve the land was not personal, in the sense that it could be performed only by J. W. Kelley, yet it might be viewed as such an undertaking as a court of equity would not undertake to specifically enforce. Stanton v. Singleton, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; Los Angeles, etc., Co. v. Occidental Oil Co., 144 Cal. 528, 78 Pac. 25. And, if specific performance could not be decreed against the party seeking such relief, it will not be awarded in his favor. Civ. Code, § 3386; Cooper v. Pena, 21 Cal. 404; O'Brien v. Perry, 130 Cal. 526, 62 Pac. 927. This objection would not apply where the acts whose performance was not the subject of compulsion by equitable decree have been in fact fully performed. Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536. But here there had been no such full performance. Kelley and his successors were bound to continue performance during plaintiff's life, and, of course, their obligation could not be said to be complete until his death.

[6] But we think the findings, if construed, as they should be, in support of the judgment, do not set forth a case of an executory contract which has to be enforced, but rather one of an oral present transfer of a life interest, in consideration of certain promises upon the part of the grantee. The finding is that it was agreed that, if Kelley would enter into possession of the lands with his family, and do the things agreed upon, said "Kelley, his heirs, executors and administrators were to have the possession of, occupy, use and enjoy said land, together with the profits thereof, during the lifetime of said Husheon." This was an immediate grant of a life estate. No further transfer or conveyance, whether by way of lease or otherwise, seems to have been contemplated.

[7, 8] An executed written conveyance of real estate, in consideration of the promise by the grantee to perform services, cannot be set aside by the grantor on the ground that the obligation of the grantee is not the subject of specific performance. Norris v. Lilly, 147 Cal. 754, 82 Pac. 425, 109 Am. St. Rep. 188.

Where the conveyance is oral, instead of written, the case is not different, if there has been such part performance as to take the case out of the operation of section 1971 of the Code of Civil Procedure. There can be no doubt that the taking of possession by Kelley and the performance by him and his successors of the obligations of payment and improvement of the land were sufficient to overcome the want of a written transfer. It is well settled in this state and elsewhere that "a gift of real estate may be made by parol, if possession is given and taken under such gift, and acts done by the donee to carry out the purpose of the gift." Bakersfield T. H. Ass'n v. Chester, 55 Cal. 98; Manly v. Howlett, 55 Cal. 94; Burlingame v. Rowland, 77 Cal. 315, 19 Pac. 526, 1 L. R. A. 829; Neel v. Neel, 80 Va. 584; Wamsley v. Lincicum, 68 Iowa, 556, 27 N. W. 740. If a grant of the fee may thus be effectively completed by an oral transfer, coupled with a taking of possession and the performance of other acts in reliance upon the grant, undoubtedly a life interest may be similarly transferred. In Manning v. Franklin, 81 Cal. 205, 22 Pac. 550, the court held that the defendant was entitled to retain the possession, which he had taken under an agreement that, if he would erect a house on plaintiff's land, pay certain charges, and care for the plaintiff in sickness, he might occupy said house during the natural life of the plaintiff. The defendant had, until plaintiff brought the action to oust him, complied with the terms of the contract. In answer to the objections that the contract was a lease, and that specific performance could not be enforced, the court said: "This is in no sense a lease of the property, but a sale of a life estate therein. There is no attempt to compel a specific performance of the contract, and therefore the question whether a contract, the consideration of which is personal services could be specifically enforced does not arise." Here we find the essential difference between the case at bar and that of O'Brien v. Perry, supra, where the agreement was that, if the defendant would do certain things, the plaintiff "would give and grant to her the right to live with her said family" upon his premises. This was not a present transfer, but an agreement to make one in the future, and this agreement, under the principles above discussed, could not be specifically enforced.

[9] The court, therefore, properly held that the administratrix and heirs of James W. Kelley were entitled to the possession of the property in controversy. It was further proper for the court, in its decree establishing the right of the respondents, to protect the right of the plaintiff to the continued performance of the obligations which were the consideration for the transfer of his life estate. Neel v. Neel, supra; Wamsley v. Lincicum, supra. It was to this end that the decree provided that the plaintiff was entitled to the payment of $500 per year, payable as agreed, during his life. But in this no regard was had to the agreement on Kelley's part to farm and conduct the lands. The plaintiff is entitled to insist on compliance with this obligation as well as with the agreement to pay $500 per year. This omission may, however, be remedied by a slight modification of the judgment.

It is ordered that the judgment be modified by adding thereto, after the fifth paragraph, the following: "It is further ordered, adjudged, and decreed, notwithstanding anything hereinbefore contained, that, if the administratrix or heirs of said James W. Kelley shall, at any time during the lifetime of said Patrick Husheon, fail to occupy, farm, or conduct said lands, said Patrick Husheon shall have the same rights and remedies hereinbefore declared to belong to him upon default in the payment to him of the sum of $500 per year"; and, as so modified, the judgment is affirmed.

The order denying plaintiff's motion for a new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

162 Cal. 633

POLLARD et al. v. REBMAN et al.

(L. A. 2,862.)

(Supreme Court of California. May 18, 1912. Rehearing Denied June 17, 1912.)

1. Easements (§ 3*)—Grants—Validity.

Where an owner of land buys an easement over adjoining land for a way to a public street, the easement becomes at once appurtenant to his land, giving him access to the street over the way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 8–12; Dec. Dig. § 3.*]

2. Easements (§ 12*)—Grants—Validity.

Under Civ. Code, § 1217, providing that an unrecorded instrument is valid as between the parties thereto, an unrecorded conveyance of an easement for a way to a public street is good as against the grantor.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35–38, 41; Dec. Dig. § 12.*]

3. Vendor and Purchaser (§ 233*)—Bona Fide Purchaser—Notice of Easements.

Under Civ. Code, § 1214, providing that an unrecorded conveyance is void as against a subsequent purchaser in good faith and for a valuable consideration, a purchaser for a valuable consideration without notice of an unrecorded conveyance of an easement for a way, or of the use of the way, and without knowledge of facts sufficient to put him on inquiry, takes the land free from the easement.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563–566; Dec. Dig. § 233.*]

4. Vendor and Purchaser (§ 229*)—Bona Fide Purchaser—Notice of Easements.

Where a way over land to a street is in use and is marked on the land either by effects of the travel over it or by fences, or other points, so that it is plainly visible and its use obvious to one who examines the premises, a purchaser thereof is put on inquiry as to such easement, and he cannot claim as a purchaser without notice, and he takes subject to the way granted under an unrecorded conveyance.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 477–494; Dec. Dig. § 229.*]

5. Vendor and Purchaser (§ 244*)—Bona Fide Purchaser—Notice of Easements.

Evidence *held* to support a finding that a purchaser from a grantor who had previously conveyed by an unrecorded conveyance a right of way over the premises to a public street had no notice of the existence of the way or knowledge of facts putting him on inquiry, so that he took the land free from the burden of the way.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611; Dec. Dig. § 244.*]

6. Easements (§ 7*)—Right of Way—Prescription.

Where the use by an owner of land of a way over adjoining land to a street was disputed, and frequently interrupted and from time to time temporarily prevented, the use did not ripen into title by prescription.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 16–19, 27–33; Dec. Dig. § 7.*]

7. Appeal and Error (§ 981*)—Discretion of Court—Denial of New Trial.

Denial of a new trial on the ground of newly discovered evidence will not be disturbed on appeal, in the absence of abuse of discretion or error on the part of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

8. New Trial (§ 102*) — Grounds — Newly Discovered Evidence.

A party to obtain a new trial on the ground of newly discovered evidence must show that he used reasonable diligence to discover the evidence prior to the trial, and that he failed to do so, and did not know of it in time to produce it, or in time to apply for a continuance to enable him to produce it at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. § 102.*]

9. New Trial (§ 102*) — Grounds — Newly Discovered Evidence.

Where alleged newly discovered witnesses were either employés of the defeated party or near neighbors and well known to him at the time of the trial, and their whereabouts were known and they were in the state at the time of the trial, a new trial on the ground of newly discovered evidence was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. § 102.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by Alida A. Pollard and another against Frances M. Rebman and another. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. L. Murphey, for appellants. E. L. Brady and J. L. Brady, for respondents.

SHAW, J. [1] When the owner of a parcel of land buys an easement over adjoining land for a way from his land to a public street, such easement becomes at once appurtenant to his land, giving him access to the street over such way.

[2] If he fails to have the conveyance for such easement legally recorded, it remains good, nevertheless, against the grantor of the easement.

[3] But if the grantor of the easement, in such case, for a valuable consideration, afterwards unconditionally conveys the servient tenement to another, who takes without notice of the grant of the right of way, or of the use of the way, and with no knowledge of facts sufficient to put him on inquiry concerning it, he will take the land free from the burden of the easement. Civ. Code, §§ 1214, 1217; Bell v. Pleasant, 145 Cal. 413, 78 Pac. 957, 104 Am. St. Rep. 61.

[4] If the way is at the time in use, and, although not fenced, is marked on the ground either by the effects of the travel over it or by fences or other bounds, so that it is plainly visible and its use obvious to one who examines the premises, the purchaser is put on inquiry with regard to such easement and cannot claim as a purchaser without notice thereof. He cannot escape this by buying without examination. He is bound to take notice of that which a reasonably careful inspection of the land would disclose to him.

[5] These well-established principles are decisive of the present case. On June 5, 1888, I. R. Dunkelberger conveyed to John Rebman lot numbered 26 of Block A, in the Dunkelberger tract, fronting 50 feet on the south line of Ninth street in the city of Los Angeles, and extending back 200 feet. On the following day Dunkelberger, who then owned the land lying to the east and south of said lot, conveyed to Rebman a right of way 12 feet wide from the rear of said lot, and extending 100 feet east to a public blind alley opening into a public street called Sunbury street. This conveyance was not acknowledged, and was never recorded. Afterward Rebman conveyed lot 26 to his wife, Frances M. Rebman, the principal defendant herein, who has ever since remained the owner thereof. This conveyance, of course, carried with it the appurtenances, including the said right of way for access to the street from the rear of the lot. The Rebmans resided on lot 26 before the deed from Dunkelberger to Rebman in 1888, and have ever since resided there. Rebman used the rear end of the lot as a place for storing lumber and building material, and used said way as a means of ingress and egress. A barn was built by him on the southwest corner of the lot and a fence was built inclosing the lot. A gate was made in the fence at the rear, by means of which access to the way from the lot was afforded. The way was used by him whenever occasion required, from 1888 down to October 23, 1907, when this action was begun. On May 10, 1902, Dunkelberger, for a valuable consideration, conveyed to Alida A. Pollard, the principal plaintiff herein, all the land south of lot 26, including the way in question. (B. S. Pollard is joined merely because he is her husband.) The way was

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not excepted, and no mention of the Rebman easement was made in the deed to Mrs. Pollard. The purchase was made for Mrs. Pollard by S. B. Abbott, her father. Neither he nor his daughter knew anything of the conveyance of the right of way, or of Rebman's claim thereunder. Abbott and Mrs. Pollard both examined the premises before purchasing, but neither of them saw the gate or observed any marks on the ground indicating any use of the said way. The gate was plainly visible, and the mere fact that they did not observe it would not exempt them from its effect as notice of the existence of the easement, if it was sufficient to constitute notice thereof. If the marks of use of the way were then plainly visible, they would be chargeable with notice of them also. On this point, however, there was evidence on behalf of the plaintiff to the effect that there were at that time no marks on the ground comprising the right of way to indicate that it was or had been used as a way from Rebman's lot to the street, or at all. The defendant apparently offered no evidence as to the condition of the ground in this respect at that time. We must, therefore, since the finding of the court was adverse to defendants, assume that there were no such indications of use. The only thing to put Mrs. Pollard on notice of the easement was the gate in Rebman's back fence. It cannot be said as matter of law that this gate alone was sufficient to give notice to any one that Rebman owned or claimed an easement across the intervening land from his gate to the public street for access to and from the street from his lot, or that it was sufficient to put an intending purchaser on inquiry as to such easement. The finding of the court that Mrs. Pollard took her land free from the burden of the easement must be sustained.

[6] Defendants also claim title to the easement by adverse possession, continuing from the time of Mrs. Pollard's purchase in May, 1902, to the time the action was begun, being a few months more than the five years required to gain title by such means. The evidence shows that the use by Rebman was disputed, and that it was frequently interrupted and from time to time temporarily prevented during this period. This is sufficient to defeat this claim of title by prescription.

[7] A motion for new trial, made on the ground of newly discovered evidence, was denied by the court. We perceive in this no abuse of discretion or error on the part of the trial court. The only new evidence for the defendant, set forth in the affidavits, consisted of testimony to the effect that the roadway along the strip claimed as a way was well beaten and clearly visible from the effects of use, at and prior to the time of Mrs. Pollard's purchase.

[8] In order to obtain a new trial because of newly discovered evidence, the applicant must show that he used reasonable diligence to discover it prior to the trial, and that he failed to discover it, and did not, in fact, know of it in time to produce it, or in time to apply for a continuance in order that he might produce it, at the trial.

[9] As Rebman and his wife lived on the lot and themselves caused the use by which they claim that the roadway was made visible on the ground, they must admit that they knew, better than any one else, of the existence of such marks. The witnesses now proposed to be produced and whose testimony, it is claimed, has been discovered since the trial, were either employés of Rebman who used the way and made the marks while in his service, or persons who lived on adjoining lots and who were well known to him at the time. It is not claimed that they were out of the state or that their whereabouts was unknown at any time. No reason is given for the failure to ascertain what they would testify, or for the failure to produce them as witnesses, except that defendants did not expect that Mrs. Pollard or Mr. Abbott would deny that they saw the roadway and the marks of use thereof on the ground. Defendants heard them testify at the trial and did not then ask for a continuance to procure rebuttal testimony, nor did they themselves testify that any wheelmarks, hoof marks, or other evidence of use of the way, was visible on the ground. They cannot deny that they then had good reason to believe that the proposed new witnesses could and would testify that there were such marks, if, in fact, they existed. It is obvious that reasonable diligence was not used. This is sufficient to uphold the denial of the new trial.

The judgment for plaintiffs and the order denying defendants' motion for a new trial are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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162 Cal 625

In re ALLEN'S ESTATE.

(S. F. 5,961.)

(Supreme Court of California. May 18, 1912. Rehearing Denied June 17, 1912.)

1. GUARDIAN AND WARD (§ 11*)—RIGHT OF PARENT TO APPOINT.

The parents' right to appoint a guardian by will or deed is wholly statutory.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 34–39; Dec. Dig. § 11.*]

2. GUARDIAN AND WARD (§ 11*)—RIGHT OF APPOINTMENT BY WILL.

Under Civ. Code, § 138, providing that after divorce the court may make a subsequent disposition of the child, the court's decree, granting the custody of a minor child to the mother, does not terminate the father's claim to its control, but determines merely that the wife shall have the custody of the child until some later disposition is made, so that on the wife's death the husband is entitled to the custody of the minor child, the order not having undertaken to provide for its custody after the mother's death; and hence the mother could not, under Civ. Code, § 241, providing that either parent, if the other be dead or incapable of consent, may appoint a guardian by will, appoint a testamentary guardian—the father not being incapable of consent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 34–39; Dec. Dig. § 11.*]

3. Guardian and Ward (§ 11*)—Testamentary Guardian—Statute.

Under Civ. Code, § 241, providing that either parent may by will appoint a guardian of a legitimate child, if the other parent be dead or incapable of consent, a testamentary appointment by the mother during the life of the father, who was not incapable of consent, is not revived on his demise, so as to become effective.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 34–39; Dec. Dig. § 11.*]

4. Adoption (§ 15*)—Review—Persons Entitled to Allege Error.

One who has no actual right to the custody of a child, and has not been appointed guardian, cannot complain on appeal of the action of the court in adoption proceedings, merely because the mother of the child made an ineffectual attempt to appoint the appellant as a testamentary guardian.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 26; Dec. Dig. § 15.*]

5. Guardian and Ward (§ 10*)—Eligibilities for Appointment.

Any competent person may petition the court to appoint her guardian of an infant, and may appeal from the denial of that petition.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

6. Guardian and Ward (§ 10*)—Appointment—Priority.

Where a mother's attempted appointment of a guardian by will was invalid, the one whom she attempted to appoint had no right of priority over other persons, who petitioned to be appointed guardian of the minor child.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 23–33; Dec. Dig. § 10.*]

7. Guardian and Ward (§ 13*)—Appointment—Discretion of Trial Court.

Where both of the parents are dead and cannot claim, under Code Civ. Proc. § 1751, their right of priority to be appointed guardian of their minor child, the trial court is, under Civ. Code, § 246, authorized to exercise its discretion in the appointment, the primary consideration being the temporal and moral welfare of the child; and its action will not be set aside on appeal, unless there is an abuse of discretion.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

8. Guardian and Ward (§ 13*)—Appointment—Preference of Child.

Under Civ. Code, § 246, the desires of a minor child, who is under the age of 14 years, may be considered in the appointment of a guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 40–52; Dec. Dig. § 13.*]

Department 1. Appeals from Superior Court, City and County of San Francisco; James S. Troutt, Judge.

In the matter of the adoption and in the matter of the guardianship of the person and estate of Mavis Kathryn Allen, a minor. Jennie Allen appeals from orders granting Louisa V. Allen's petition for adoption and guardianship. Affirmed.

J. S. Reid, for appellant. D. S. Hirshberg, for respondent.

SLOSS, J. The controversy embodied in these appeals turns upon the right to the custody of Mavis Kathryn Allen, a minor. The minor is the daughter of Peri E. Allen and Catherine B. Allen, who, at the date of the child's birth, August 29, 1900, were husband and wife. On October 16, 1901, in an action instituted by the wife, a decree of divorce was entered in her favor, and by the decree the care, custody, and control of the minor were awarded to the plaintiff in the action, "with the privilege given the defendant of visiting said child at all reasonable times."

The mother, to whom the custody of the child had thus been granted, died on June 2, 1903, leaving a will, which contained, among other things, a request that if the testatrix should leave issue Jennie Allen, a sister of Peri E. Allen, and appellant here, should "have the care and custody of such issue." We shall assume, for the purposes of this opinion, that the appellant is correct in construing the language quoted as equivalent to a testamentary appointment of Jennie Allen as guardian so far as the testatrix had power to make such appointment. The will was admitted to probate in the superior court of the city and county of San Francisco. After the death of the mother, the father applied to said court for letters of guardianship of the person and estate of said child, and such letters were issued to him on August 12, 1903. From then until August 19, 1910, when Peri E. Allen died, he remained the guardian of the person and estate of the child.

On September 15, 1910, Louisa V. Allen, with whom Peri E. Allen had contracted a second marriage, instituted a proceeding for the adoption of the minor, and on the same day the superior court of the city and county of San Francisco made an order for such adoption. At that time, and for a long period theretofore, the appellant was out of the jurisdiction. She returned to San Francisco, and on December 14, 1910, served a notice of motion to revoke the order of adoption and filed a petition for letters of guardianship of the person and estate of the minor. The respondent, Louisa V. Allen, filed an opposition and a counterpetition for her own appointment as guardian. The motion to set aside the adoption and the petitions for letters of guardianship were heard together. The court denied the motion to set aside the adoption, and in the guardianship proceeding made an order denying Jennie Allen's petition for letters of guardianship and granting Louisa V. Allen's petition for such letters.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Jennie Allen now appeals from these orders. She raises many points; but, as most of them are founded upon the assumption that the attempt of the mother to appoint a guardian by will was valid, the inquiry may be simplified by an examination of the soundness of this assumption.

[1, 2] The right to appoint a guardian by will or deed is statutory. Under the law of this state (Civ. Code, § 241), a guardian of a legitimate child may be so appointed "by the father, with the written consent of the mother, or by either parent if the other be dead or incapable of consent." The father, in this case, was not dead when the will took effect. Nor was he "incapable of consent." It is argued that the decree of divorce, whereby the custody of the child was awarded to the mother, terminated the father's claims to the control of the child, and made him incapable of objecting or consenting to any disposition that the mother might see fit to make. The contention attributes a very broad meaning to the term "incapable of consent." But, even if this interpretation be adopted, the argument fails, for the reason that the father's right was not absolutely ended by the decree of divorce. The decree dealt with the situation as it stood, and merely determined that, as between the husband and the wife, the child should be placed in the custody of the latter until some other disposition should be made. Civ. Code, § 138. It did not undertake to provide for the custody of the child after the mother's death. In line with this view, it is almost universally held that, upon the death of the parent to whom is awarded the custody of a minor child by the decree divorcing the parents, the other parent becomes entitled to the custody. 14 Cyc. 809; In re Blackburn, 41 Mo. App. 622; In re Neff, 20 Wash. 653, 56 Pac. 383; In re Robinson, 17 Abb. Prac. (N. Y.) 399; Taylor v. Jeter, 33 Ga. 195, 81 Am. Dec. 202. And such, too, has been the ruling of this court. Schammel v. Schammel, 105 Cal. 258, 38 Pac. 729. It follows that at the time of the mother's death, when her appointment was intended to become operative (Civ. Code, § 241; Matter of Baker, 153 Cal. 537, 96 Pac. 12), she had no right of appointment, because the father was alive and entitled to the control, which he in fact assumed. The attempted appointment of appellant as testamentary guardian was therefore entirely without force or effect. See In re Neff, supra; Taylor v. Jeter, supra; McKinney v. Noble, 38 Tex. 195.

[3] It is suggested that the appointment, even if ineffectual when the mother died, became operative upon the subsequent death of the father. It is sufficient to say, with regard to this contention, that it is not consistent with the language of section 241 of the Civil Code, which authorizes an appointment by the mother in the event only that the father be dead or incapable of acting. The condition must exist at the date of the mother's death, or, at least, when her will is probated. It is also claimed that the father could give validity to the appointment by a subsequent consent. This we need not consider; for the father did not consent to the guardianship of the appellant. On the contrary, he manifested his dissent in the clearest possible way by applying for and obtaining letters of guardianship himself.

[4] If the appellant could base no valid claim on the provision of the mother's will, it follows that she is without interest or standing to attack the adoption proceedings, and cannot complain of any error, if error there was, in those proceedings. She had no natural right to the custody of the child, and had not been appointed guardian by the court.

[5-7] She was, however, entitled, as any other competent person would be, to petition the court to appoint her as guardian, and to appeal from the order denying her petition. But, on such application for letters, she had no right to preference over the respondent, who also sought to be appointed. Since the appointment sought to be made by the will of the mother was ineffectual, the court was authorized, under the provisions of section 246 of the Civil Code, to exercise its discretion in appointing one or the other of the contending parties, having due regard for the considerations set forth in that section. Where neither parent is claiming the right (Code Civ. Proc. § 1751; In re Campbell, 130 Cal. 380, 62 Pac. 613), the primary consideration for the guidance of the court is "the best interest of the child with respect to its temporal and moral welfare" (Civ. Code, § 246); and the conclusion reached will not be set aside on appeal, unless it was reached as the result of an abuse of discretion. It cannot be said that the record here discloses such abuse of discretion.

[8] At the time of the hearing, the minor was, and had for some time been, residing with the respondent. She expressed a desire to have the respondent appointed; and this preference the court had the right to take into account, even though the child was under the age of 14. Civ. Code, § 246. The contentions that the respondent had concealed property belonging to the minor, and that her own interests were adverse to those of the minor, were properly presented to the trial court; but the evidence was such as to justify the conclusion that there had been no willful concealment, and that the respondent asserted no property right as

against the claims of the minor. It is unnecessary to detail the evidence relating to the respondent's ability, financially and otherwise, to care for the child. On the whole case, we are satisfied that the court was justified in determining that the interests of the child, in respect to its temporal, mental, and moral welfare, would be best served by the appointment of the respondent.

We have not discussed the question whether by the adoption the respondent had not gained the status of parent, and, as such, a preferential right to letters of guardianship. In view of the claim that the respondent sought, by adopting the child, to forestall appellant's expected assertion of a right to guardianship, we have preferred to consider the respective claims of the parties to letters as if the adoption had not preceded the rival applications to be appointed guardian. Even on this state of facts, the action of the court below should, as we have seen, be upheld.

The orders appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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162 Cal. 668

HEALTON v. MORRISON et al.

(L. A. 2,731.)

(Supreme Court of California. May 24, 1912. Rehearing Denied June 22, 1912.)

1. Taxation (§ 679*)—Tax Sale—Purchase by State—Resale—Notice.

Under Pol. Code, § 3897, providing that notice of sale of land purchased by the state at a tax sale shall be given by publishing the notice for three successive weeks prior to the sale and by mailing a copy of the notice to the party to whom the land was last assessed, the notice must be mailed to the person to whom the land was last assessed at least three weeks prior to the sale, and, if mailed within three weeks before the sale, the sale is void.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

2. Taxation (§ 679*)—Tax Sale—Purchase by State—Resale—Notice.

Under Pol. Code, § 3897, requiring notice of the resale by the state of land purchased at a tax sale to be mailed to the person to whom the land was last assessed at his last known post office address, the tax collector is not bound to look beyond or outside of the assessment roll to ascertain such person's address, and, if the roll does not furnish the address, mailing of the notice is not required.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

3. Taxation (§ 679*)—Tax Sale—Purchase by State—Resale—Notice.

Under Pol. Code, § 3897, requiring notice of the resale by the state of land purchased at a tax sale to be mailed and registered to the person to whom the land was last assessed at his last known post office address, the tax collector discharges his duty by mailing and registering such notice whether it is received by the party or not, but the party is entitled to all the advantages for its delivery afforded by the postal system, and the tax collector has no right by any request for its return indorsed thereon to do anything which may prevent the party from having these advantages.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1361, 1362; Dec. Dig. § 679.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action to quiet title by A. L. Healton against Ada R. Morrison and others. From a judgment for defendants, plaintiff appeals. Affirmed.

C. A. Stice, for appellant. O. B. Carter and Ralph A. Chase, for respondents.

LORIGAN, J. This is an action to quiet title to lot 22, block S, of the Dayton Heights tract, in the county of Los Angeles; plaintiff claiming title under a tax deed from the state of California. It was stipulated on the trial that plaintiff had no other title to the lot, and that, unless the tax deed to him was valid, the title to the property is vested in the defendant, Ada R. Morrison.

The defendants had judgment, the decree requiring repayment to plaintiff (as defendants had offered in their answer) of the amount of the taxes, penalties, interests, and costs against the property, paid by plaintiff to the state on its sale of the lot to him. It is only necessary on this appeal to consider one of the many points upon which it is claimed by respondents that the deed from the state under which plaintiff claims is void, and the judgment properly rendered in their favor. The deed from the state, upon which appellant relied, was made by the tax collector of Los Angeles county on behalf of the state pursuant to a sale at public auction, noticed for and held on February 19, 1909, and the deed recited, among other things, that on February 2, 1909, the tax collector had mailed a copy of the notice of sale "postage thereon prepaid and registered, to the party to whom the lot was last assessed next before such sale."

Evidence was introduced on the part of respondents showing that the party to whom the lot was last assessed prior to the sale and her address as appeared from the assessment roll was "Mary E. Waldron, Los Angeles, Calif."; that on February 2, 1909, the said tax collector mailed a registered letter containing a copy of the notice of sale of said property addressed to "Mary C. Waldron, Los Angeles, Calif."; that the registered letter bore a notification on the envelope "Return in 5 days to W. O. Welch, County Tax Collector, Los Angeles, Cal.," and that on the 8th day of February, 1909, said registered letter was returned to the office of said tax collector by the postmaster. It was further proven that under the rules of the United States postal department governing the delivery of registered letters, if such a letter is not delivered or called for by the party to whom it is addressed, it is retained in the post office for a period of 30 days, unless instructions on the envelope call for its return to the sender at an earlier date, in which case it would be returned to the latter pursuant to the instructions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Section 3897 of the Political Code prescribing the proceedings to be taken on the sale of property which has been purchased by the state for delinquent taxes requires that the tax collector shall cause a notice of such sale to be published for three successive weeks prior to the date fixed for the sale, and, in addition to such published notice, "that it shall be the duty of the tax collector to mail a copy of said notice, postage thereon prepaid and registered to the party to whom the land was last assessed next before the sale at his last known post office address." We held in Smith v. Furlong, 160 Cal. 522, 117 Pac. 527, that the giving of the notice by publication and the mailing of a copy of the notice to the party to whom the land was last assessed next before the sale, at his last known post office address, were both jurisdictional prerequisites to a valid sale by the state, and that a failure to give the latter notice when the condition existed requiring it, rendered the sale and the deed thereunder void; that the recital in a tax deed from the state on the matter of notice is not conclusive evidence on the subject, but prima facie evidence only and open to attack.

In making the sale in question here the tax collector in an attempt to comply with the section, in addition to publishing the notice of sale, mailed a copy of the notice. As to such mailing it is, however, insisted by respondents that the action of the tax collector in directing the letter to "Mary C. Waldron" instead of to "Mary E. Waldron," her proper name as it appeared on the assessment roll, amounted to no notice at all.

[1] We do not stop to consider this point, but address ourselves to the more serious and vital one made by respondents as to the mailing itself of said notice, namely, that within the contemplation of the section it was not mailed within the proper time; that, when the condition exists requiring the tax collector to give personal notice by mail to the person to whom the property was last assessed before the sale, it is necessary that such notice be given for at least the same period as the notice of sale is required to be published previously thereto, to wit, at least three weeks before the sale, and, as it appears here that notice by mail was not given for that period, the tax collector acquired no jurisdiction to make the sale or to execute a valid deed, and the trial court properly so held.

We are satisfied that this position of the respondent is correct. It is true that there is nothing in the section relating to the giving of personal noice by mail which specifically requires it to be given for any particular length of time, but, when we take into consideration that the giving of notice by mail is made just as essentially a jurisdictional prerequisite to a valid sale as the publication of notice and the giving of both is provided for in the same section, it is only a proper and reasonable construction to hold that, though specific direction is not given as to how long before the sale personal notice shall be mailed, the legislative intent is that it shall be given for the same period as notice by publication is required. The justness of this construction is strengthened when we consider the special purpose to be subserved by requiring personal notice. While the state might have sold the land without notice to the delinquent owner (Fox v. Wright, 152 Cal. 59, 91 Pac. 1005), it deemed it proper in the exercise of that right to provide for giving him a last opportunity to redeem before the property would be lost to him. In providing for such notice the Legislature made both publication and notice by mail, where the last post office address was known, equally essential. It realized that published notice of the sale, which is generally intended to accomplish the dual purpose of imparting notice to the delinquent owner that his property is about to be sold by the state and informing the public that they may purchase it, was not the most efficacious method of giving the delinquent owner a final opportunity to redeem, and so, in addition, personal service of notice by mail was provided for. It is quite obvious that the personal notice so required ordinarily affords a far better opportunity to the delinquent owner for obtaining notice of a contemplated sale of his property and permitting its redemption by him than is afforded by a publication, and certainly, in requiring the tax collector under certain circumstances to give both, the Legislature was providing as complete a method of protecting the delinquent owner against the loss of his property as could be reasonably devised, and undoubtedly, intended to make the method effective. No distinction, in terms, is made in the section between the period before the sale that publication shall be made and the time before the sale when the notice by mail shall be sent, and no valid reason can be suggested why a construction should be placed on the section making any such distinction. The period is fixed as to the time of publication prior to the sale. The section is silent as to the time of mailing notice prior thereto, but the subject with which the Legislature is dealing is notice to the delinquent owner and the section prescribes that both notice by publication and by mail where residence is known are essential to the validity of a sale. As the giving of both kinds of notice is equally essential, it could not be the intention of the Legislature to distinguish between the period for giving either, to fix definitely the period of publication and leave it to the discretion of the tax collector (which would be the effect of any other construction) as to the time before the sale when he should give notice by mail. So construed, the section would make a distinction between the importance and efficacy of the two essential kinds of notice provided to be given where it is certain that the Legislature intended to make none. If the section were construed as leaving it to the discretion of the tax collector to determine at what time prior to the sale he should mail notice, in many instances the attempt on his part to comply with the section would amount to practically no notice at all, as where the address of a party to whom the land was last assessed, as appearing on the assessment roll, might be in some distant part of the state, or in one of the remote states of the Union, or in some foreign country, and the notice mailed would be sent at such a time that it would render it extremely doubtful, if not impossible, that it should be received in time to act upon it. And in practically every case where the notice was given less than three weeks before the sale the question could fairly arise whether the notice was sent within a reasonable time. There would thus be no fixed standard for determining in any case whether the statute had been complied with, and in each it would be left to the court to determine whether, under the facts and circumstances disclosed, the tax collector had complied with the statute in giving the particular notice. The Legislature could not have intended in requiring the giving of the notice by mail as an additional benefit to the delinquent owner to make it of such uncertain advantage. Personal service by mail and notice by publication were deemed equally important, and the reasonable construction of the section is that, as the giving of published notice and personal notice under certain conditions are made necessary jurisdictional prerequisites to authorize a sale, it was intended that the notice required to be given to the property owner by mail should be given for the same period prior to the sale as is provided that notice by publication shall be made, namely, at least three successive weeks before the date fixed for the sale.

[2] And the duty imposed upon the tax collector of giving this personal notice is so easy of performance as to afford itself a reason why the Legislature did not specifically mention the time prior to the sale when this notice should be sent, being satisfied that as the giving of both kinds of notice was prescribed, the simplicity of the task of sending the personal notice would leave no doubt of the intention of the Legislature to require it to be given for the same period of time prior to the date of sale as publication must be had. All the tax collector has to do as to mailing notice is to look at the assessment roll and ascertain to whom the property about to be sold was last assessed, and whether the address of the party appears thereon. If it does, he must mail a notice. If it does not, no mailing of notice is required. He is not bound to look beyond or outside the assessment roll to ascertain the address of a party when the assessment roll does not furnish it. Kehlet v. Bergman, 121 Pac. 918. If, however, the address is found on the assessment, roll, all that is necessary to do is to inclose a copy of the printed notice in an envelope, address it, and register and mail it at least three weeks prior to the date set for the sale. Nor is this task made any more difficult when the notice of sale embraces a large number of pieces of property to be sold under the same notice. The tax collector himself fixes the date of sale, and can fix it sufficiently in advance so as to permit him to comply with this simple provision of the law as to personal notice.

As in the instant case the notice by mail was not given to the party to whom the land was last assessed for the period provided by the statute, the tax collector acquired no jurisdiction to make the sale in question, and the tax deed under which plaintiff claims was by the superior court properly held to be void.

It further appears in this case that the tax collector in mailing the notice on February 2, 1909, noted on the envelope a request that the registered letter, if not delivered in five days, be returned by the postmaster to him, and that, in compliance with the request, the registered letter was returned to him on February 8th. This notice by mail was sent some eleven days only before the sale, and by reason of the instructions on the letter for its return to the tax collector if not delivered in five days and a compliance therewith by the postmaster, only a period of five days was afforded the party to whom the letter was addressed within which to receive it. It further appears that a registered letter, if there is no indorsement thereon requiring an earlier return, will be retained in the post office for thirty days after its receipt.

[3] In view of the conclusion reached, that notice by mail was not given under the section because it was not sent in time, it is unnecessary to discuss what would be the effect of this procedure by the tax collector when, by reason of the indorsement on the registered letter, it is returned to him many days prior to the date of sale and during which it might have been delivered to the person to which it is addressed. In that regard it may be suggested, however, that there is no provision in the statute making it any concern of the tax collector whether, after he mails the notice, the party to whom it is mailed gets it or not. When he mails it in time, addressed, and registered, his duty is discharged. Neither is there any statutory requirement that he should put a notification on the letter calling for its return to his office at all, and certainly there is no warrant whatever for placing a notification thereon

calling for such return at any time earlier than the date set for the sale. The party to whom the letter is addressed is entitled to all the advantages for its delivery which the postal system, domestic or foreign, affords, and the tax collector has no right to do anything which may prevent him from having them. If in discharging his duty in mailing the notice the tax collector desires, in aid of supporting his recital in a tax deed that notice was properly mailed, if it be questioned, to produce the registered letter sent, which has been subsequently returned to him, he can effect this very simply by having his notification call for a return of the registered letter at some date subsequent to the day set for the sale.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

162 Cal. 648

BRAMMAN v. CITY OF ALAMEDA et al.
(S. F. 5,527.)

(Supreme Court of California. May 21, 1912.)

1. Licenses (§ 7*)—Occupations or Privileges—Classification.

A municipality cannot impose different license taxes upon persons exercising the same privilege, but it may classify occupations, distinguish between different occupations and between those engaged in similar occupations, and in classifying persons in the same general occupation may adopt any rule of gradation which is reasonable and equally affects all within the class.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. § 7.*]

2. Licenses (§ 7*)—Occupations or Privileges—Classification.

The city of Alameda, pursuant to its charter (St. 1907, p. 1051) art. 2, § 17, subds. 17, 19, authorizing it to impose license taxes and to authorize the granting of licenses for revenue and regulation, adopted an ordinance imposing a license tax of $10 a year on the business of retail meat dealers, and a tax on every vehicle or wagon not otherwise specified, used in connection with any business, of $5 a year if drawn by two or more animals and $3 a year if drawn by only one. *Held* that, construing the provisions of the ordinance imposing the tax on vehicles in connection with the further provisions, it did not impose a tax on the business of retail meat dealer, and a further tax on a mere incident of that business, but imposed only one tax on the business and classified persons engaged therein according to the number of animals and vehicles used, and that such classification, not being unreasonable, was valid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15, 19; Dec. Dig. § 7.*]

Department 2. Appeal from Superior Court, Alameda County; W. S. Wells, Judge.

Action by H. S. Bramman against the City of Alameda and another. From a judgment for plaintiff, defendants appeal. Reversed.

M. W. Simpson, for appellants. Fred W. Fry, for respondent.

LORIGAN, J. This action was brought to restrain defendants from enforcing against plaintiff the provisions of an ordinance of the city of Alameda (No. 484) providing, among other things, for a license tax on wagons and vehicles used in connection with any business. The complaint alleges that plaintiff is a retail dealer in meats, having a shop in the city of Alameda where meats are sold and from which shop plaintiff delivers them to his customers in the city of Alameda by means of carts drawn by horses; that he has paid the license tax imposed by said ordinance for the carrying on of his general business as a retail dealer in meats, but has refused to pay a license tax assessed by said ordinance upon the wagons used by him in connection with his business, upon the ground that said wagon license tax is unconstitutional and void. The provisions of the ordinance which are attacked are set forth in the complaint, and then follow allegations of interference with the business of plaintiff and injury thereto sustained through the conduct of defendants in delaying, detaining, and harassing, upon the public streets of said city, the drivers of the delivery wagons of plaintiff in an effort to compel the payment of said wagon license tax and the threatened arrest of plaintiff and his employés if said license tax is not paid. The prayer was for a perpetual injunction restraining the enforcement or attempt to enforce the collection of said wagon license tax from plaintiff or his employés. The defendants challenged by demurrer the sufficiency of the facts set forth in the complaint to constitute a cause of action. It was stipulated on the hearing of the demurrer that the general business license tax referred to in the complaint as having been paid by the plaintiff under the same ordinance imposing the said wagon license tax was the sum of $10, and that the carts referred to in the complaint used by plaintiff in the delivery of meats to his customers consisted of two, each drawn by one horse. The demurrer to the complaint was overruled, and, the defendants declining to answer, judgment was entered against them granting plaintiff the relief prayed for, and from this judgment defendants appeal.

The only point in the case is as to the validity of the section of the ordinance dealing with the wagon license tax, it being conceded that if this section is invalid the complaint states a cause of action; if valid, the demurrer of the defendants should have been sustained.

A proper consideration of the point involved necessitates a reference to some of the provisions of the charter of the city of Alameda, as also to some of the provisions of the ordinance in question.

Since 1907 the city of Alameda has been organized and existing under a freeholders' charter (Stats. 1907, p. 1051), which provides, as to the powers and limitations of the council thereof (article 2, c. 2), that it shall have power (section 17, subd. 17) "to impose all license taxes subject to the restrictions elsewhere in this charter contained, and to provide for the collection thereof." Subdivision 19: "To authorize the granting of licenses for any lawful purpose for revenue and regulation and to fix by ordinance the amount to be paid therefor and to provide for revoking the same; provided that no license shall be granted for a longer period than one year."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig Key No. Series & Rep'r Indexes

In 1908 the ordinance entitled "Ordinance No. 484, providing for municipal licenses for regulation and revenue and establishing the license tax therefor," some of the provisions of which are here in question, was adopted. The opening section of the ordinance makes the usual provision declaring it unlawful to commence or carry on any "trade, calling or occupation" specified in the ordinance or to "keep, employ or use any article or thing" for which a license tax is imposed without first having procured a license from the city so to do. Section 10 of the ordinance declares: "Except as hereinafter otherwise provided, where more than one occupation or business of those upon which a license tax is hereinafter imposed is carried on or conducted by one person, firm or corporation at any one location, the license tax for such combined business or occupation shall be the tax hereinafter imposed on that one of said occupations or business which is most heavily taxed hereunder." Then follow provisions imposing a license tax upon various specified occupations and businesses in the form usually pertaining to such ordinances. On the business of a retail meat dealer is imposed a general business license of $10 a year, which is the license plaintiff paid.

Coming now to the sections of the ordinance particularly involved here: Section 85 is as follows: "For every person, firm or corporation who owns, keeps or uses any wagon or vehicle hereinafter described the license tax shall be as follows: Subdivision A. For every hack, coach, carriage, omnibus or automobile used for the carrying of passengers for hire with driver, $5.00 per year for each such vehicle. Subd. B. For every wagon or cart drawn by two or more animals and used for the hauling of rock, dirt, manure, sand, loam, gravel, lumber, coal, hay, brick, cement, ice or oil, $6.00 per year for each such vehicle. For every such wagon or cart drawn by one animal, $3.00 per year. Subd. C. For every truck or dray, express wagon, garbage wagon, or cart, vegetable garden wagon, or peddlers' wagon, $8.00 per year when drawn by two or more animals, and $5.00 per year when drawn by one animal. Subd. D. For every motor vehicle used in transporting merchandise, $15.00 per year. Subd. E. For every vehicle or wagon not hereinbefore in this section included, where used in connection with any business, $5.00 per year when drawn by two or more animals and $3.00 per year when drawn by one animal. Subd. F. The provisions of section 10 of this ordinance shall not apply to the license taxes imposed by this section."

It is asserted by the appellant, in his brief on this appeal, that the view taken by the trial court holding section 85 of the ordinance invalid was that the power conferred by the charter upon the council "to authorize the granting of licenses for any lawful purpose for revenue or regulation" extended only to the granting of licenses for the lawful purposes followed by the licensee, and that the "lawful purpose" specified in the charter means the main business, pursuit, or occupation of the licensee, and that the plaintiff is not pursuing the business of operating a horse and wagon, but the operation of a horse and wagon is merely incidental to his main pursuit, which is that of conducting the business of a retail meat market, upon which alone a license tax may be imposed.

Counsel for respondent, while insisting that this view of the trial court was correct, does not limit his attack upon the validity of the subdivison of the ordinance to that ground alone, but, in a voluminous and exhaustive brief upon the subject of the invalidity of the section, insists that it is violative of constitutional provisions, among others, that the section considered of itself, or in connection with the other provisions of the ordinance, is unreasonably discriminating, lacks uniformity in its operation, makes an arbitrary classification, and is class legislation. While, as we say, the brief of respondent discloses a careful and thorough presentation of these constitutional points, we perceive no occasion for any extended discussion of the subject.

When we come to a particular examination of the section in controversy and the ordinance of which it is a part, and apply to their consideration well settled rules governing the proper exercise by municipalities of the power to license where it is conferred both for regulation and revenue, we think this case is brought within a narrow compass, which does not involve the consideration of anything save these rules. It is to be observed that the particular provision of the ordinance which was held to be invalid by the trial court is found in a general ordinance of the municipality imposing license taxes for the purposes of both regulation and revenue. In considering the validity of the license tax here in question, it is immaterial whether the license sought to be imposed is one for regulation or for revenue, because, under the charter, the municipality has authority to impose it for both. The sole question is was there a valid exercise of power.

The principal point made by the respondent against the validity of section 85 of the ordinance is that it is an unwarranted attempt by the municipality to impose a license upon (taking his particular occupation) an incident to the business of a retail meat dealer, namely, the use of delivery wagons therein, while there has already been imposed a license tax upon the business itself to which such use is incident.

[1] It may be conceded that the municipality could not divide a single taxable privilege and impose a separate tax upon different elements which constitute it. But when the entire ordinance here in question is given proper consideration, it is evident that nothing of this kind is attempted. While, of course, the municipality in the imposing of taxes may not discriminate in doing so by imposing different license taxes upon persons similarly situated and exercising the same privilege, still it is well settled that it may classify occupations, and in doing so may distinguish between different occupations, and likewise distinguish between those engaged in similar occupations. In adopting a classification with reference to the persons engaged in the same general occupation or business for the purpose of imposing a license tax, any standard or rule of gradation may be adopted which is fair and reasonable. The license tax to be paid by those engaged in a certain business or occupation may be made to depend on the business done—the receipts, sales, or business transacted. County of San Luis Obispo v. Greenberg, 120 Cal. 300, 52 Pac. 797. The license tax of those engaged in the laundry business may be graded according to the number of persons employed there; this being one method of gauging the amount of business done in the laundry. Ex parte Li Protti, 68 Cal. 635, 10 Pac. 113. That there is no discrimination as to a license tax resulting from a lower tax upon those selling articles at a fixed place of business than is required of those otherwise selling the same articles is sustained in Ex parte Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527. In Ex parte Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946, in which the cases just referred to are cited, it was held that an ordinance imposing a higher license tax upon restaurants where meals are not prepared by the proprietor or members of his family and those where they are so provided was a proper classification of the occupation of keeping a restaurant. Within the rule of the authorities, as the classification may be accomplished in a variety of ways, any gradation will be sustained which is reasonable and fair and equally affects all within the class to which it is applied.

[2] And among the varying standards which may be adopted, certainly it cannot be objected to as unfair or unreasonable that as to a business class a reasonable distinction between members of the class cannot be based upon the number of vehicles and animals which are used in the prosecution of the business. This, as in the case of distinguishing a class by the number of persons engaged in the conduct of the business, is a method of gauging the amount of business done or the capital employed therein and imposing a license tax upon the occupation under such gradation. Such a classification is recognized as a proper one in Dillon on Municipal Corporations, § 1410, vol. 4 (5th Ed.) p. 2473. See, also, Wilson et al. v. City of Lexington, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834. This it appears to us is just what the ordinance here in question does. We are not dealing with two distinct ordinances, nor with one ordinance imposing a tax upon the privilege of doing business in a municipality and likewise taxing vehicles, but with a single ordinance taxing occupations or business privileges and attempting to classify and license all such businesses for both regulation and revenue. Section 85 of the ordinance cannot be taken as something separate and distinct from the other provisions of the ordinance, but its provisions must be construed together and the ordinance looked to in its entirety. When this is done, no difficulty is presented in determining exactly what is provided thereby. As far as the retail butcher business is concerned, conducted as a distinct business upon which a tax may be imposed, the ordinance divides it into classes consisting of those who maintain a place of business in the conduct of which no vehicles are used, and those who in the conduct of the same business use vehicles. Classification being authorized, such a classification is fair, rational, and reasonable. The municipality is required to maintain and repair its streets. Those engaged in a business and using vehicles to transact it are doing so to the constant detriment of the street and are also in the enjoyment of a use thereof which is a use not commonly exercised by all the inhabitants of the municipality. It is therefore only proper and fair that those who make use of the streets in the conduct of a business privilege should pay therefor, and that those who use the streets most should pay more than those who use them less. This is the rule obviously adopted in the ordinance in question and upon which the classification is based. All engaged in the business of retailing meats, but who use no vehicles in transacting that business, constitute one class and for the privilege of doing business as such in the municipality are required to pay an annual license tax of $10. Another class are those engaged in such business but using vehicles in connection therewith. The license fee to be paid by this class is made dependent upon the number of animals used in the vehicles employed in the business. This is to be ascertained by the simple standard of multiply-

ing the number of vehicles used in the business and drawn by one animal by three and those drawn by more than one animal by five, and as may be the case with each retail meat dealer using vehicles, this product added to the amount of the tax of $10 will constitute the amount which under the ordinance these latter dealers are, as a class, required to pay as an occupation tax. This is all there is to the ordinance. Section 85, as counsel for respondent assumes, is not at all a tax on vehicles as an essential incident of a business on which a license tax has by previous provisions of the ordinance been fixed. The section is a constituent part of the general ordinance fixing occupation taxes, and is to be read and construed as such, and amounts simply to a classification of retail meat dealers into those who do, and those who do not, use vehicles in following their business (a classification quite rational and fair as we have pointed out) and measuring the occupation tax to be paid by the classification. The municipality undoubtedly has a right to make reasonable classifications, and as this is clearly what was done here, and the license tax imposed as an occupation tax on the business under the classification, it was a valid exercise of municipal power and should have been so held.

Various other objections to the section are made by respondent; but, in view of the construction which we have placed upon the ordinance as an entirety, we do not perceive any necessity for discussing these other points.

The judgment appealed from is reversed.

We concur: HENSHAW, J.; MELVIN, J.

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162 Cal. 638

MORRISSEY et al. v. GRAY et al.

(Sac. 1,891.)

(Supreme Court of California. May 20, 1912.)

1. JUDGMENT (§ 17*)—PROCESS TO SUPPORT—SERVICE.

Where the complaint stated a cause of action against defendant individually and as administratrix, and the summons was directed to her as administratrix and individually, and the sheriff's return recited that service was made on defendant personally, the return was sufficient to support a judgment against defendant in her representative capacity.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25–33, 422; Dec. Dig. § 17.*]

2. JUDGMENT (§ 497*)—COLLATERAL ATTACK—SERVICE—RETURN.

Where from the judgment roll it appears that a judgment was rendered against a defendant in a representative capacity, that the action was brought against him in two capacities, representative and individual, that the summons and complaint were directed to him for service in both, and the return of the sheriff shows generally that personal service on him was made, the court to uphold the judgment may consider the matters appearing on the judgment roll in support of the judgment, and the service, when taken in connection with the complaint and summons, was a service on defendant in both capacities warranting a judgment against defendant in both.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

3. JUDGMENT (§ 495*)—VALIDITY—PRESUMPTIONS.

All intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts is conclusively presumed to have been acquired unless the record shows the contrary.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.*]

4. PROCESS (§ 164*)—SERVICE—RETURN.

Where one is sued in an individual and representative capacity, and process is directed against him in both, the return of service, stating that process was served on him personally, is not conclusive that the service was on him only in his individual capacity, or that he was not served in his representative capacity, but the return is equivocal, and the court may permit an amendment by the officer, so as to show that service was made on defendant in the capacity in which the judgment against him was actually rendered, or, on the trial, in support of the judgment, allow proof of the actual capacity in which service was made.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 176, 239–248; Dec. Dig. § 164.*]

5. JUDGMENT (§ 495*)—PRESUMPTION—SERVICE—RETURN.

Where one is sued in his individual and representative capacity, and process is directed against him in both, and the return of service merely states that process was served on him personally, and from lapse of time, or for other reasons, it is impossible to make proof justifying the court on motion in allowing an amendment to the return to show the capacity in which service of process was made, the court must determine the validity of the judgment on the entire record, and where it appears from the record that the true nature of the action against defendant was in both capacities, and process issued directed service in both, the court, in connection with the return of the sheriff, may presume that, in whichever capacity judgment was rendered, service on defendant in that capacity was had and jurisdiction acquired.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. § 495.*]

6. JUDGES (§ 47*)—DISQUALIFICATION.

A judge who, while a practicing attorney, acted as attorney for a widow in procuring letters of administration of the estate of her deceased husband and an order setting apart the homestead, is not thereby disqualified from sitting in a suit to foreclose a mortgage executed by the deceased husband brought against the widow and the heirs.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214–219, 222, 223; Dec. Dig. § 47.*]

7. QUIETING TITLE (§ 44*)—FORECLOSURE—ACQUISITION OF TITLE.

Where a person's title is deraigned through a sheriff's sale under a judgment in a mortgage foreclosure proceeding, and the judgment is valid, any fraud on the part of such person in procuring a deed from defendants in the foreclosure action is immaterial.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

Department 2. Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by Matthew Morrissey and others against John C. Gray and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. H. Morrissey, for appellants. W. H. Carlin, Carleton Gray, and A. E. Boynton, for respondents.

LORIGAN, J. This action is brought to have declared void a certain judgment of foreclosure and deed issued upon a sale thereunder, as also a subsequent deed from plaintiffs to the defendant Gray, and for a decree that plaintiffs are the owners of the real property described in said foreclosure judgment and said deeds, and that said Gray and the other defendants hold said property in trust for plaintiffs. A demurrer to the second amended complaint was sustained, and, plaintiffs declining to amend, judgment was entered in favor of the defendants, and from the judgment plaintiffs appeal.

The complaint in this action is quite voluminous; but, for reasons hereafter to be stated, it will be necessary only to set forth the allegations upon the one legal proposition which we think it necessary to consider. With respect to it the complaint alleged that one Timothy Morrissey died intestate in July, 1887, a resident of Butte county, leaving real property therein consisting of 300 acres of land (described in the complaint) and as his heirs at law his widow and eight minor children, said widow and five of said children being the plaintiffs in this action; that said land was community property; that his widow, the plaintiff Johanna Morrissey, employed the defendant Gray, then a practicing attorney in Butte county, to represent her in procuring letters of administration upon the estate of her deceased husband; that on August 1, 1887, he having made application in her behalf, she was appointed administratrix of his estate; that upon her application, said Gray representing her, an order of court was made March 26, 1888, setting apart to said widow and her children a homestead consisting of 45 acres out of said 300 acres of land; that prior to his death said Timothy Morrissey had executed a mortgage on said 300 acres to one Mose Wick to secure an indebtedness of $1,500, and on April 15, 1892, proceedings were commenced to foreclose said mortgage, said Johanna Morrissey individually, and as administratrix of the estate of Timothy Morrissey, deceased, and all the children of said deceased, being named as defendants in the foreclosure complaint; that a return of service of summons in said action, as appears in the judgment roll in said foreclosure proceeding, is as follows: "Sheriff's service. I hereby certify that I received the within summons on the 17th day of April, A. D. 1893, and personally served the same on April 19th, A. D. 1893, by delivering to Johanna Morrissey a copy of said summons attached to a copy of the complaint personally in the county of Butte, and that by order of the plaintiff's attorney none of the other defendants were served. Dated this 19th day of April, 1893. R. A. Anderson, Sheriff, T. A. Atchinson, Deputy." That the defendant Gray became judge of the superior court of Butte county in 1891 and was such when the foreclosure proceedings were brought and thereafter; that none of the defendants named in said foreclosure proceeding appeared in said action, but on July 1, 1893, on the order of said Gray, presiding as superior judge, what purported on its face to be a judgment by default was entered therein against the plaintiff herein Johanna Morrissey in her individual capacity and not against any of the other defendants therein, and what purported to be a decree of foreclosure was made and entered by said court; that the said court never acquired jurisdiction over the subject-matter of said property or of the said estate of Timothy Morrissey, deceased, or of plaintiffs herein by service of process or otherwise; that said decree is of no validity against the said property and estate of said Timothy Morrissey, deceased, or the interests of plaintiffs therein; that on August 2, 1893, pursuant to said decree and an order of sale, the property was sold by the sheriff to one C. T. Wick, who on the same day, at the solicitation of said defendant Gray, sold and assigned to the latter all the right acquired by him under the certificate of sale without the knowledge of these plaintiffs or either of them.

The complaint contains other allegations under which it is asserted that the defendant Gray, having acted as attorney for the widow in procuring letters of administration and an order setting apart the homestead, was disqualified to act judicially in the foreclosure proceedings, and hence the judgment rendered by him was void; that a certain amended return of the service of summons was ordered by him to be made as presiding judge of the superior court after he had acquired an interest in the property, and which amended return reciting that service of summons in the foreclosure proceeding had been made upon Johanna Morrissey as administratrix of the estate of Timothy Morrissey, deceased, was also void. It was also alleged that the defendant Gray, after obtaining the assignment of the certificate of sale from Wick, had procured from plaintiffs a deed to their interest in the 300-acre tract of land in consideration of a reconveyance by him to the plaintiff Johanna Morrissey of the homestead premises embraced in the decree of foreclosure and sheriff's certificate of sale, and that said deed was obtained from plaintiffs by the exercise of undue influence proceeding from the confidence and trust they reposed in him as former attorney in the administration of the estate, and alleged misrepresentations as to their rights in the property sold under the foreclosure proceedings.

The defendants filed a disclaimer as to

any interest or claim to the land referred to in the complaint as the homestead premises and embraced in this action, at the same time that they filed their demurrer—general and special—which was sustained.

The complaint in the present action was filed after trial and a judgment against the plaintiffs therein in a previous action subsequently appealed to this court and the judgment sustained in Morrissey et al. v. Gray et al., 160 Cal. 390, 117 Pac. 438. That action, which was brought by other children of Timothy Morrissey, deceased, coheirs with these present plaintiffs in the land left by their deceased father, involved the validity of the same judgment as is attacked here; the right of recovery upon the appeal being predicated on the part of the plaintiffs therein, upon the same claim of invalidity as is now asserted in this complaint by the present plaintiffs. In the action referred to it will be observed, from an examination of the opinion of this court disposing of that appeal, that the claim of the plaintiffs there was that the judgment in the foreclosure proceeding of Wick v. Johanna Morrissey et al., which purported in terms to be a judgment of foreclosure against Johanna Morrissey as administratrix and against the estate of the deceased, was void because it appeared from the original return of service of summons in the judgment roll that the only service thereof was made on Johanna Morrissey, individually, and not in her representative capacity as administratrix of the estate, and that the only judgment which the court could render, and which it was claimed in legal effect was rendered, foreclosed only the rights in the property of Johanna Morrissey, individually, and did not affect the interests of the other plaintiffs as heirs at law of deceased, no service having been made upon them; that the validity of that judgment is to be determined solely upon an inspection of the return of service made by the sheriff (recited above) as it appeared upon the face of the judgment roll when the judgment became final; and that a certain purported amendment to this return thereafter made by order of the court—the defendant Gray presiding as judge—reciting that service was made on Johanna Morrissey as administratrix was void.

On the trial of the action referred to, the deputy sheriff who made the original return was called as a witness and testified that in fact he had made service of process upon Johanna Morrissey as administratrix. The trial court permitted him to amend the original return accordingly and then sustained the judgment theretofore rendered as one foreclosing the interest of the estate of the deceased in the property. It was held here on that appeal that the ruling of the trial court was correct, the amendment properly permitted, and the judgment valid. That decision would appear, practically, to dispose of any possible advantage which could accrue to the present plaintiffs if the order of the superior court here involved sustaining the demurrer should be reversed. Upon the trial under the amended return which has been made a part of the judgment roll, the validity of the judgment would now be beyond question on any ground urged here.

Appellants, however, who were not parties to that action, or to that appeal, and are not bound by the judgment therein, have submitted this appeal on its own record for disposition, and we are satisfied that, under the allegation in the complaint here with reference to the matters contained in the judgment roll, the judgment is valid.

In this connection, it may be observed that we are not concerned with the judgment in question as far as it purports to affect the rights of the plaintiffs, children of the deceased, in the homestead property embraced in the judgment of foreclosure and sale. The defendants have expressly disclaimed any interest or claim therein. The only question is as to the validity of the judgment foreclosing the interests of the estate in the remainder of the 300 acres.

[1] The principal contention of plaintiffs here in their attack upon the judgment is based upon the original return of service which it is claimed can alone be looked to in determining the capacity in which service upon Johanna Morrissey was made. While in Morrissey v. Gray, supra, in referring to this original return it was said that "this return, of course, afforded no evidence of service upon Johanna Morrissey as administratrix of the estate," this language had reference to the return taken in consideration by itself, and without reference to the judgment which was actually rendered or to the pleading or process to which it was addressed. What effect the return would have on the validity of the judgment actually rendered, when taken in connection with all the matters contained in the judgment roll, this court was not then considering, because the action of the trial court in permitting, on the trial, the amendment to the original return which was the principal matter discussed and sustained, made such consideration unnecessary. Here, however, the exact situation is presented, the trial court doubtless basing its conclusion that jurisdiction over the administratrix of the estate of Timothy Morrissey, deceased, was acquired and the judgment properly rendered against her in that capacity, from an inspection of the entire record as it stood when the judgment was rendered, and we think that conclusion was right.

While the allegations of the complaint are not as ample as they might be with reference to the contents of the judgment roll as recited therein, it sufficiently appears therefrom that the complaint in the foreclosure proceeding was drafted against Johanna Morrissey as administratrix to foreclose through her, as such, the interest of the estate of Timothy Morrissey, deceased, in the property and against her and the children individually to foreclose also any rights which she or they might personally have in the land. The summons was directed to her in her capacity as administratrix as well as individually, and the return of the sheriff was that he had made service thereof "by delivering to Johanna Morrissey a copy of said summons attached to a copy of the complaint, personally, in Butte county." No appearance was made by Johanna Morrissey in either capacity, and subsequently a decree was rendered foreclosing through her as administratrix the interest of the estate of Timothy Morrissey in the property. No judgment was rendered against her individually, and, of course, none against the other defendants upon whom it appears no service was had. Notwithstanding these matters appearing in the judgment roll, it is insisted by appellants that the original return (which as we say it is claimed can alone be considered) shows that the service was made upon Johanna Morrissey only in her individual capacity. But this is not true in point of fact. There is nothing in the return which declares explicitly in what capacity she was served. It is a general return that she was served with a copy of the summons and complaint and in the nature of things, the complaint being against her in her capacity as administratrix and individually, and the summons being directed to her in both capacities, a service upon her personally, which the sheriff returns he made (nothing further appearing in the return), must be taken to have been made upon her in all the capacities in which she was sued. The purpose of the service of process is to give notice to a defendant that suit had been brought against him so that he may have an opportunity to defend if he so elects. All that is necessary for a sheriff to do in making service, and his sole duty in that respect, is to deliver to the defendant a copy of the summons and a copy of the complaint and make return of that fact. It is not necessary in making service that the sheriff shall announce to a defendant the capacities in which he is sued or in what capacity he is served. He is informed of that by the receipt of the complaint and the summons.

[2] And when from the judgment roll it appears that a judgment is rendered against a defendant in a representative capacity, that the action was brought against him in two capacities, representative and individual, the summons and complaint directed to him for service in both, and the return of the sheriff shows generally that personal service upon him of the process was made, we cannot perceive upon what principle it can be claimed, simply from the general return of service, that the service was upon him in one particular capacity rather than in all the capacities in which he was sued. Counsel for appellants have cited us to no case where it has been so held. The cases to the effect that a judgment is void where one is sued in a representative capacity and judgment is rendered against him individually, or vice versa, have no application. If one is sued in a representative capacity alone, and the return of summons is, as here, a general return of personal service, and the judgment is against the defendant in a representative capacity, it could not reasonably be contended, in an attack upon the judgment, which would of course be made upon the same theory as is advanced here, namely, that the return alone can be considered in determining the validity of the judgment, that the court must be constrained to a consideration solely of the return of service in determining the validity of the judgment. It could look to the entire judgment roll; the complaint which showed an action brought solely against the defendant in a representative capacity, the summons directed to him in such capacity alone, and in support of the judgment as actually rendered, it would be held that the general return of personal service showed service upon the defendant in the capacity in which he was alone sued. No one would question the right of the court to consider all the matters appearing upon the judgment roll in support of the judgment actually rendered, nor question the validity of a determination that from such an inspection the return of service showed a service upon defendant in the capacity in which he was sued and jurisdiction acquired to render judgment against him in that capacity. The same principle applies here. Johanna Morrissey was made a defendant in two capacities, the summons was addressed to her in both, the duty of the sheriff was to serve her in both, the delivery to her of a copy of the summons and complaint was in effect a service upon her in both, and the service upon her which the sheriff returned as personally made, taken in connection with the complaint and summons, was a sufficient return of service in all capacities in which she was sued, and would have warranted a judgment against her in both, although here it was only entered against her in her representative capacity.

[3] All intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired unless the record itself shows to the contrary.

[4] And where one is sued in both an individual and representative capacity, and process is directed against him in both capacities, the return of service, which simply states that process was served upon the defendant personally, is not conclusive that

such personal service was upon him only in his individual capacity, nor that he was not served in his representative capacity. The return under such circumstances becomes equivocal or of doubtful inference. In such a case, as pointed out in Morrissey v. Gray, supra, the court, in support of the judgment actually given, could under this equivocal or defective return permit an amendment by the sheriff so as to show that in fact service was made on the defendant in the capacity in which the judgment against him was actually rendered, or upon the trial in support of said judgment allow proof of the actual capacity in which the service was made.

[5] But cases may arise where from lapse of time, or for other reasons, it may be impossible to make proof justifying the court, on motion, in allowing an amendment to the return to be made, or when the judgment is attacked to supply evidence of the capacity in which service of process was in fact made in support of the judgment entered. It then becomes necessary for the court to determine the validity of a judgment on other considerations. It cannot, of course, be determined from the return itself, because that is equivocal, hence resort must be had to the entire record, and where it appears upon such resort that the true nature of the action against the defendant was in both an individual and representative capacity and process issued directed for service upon him in both capacities, these facts taken into consideration by the court, in connection with the return of the sheriff that the service was made upon the defendant personally, warrant the conclusive presumption that, in whichever capacity a judgment was rendered against him, service upon him in that capacity was had and jurisdiction to render it acquired.

[6] As to the other claim made in the complaint that the judgment is void because of the previous connection of Judge Gray with the estate of Timothy Morrissey, deceased, as one of the attorneys for the administratrix, which it is alleged disqualified him from proceeding as superior court judge in the foreclosure matter and rendering a decree of foreclosure: The facts which are stated as allegations in the complaint in this respect are no different from those considered under the evidence in the appeal heretofore referred to (Morrissey v. Gray, supra), where it was held that they constituted no disqualification.

[7] As to the further claim of fraud on the part of Gray in procuring the deed from plaintiffs: In view of the fact that the title of Gray to the property is deraigned through a sheriff's sale under the judgment in the foreclosure proceedings which we have just been considering, and which was valid as against the interest of the estate of Timothy Morrissey in the land, the deed from plaintiffs to Gray which they seek to avoid becomes of no moment. The title of Gray being valid under the judgment of foreclosure and sale, he need place no reliance on that deed. He acquired nothing under it that he did not already possess. This matter is also sufficiently treated of in the case on appeal referred to and needs no further consideration.

The judgment is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

162 Cal. 630

FITZIMONS v. ATHERTON et al.

(L. A. 2,866.)

(Supreme Court of California. May 18, 1912.)

1. Adverse Possession (§ 86*)—Acts Constituting—Payment of Taxes.

One who has been in the continued adverse possession of a tract, but who has never paid any taxes, does not acquire title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 504; Dec. Dig. § 86.*]

2. Taxation (§ 775*)—Tax Deeds—Description—Evidence.

Where a tax deed described the land as the east one-half of a designated block in an addition, the recorded map of the addition and evidence of the location of the block on the ground, and the marking thereof by stakes set at each corner, were properly admitted to explain and make certain the description in the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1543; Dec. Dig. § 775.*]

3. Boundaries (§ 48*)—Acquiescence—Evidence.

One who proves occupancy, but who does not show that the adjacent owner ever agreed to the boundary line claimed, or that he was aware of the occupancy or that the location of the division line was a matter of dispute or agreement between the parties, does not establish a boundary by acquiescence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232–242; Dec. Dig. § 48.*]

Department 1. Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by James Fitzimons against A. C. Atherton and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Thomas Scott and J. R. Dorsey, for appellant. Chas. N. Sears, for respondents.

SHAW, J. This is an action to quiet title to a tract of land containing 4.44 acres, constituting a part of lot 2 of Kelly's addition to the town of Delano, in Kern county. The tract embraces part of the east half and part of the west half of the lot, which, according to the plat and survey thereof, contains 10 acres. The defendants answered, admitting the ownership of the west half of lot 2 by the plaintiff, denying his ownership of any part of the east half thereof, and also alleging that defendant A. C. Atherton is the owner of said east half of the lot, and that he makes no claim to any other part thereof. The findings are in favor of the defendant on all these issues. Judgment was given declaring that A. C. Atherton is the owner and is in possession of the east half of the lot, and quieting his title thereto. The plaintiff appeals from the judgment and from an order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There is no adjudication respecting the alleged claims of defendants to the portion of the 4.44 acres described in the complaint lying within the west half of the lot. We mention this in explanation merely. The evidence shows that they never made such claim. Their pleadings do not make the claim. The failure to adjudicate all the issues is not complained of, and, under the circumstances, the plaintiff does not appear to be substantially prejudiced by the omission of a formal judgment in his favor as to that part of the premises.

[1] The proof on the part of the plaintiff showed title of record to the west half only. There was evidence of long-continued adverse possession of the other part of the tract in dispute, but there was no evidence that plaintiff had paid taxes on any part of the lot except the west half. Therefore his claim of title to a part of the east half by adverse possession was not established.

[2] The defendant A. C. Atherton, in support of his claim of title to the east half, introduced a deed by the tax collector, on behalf of the state, conveying said half to the plaintiff. The conveyance purported to be made in pursuance of a sale to the state in July, 1895, for nonpayment of taxes, a subsequent deed thereof to the state, and a subsequent sale by the state to Atherton, all in accordance with the law. The deed to Atherton described the property as "lying and being in the county of Kern, State of California and described as follows, to wit: E. ½ of block 2, Kelly's addition to Delano." Objection was made that the deed was void because of uncertainty in the description. Thereupon the recorded map of Kelly's addition to Delano was introduced in evidence, proof was made of the location of the block on the ground and that it was marked by stakes set at each corner, and that there was no other recorded map of said addition. We perceive no error in this and it was sufficient to explain and make certain the description given in the deed. Best v. Wohlford, 144 Cal. 737, 78 Pac. 293; Baird v. Monroe, 150 Cal. 569, 89 Pac. 352; Fox v. Townsend, 152 Cal. 53, 91 Pac. 1004, 1007; Chapman v. Zoberlein, 152 Cal. 218, 92 Pac. 188. No other objection is here made to the validity of the deed.

[3] It is argued on behalf of the plaintiff that the evidence shows that the boundary line between the east half and the west half of the lot was fixed by acquiescence and occupancy so as to include within the west half the land to which he claims title. There is no merit in the claim. There was evidence of occupancy and claim of title by plaintiff, but there was no evidence to show that the owner of the east half ever agreed to the line claimed, or was aware of the occupancy, or that the location of the division line was ever a matter of dispute or agreement between them. Apparently the owner of the east half was absent and had left it vacant and uninclosed. At least there is nothing to the contrary. Such evidence is not sufficient to establish a boundary by acquiescence or estoppel. So far as it shows adverse possession, it is, as stated, ineffectual because the taxes were not paid by the claimant. There are no other points worthy of notice.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

162 Cal. 675

CITY OF OAKLAND v. OAKLAND WATER FRONT CO. (S. F. 5,408.)

(Supreme Court of California. May 24, 1912.)

1. APPEAL AND ERROR (§ 1195*)—LAW OF THE CASE—DECISION OF SUPREME COURT.

A decision of the Supreme Court concurred in by four justices, which defined the nature and physical extent of a grant by a city to an individual, is the law of the case on a subsequent trial, but where three justices determined that the individual took title by virtue of ordinances and deeds under a compromise entered into by statutory authority, while two justices specially concurring held that the individual acquired title by virtue of earlier ordinances, deeds, and ratifying statutes, the decision is not the law of the case as to the questions when in point of time and by virtue of what acts the city parted with and the individual acquired title.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. APPEAL AND ERROR (§ 1194*)—LAW OF THE CASE—DECISION OF SUPREME COURT.

Where the Supreme Court on appeal did not discuss and determine a question, the question could be litigated and determined on a subsequent trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648–4660; Dec. Dig. § 1194.*]

3. MUNICIPAL CORPORATIONS (§ 657*)—STREETS—DEDICATION—VACATION.

The Legislature may vacate a dedication of a street in a city, and may delegate the power so to do to the city, especially where the street has not been used by the public.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

4. MUNICIPAL CORPORATIONS (§ 657*)—GRANTS—COMPROMISES—EFFECT.

St. 1867–68, p. 222, authorizing the city of Oakland to compromise and adjust all claims and controversies in which the city is interested, was enacted pending a controversy over the validity of streets and easements which the city contended were imposed on lands granted by the city, which the grantee insisted could not be imposed because of private ownership, and to enable the city to secure for itself the terminus of a transcontinental railroad. By the terms of the compromise, a portion of the lands in controversy should be given to the railroad. The validity of the grant to the grantee was recognized by the compromise, and the city bound itself to make good the title to the property included in the grant. The grantee conveyed to a third person in solido, and the deeds from the third person to the city and to the railroad company followed. An ordinance of the city recited that all disputes between the city and the grantee and his assigns were abandoned by the city to him and his assigns. Subsequent to the compromise, the city recognized that the streets claimed by it prior to the compromise did not exist, and made efforts to condemn for street purposes the property claimed by the city prior to the compromise to be included in steets, and it assessed and collected taxes on such property. *Held*, that the city, by virtue of the compromise, abandoned its claims to the streets previously claimed, and revoked any dedications previously attempted to be made.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 722, 844, 1429, 1496; Dec. Dig. § 657.*]

5. MUNICIPAL CORPORATIONS (§ 225*)—RATIFICATION OF ACTS—STATUTORY AUTHORITY.

The power of the city of Oakland to ratify an original grant to an individual is conferred by St. 1867–68, p. 222, authorizing it to compromise claims in which it is interested, and a ratification made by the authorities of the city is valid.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 626–643; Dec. Dig. § 225.*]

6. MUNICIPAL CORPORATIONS (§ 225*)—RATIFICATION OF ACTS—EFFECT.

A ratification by a city of a prior grant made by it operates as of the date of the original grant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 626–643; Dec. Dig. § 225.*]

7. ESTOPPEL (§ 62*)—GRANTS—RESERVATIONS—CITY.

A declaration by a city that a grant by it to an individual is binding negatives the idea, in the absence of any express reservations, of easements on the property included in the grant, and the city by the use of the word "grant" is estopped as against the grantee from asserting anything in derogation of its deed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 151–153; Dec. Dig. § 62.*]

8. MUNICIPAL CORPORATIONS (§ 1018*)—COMPROMISE OF ACTION—CONSENT JUDGMENT—CONCLUSIVENESS.

When the city of Oakland, authorized by St. 1867–68, p. 222, to adjust all causes of action in which it may be interested, consented to a judgment against it quieting title to lands described without any reservation as to streets, the judgment was res adjudicata, and it could not subsequently urge the existence of streets over such lands.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2191; Dec. Dig. § 1018.*]

In Bank. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Action by the City of Oakland against the Oakland Water Front Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. R. Davis, W. Lair Hill, H. A. Powell, John W. Stetson, City Atty., and Ben. F. Woolner, Ex-City Atty., for appellant. A. A. Moore, Wm. F. Herrin, Stanley Moore, W. H. Orrick, and John E. Foulds, for respondent.

PER CURIAM. This is a second appeal, and is from the order denying plaintiff's motion for a new trial. The first appeal is reported in 118 Cal. 160, 50 Pac. 277. The history of the case will there be found set forth at length, and need not here be repeated.

[1] The nature and physical extent of the city's grant to Carpentier were there defined and delimited. That definition and delimitation have become the law of the case. In the opinion of the Chief Justice, concurred in by two of the associate justices, it was held that Carpentier took title by virtue of the ordinances and deeds under the compromise of 1868, entered into by authority of the statute of March 21, 1868 (St. 1867–68, p. 222). Two justices, specially concurring, held that Carpentier acquired title, not by virtue of this compromise, but by virtue of earlier ordinances, deeds, and ratifying statutes. It is proper to note that, as there has not been the concurrence of four justices upon the precise question as to when in point of time and by virtue of what acts the city parted with and Carpentier acquired title, it cannot be said to be the law of the case that such title was first acquired in 1868. Roche v. Baldwin, 143 Cal. 186, 76 Pac. 956; Philbrook v. Newman, 148 Cal. 172, 82 Pac. 772; Los Gatos, etc., Ry. Co. v. San Jose Ry. Co., 156 Fed. 455, 84 C. C. A. 265, 13 Ann. Cas. 571; Pollock v. Hennicke Co., 64 Ark. 180, 46 S. W. 185. Two of the justices, believing that such title had been acquired before 1868, and three believing that it had been acquired in 1868, the result was a consensus of opinion of five that at least in 1868 such title was vested in Carpentier. Two justices dissented. They held the view that the grant to Carpentier was void within the principle announced in Illinois Central R. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, that the state itself could not make such a grant, and therefore it could be made by no agency of the state; that, because the grant was thus void as an abdication of a trust upon which the sovereign state held these lands, no ordinances or statutes of confirmation or ratification and no consent judgments could operate to give it validity. These dissenting justices were not called upon to express and did not express their views as to when and how title vested in Carpentier, conceding the power of the state to make the grant.

It has, however, become the settled law of the case that the state had power to make the grant; the Chief Justice expressing the following determination which was concurred in by four of his associates: "A grant by the state of California, therefore, of mud flats and shoals between high and low tide on the margin of the bay of San Francisco cannot be held to have been in excess of the legislative power, in the absence of any proof that such grant has seriously impaired the power of succeeding Legislatures to regulate, protect, improve, or develop the public rights of navigation or fishery, and in this case it does not appear that the grant to Oakland, as here construed, would have that effect if transferred to a natural person or private corporation. It is true that the private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. This, however, is a minor and temporary inconvenience for which our laws and the laws of all civilized states provide an ample remedy. By the exercise of the right of eminent domain all necessary means of access from the uplands to the water front may be condemned for the public use, at a cost not in excess of the reasonable value of the land taken or subjected to the servitude. And there is no injustice in requiring this compensation to be made to the grantee of shore lands when his right to such lands is in other respects valid in law; for, like other holders of title derived from the state, he is presumed to have given what, at the time of the grant, was deemed a fair equivalent for the land granted." The Chief Justice further said: "The conclusion, I think, necessarily follows that from and after the 2d day of April, 1868, the city of Oakland ceased to be the owner as trustee, or otherwise, of any portion of her water front except those portions secured to her by the compromise of that date, and such streets, thoroughfares, and other parcels as may have been previously dedicated to public use. As to all such places the transfer to the Water Front Company and its assigns was subject to the public easement, and the city as trustee for the public is no doubt entitled to a decree in this action defining her right of control over the lands so dedicated. With respect to such streets and public places, the various consent decrees, relied upon by defendant, constitute no estoppel, and the statute of limitations does not apply." This language cannot be held to embody any law of the case. It is the decision of but three justices, and is necessarily at variance with the views of the two justices especially concurring, for, by the views of those justices, Carpentier acquired title long prior to 1868, and his acquisition of title on any such earlier date would certainly render any subsequently attempted dedication by the city of streets over his land a mere nullity, yet the language quoted implies that the city of Oakland retained control of such streets and thoroughfares "as may have been previously (previous to the compromise of 1868) dedicated to public use." The dissenting justices, of course, presented no views upon this matter, and for aught that appears, or can be made to appear, if the power of the state to make such a grant were admitted, they might have concluded that the original grant to Carpentier was valid, or that it was made valid by the act of 1861 (Laws 1861, p. 387, § 3), or by one or another of the judgments given in the case. Moreover, the language quoted cannot be construed as a finding, much less a determination, that there were any such streets. Not only had no question of dedicated streets been presented in the case, but the very evidence here introduced, of the maps and dedicatory ordinances, were not in the record upon the former appeal. Nor was there determined upon that appeal the mode by which Carpentier and his successors acquired title, the court limiting its declarations in this respect to the statement that the act of 1868 contemplated and was "comprehensive enough to sustain a transfer" of all the property in controversy.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] Not having been called upon to discuss, and not having discussed, the specific terms of the compromise and the nature of the title taken under it, those questions are untouched and undetermined.

The town of Oakland was never a pueblo. Surrounding its uplands, which were all held in private ownership, were marsh lands which, generally speaking, extended from the line of extreme high tide, where the upland grasses and the marsh grasses came together, to the line of ordinary high tide, which marked the limit of vegetation. This land also was held in private ownership. The water front owned by the town of Oakland consisted of the mud flats lying between the line of high and low tide. Following the conveyance to Carpentier in the early 50's, the town of Oakland from time to time passed ordinances dedicatory of certain streets. In some instances maps were referred to. Some of these ordinances purported to dedicate such streets to high tide, others to low tide, still others to the southern or western boundary of the city. Because of the conditions above adverted to these attempts to dedicate streets over the uplands and marsh lands amounted to nothing, since the town and the city, its successor, had no ownership in or control over these lands, and did not undertake to perfect these incipient dedications by purchase or condemnation of such lands. The utmost result that could be claimed for such efforts is that they operated to set apart for public use the 60, or 70, or 80 foot strips projected along the line of the nonexisting streets over the mud flats between the high and low tide. We need not pause here to consider whether when a municipality makes a dedication to the public over its own lands the so-called dedication amounts to anything more than an offer, until accepted by the use of the public or by the acts of the municipal authorities in rendering the property so dedicated available to public use. It may be conceded that the dedication was complete so far as the municipality was concerned without any further act upon its part or upon the part of the public. Certain it is, however, that the town or city did nothing more than to pass these ordinances, that it never in any wise developed these so-called streets, and that the public to this day has never used them.

[3] Treating these strips across the mud flats unconnected with the high lands as dedicated though unused streets, that the Legislature had full power to vacate such dedications (even if affected by a public use, as was not the case here), or to delegate this power, as was done in the plenary act of settlement and compromise of 1868, is beyond question. Says the court in Polack v. Trustees of the S. F. Orphan Asylum, 48 Cal. 490: "That the Legislature possesses competent power to vacate a street in a city; that the Legislature may delegate or commit such power to the municipal authorities of the city; that its exercise by the municipal authorities is dependent on the will and subject to the control of the Legislature; and that, after such power has thus been committed to the municipal authorities, the Legislature may revoke it in part as well as in whole, or, without an express revocation, may itself exercise it in any particular instance, are propositions about which there can be no controversy in this state." See, also, Brook v. Horton, 68 Cal. 554, 10 Pac. 204; San Francisco v. Burr, 108 Cal. 460, 41 Pac. 482.

[4] The real question, then, is, Did the Legislature, acting through its authorized agent, the city of Oakland, revoke such offers of dedication or vacate such unused streets? To this question not only the terms of the compromise itself, but every act of the city therein and thereafter, make possible but one answer. Such dedications were unquestionably revoked. It is said in the opinion of the Chief Justice upon the former hearing, speaking of the controversy which the Legislature authorized to be compromised, that, if ever there was "a flagrant and notorious controversy over anything, there certainly was such a controversy between Carpentier and the city of Oakland over this water front." A very vital part of this controversy raged over these so-called streets and the easements which the city was contending were being imposed upon these lands, and which Carpentier was insisting could not be imposed by virtue of the fact that he held them in private ownership. The settlement of this controversy over these streets was therefore a part, and as necessary a part, of the compromise which was entered into with Carpentier as was any other term, covenant, or condition of it. The plenary power of the state to effect such revocation and its delegation of power to the city have been adverted to. The statute of 1868 itself was not a mere authorization to grant or alienate the property in controversy. It was enacted with special reference to the strife that had grown up over grants previously made, and it empowered the city "to compromise, settle and adjust any and all claims, demands, controversies and causes of action" growing out of such previous transactions and the resultant disputes which arose out of them. One of the moving impulses to the adjustment was Oakland's desire to secure for itself the terminus of the first transcontinental railroad which had proposed entering San Francisco by another route. A portion of these lands was to be given by the terms of the compromise to the railroad, and, upon this gift and the vesting in the railroad company of "a good title in fee simple" (such is the language of the compromise) of the property, the railroad company would expend at least a half a million dollars thereon, and would make Oakland a terminal point. The validity of Carpentier's title in this compromise was recognized, first, by the fact that under it he was to convey all these lands to respondent herein. The respondent was to convey certain of them to the railroad company and certain others expressly described to the city of Oakland. The city of Oakland bound itself "to the performance and execution by the municipal authorities of the city of Oakland of all instruments, ordinances and proceedings necessary to perfect, complete and make good the title" to the property conveyed by Carpentier to respondent. Carpentier conveyed to the respondent in solido, and the deeds from respondent to the city and to the railroad company of their lands followed in due course. The city is still holding the property so conveyed to it. The language of the ordinances of the city of Oakland in settlement of the controversies is set forth in full in the previous opinion in this case. That these ordinances were carefully drawn may not be doubted. Lawyers of the greatest learning were employed upon either side. The ordinances do not pretend to make a new grant of the property or of any part of it. They set forth the earlier ordinances of the city granting these lands to Carpentier, the deed of the mayor following such ordinances, and, with the declaration that all claims, demands, controversies, disputes, litigations, and causes of action heretofore existing between the city of Oakland and Carpentier and his assigns are compromised, settled, and adjusted, announce that "the said above-mentioned ordinances and conveyances are made valid, binding, and ratified and confirmed, and all disputes, litigations, controversies, and claims in and to the franchises and property described in said ordinances and deeds of conveyance and every part thereof are abandoned and released by the said city of Oakland

to the said Carpentier and his assigns." Then follow specific conditions, and even reservations. The Oakland Water Front Company, respondent herein, is to make certain conveyances to the railroad company and to "other parties" which included the city of Oakland, and, as a reservation, nothing is deemed to affect the rights of the San Francisco and Oakland Railroad Company, derived under an ordinance of the city, nor the reversion of the property of the Western Pacific Railroad Company to the city of Oakland. In an ordinance passed the next day, which declared the due execution by the respondent of all which it was called upon to perform, there is a further ratification and confirmation, and another declaration that "all disputes, controversies, claims, demands and causes of action heretofore existing between the said city of Oakland on the one part and Horace W. Carpentier and his assigns on the other part relating to the force and validity of said ordinances and deed are hereby abandoned and released by the said city of Oakland to the said Carpentier and his assigns." In this agreement it has been said the city took certain of these water front lands with their streets from the respondent. It is impossible to conceive of language which more completely evinced a settlement of the controversy of streets or no streets effective dedications or ineffective dedications than that here employed and this language is susceptible of but the one construction the abandonment of the city's claims in this regard and the revocation of any dedications previously attempted to be made. This is borne out not only by the language above quoted, but by the fact that it is Carpentier's deed and not the deed of the city which, in the compromise, formed respondent's recognized muniment of title, and by the even more significant fact that the city itself deliberately ratified its original grant to Carpentier.

[5] The power to ratify was necessarily a power conferred by the state under the act of 1868 authorizing the city to settle, adjust, and compromise and the ratification is as complete when made by an authorized agent of the authority having the power to ratify as though made by that authority itself. Bissell v. City of Jeffersonville, 24 How. 287, 16 L. Ed. 664.

[6] Nor can any exposition be needed of the well-settled principle that ratification operates as of the date of the originally invalid act. 1 Abbott, Mun. Corps. § 281; Boggs v. Merced Mining Co., 14 Cal. 279; Zottman v. San Francisco, 20 Cal. 96, 81 Am. Dec. 96; City of Monterey v. Jacks, 139 Cal. 542, 73 Pac. 436.

[7] There is then a declaration by the city of Oakland that the grant by itself to Carpentier of 1852 is in all respects binding. This declaration, in the absence of express reservation, negatives the idea of any incumbrances by easements or otherwise upon the property, and by the very use of the word "grant" the city "is estopped as against its grantee to assert anything in derogation of its deed." 10 Cyc. 626. It was a covenant on the part of the city that the water front was not burdened with incumbrances by way of easements or otherwise, for that a public highway is an incumbrance which will be held to be a breach of a covenant stipulating that there are no incumbrances is well settled. Kellogg v. Ingersoll, 2 Mass. 97; Prichard v. Atkinson, 3 N. H. 335; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426.

As little question can there be over the intent appearing in these compromise ordinances to revoke any such dedications. If what has already been pointed out does not make this plain, there is the added consideration that a deed in solido without reservation of easements or streets, such a deed as was here made, itself operates as a revocation. Hayward v. Manzer, 70 Cal. 476, 13 Pac. 141; Schmitt v. City and County of San Francisco, 100 Cal. 302, 34 Pac. 961; Sacramento v. Clunie, 120 Cal. 29, 52 Pac. 44; Los Angeles v. Kysor, 125 Cal. 463, 58 Pac. 90; Myers v. City of Oceanside, 7 Cal. App. 87, 93 Pac. 686; San Francisco v. Calderwood, 31 Cal. 585, 91 Am. Dec. 542; San Francisco v. Canavan, 42 Cal. 541; People v. Williams, 64 Cal. 498, 2 Pac. 393; Demartini v. San Francisco, 107 Cal. 402, 40 Pac. 496; Shulz v. Redondo Improvement Co., 156 Cal. 439, 105 Pac. 118. Instructive upon this is the case of Hoboken v. Pennsylvania R. R. Co., 124 U. S. 656, 8 Sup. Ct. 643, 31 L. Ed. 543, which offers some features of great similarity to those presented in this consideration. The original owner of the land upon which the city of Hoboken stands, Stevens by name, caused a plan of the city to be made and filed, which plan exhibited numbers of streets running north and south and east and west, which latter streets upon the map terminated at the eastern end of the high water mark of the Hudson river. Lots were sold in accordance with the plan. Stevens' title went to high water, and subsequently the state sold certain of the lands below high water to the Hoboken Land & Improvement Company. The latter filled in its property and claimed title in fee simple. The claim of the city was that the land lying at the extremities of the streets was subject to an easement in favor of the public for street purposes under the principle that when a street is carried to high water an easement attaches in favor of the public for wharf and similar purposes to the lands under the waters beyond, and this easement will be continued over any filled land which otherwise would cut off access from the street to the water. But the Supreme Court of the United States, all the judges concurring, declared that, if any such easements existed, they were extinguished by the action of the state in conveying the property to the Hoboken Land & Improvement Company without reservation of such easements; the court saying: "The grant, being from the state, creates an estoppel against the estoppel, for the state, in respect to the easements claimed, is the representative of the public, superior in authority and paramount in right to the city of Hoboken; and, as we have already seen, the existence of the easement defeats the grant of the state. The state, therefore, being estopped by its grant, is estopped to deny its effect to extinguish the public right to the easement claimed. The right insisted upon in these actions by the city of Hoboken is the public right, and not the right of the individual citizens, claiming by virtue of conveyances of lots abutting on streets made by Stevens or his successors in the title. The public right represented by the plaintiff is subordinate to the state, and subject to its control. The state may release the obligation to the public, may discharge the land of the burden of the easement, and extinguish the public right to its enjoyment. Whatever it may do in that behalf conclusively binds the local authorities, when, as in the present cases, the rights of action asserted are based exclusively on the public right."

[8] Again, it is to be remembered that the act of 1868 authorized the compromise, adjustment, and settlement of all "causes of action" in which the city was interested. There can be no question but that a consent judgment becomes res adjudicata between the parties. Holmes v. Rogers, 13 Cal. 191; Semple v. Wright, 32 Cal. 659; McCreery v. Fuller, 63 Cal. 31; Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; Nashville, etc., Ry. Co. v. U. S., 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971. In City of Oakland v. Oakland Water Front Company (No. 115, superior court of Alameda county), the city stipulated that the respondent herein should "have a final judgment against plaintiff quieting the title to the lands described in its cross-bill or complaint." These lands were all of the property here in controversy without reservation as to the streets.

Again, in the cases of Central Pacific Railroad Co. v. City of Oakland (No. 5330, superior court of Alameda county), Central Pacific Railroad Co. v. City of Oakland (No. 5331, superior court of Alameda county), and Huntington v. City of Oakland, no opinion filed (No. 2,209, United States Circuit Court, Ninth Circuit), under disclaimers filed by the city pursuant to an ordinance of the city council, it was adjudged and decreed that the city of Oakland had no right or title or interest in or to any of the lands there in question which are included in the property involved in the present appeal. Says the Supreme Court of Indiana (Parrish v. Ferris, 2 Blackf. 606, 17 L. Ed. 317): "If the judgment is in favor of the plaintiff and declares that he has title in fee simple, and that the defendant's claim is unjust and unfounded, every possible interest of the latter in the land is cut off. He cannot afterwards assert that he has an easement in the land."

We need not consider how far these judgments operate to estop the appellant. They are certainly strong evidence upon the matter of revocation. They show that in none of these instances was the city endeavoring to protect what it now claims to be its streets, though it is inconceivable that, if it had believed it had any streets, it would not have done so. Aside from the plain language of the ordinances and from the other considerations above discussed, the interpretation by conduct of one or the other of the parties is always of value. And so further in this connection it may be pointed out that the city repeatedly made efforts to condemn for street purposes the very property which it here claims was dedicated to street purposes. It has assessed and collected taxes upon the property claimed as streets. It has sold this property for the nonpayment of taxes assessed thereon. It has taken conveyances from respondent for street purposes of some of the property within the lines of some of the asserted streets. All these matters and things, with the language of the compromise itself and the provisions of the agreement of compromise to the effect that the city of Oakland "should perfect, complete and make good" the title of respondent to the property conveyed to it by Carpentier, make it manifest not only that the city did revoke its dedications, complete or inchoate, but that it thoroughly understood that it had done so and continuously acted upon such understanding.

For these reasons, the order appealed from is affirmed.

BEATTY, C. J., did not participate in the foregoing decision.

162 Cal. 747

JERGINS v. SCHENCK et al. (L. A. 2,914.)

(Supreme Court of California. June 3, 1912.)

1. Judgment (§ 139*)—Appeal and Error (§ 957*)—Default—Opening—Discretion.

An application to be relieved from a default, under Code Civ. Proc. § 473, is addressed to the sound discretion of the trial court; and its action will not be reversed, unless an abuse of discretion clearly appears.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 265–268; Dec. Dig. § 139;* Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.*]

2. Judgment (§ 163*)—Default—Opening—Right to Relief.

On an application to open a default, any doubt should be resolved in favor of the application; and hence an appellate court will be less inclined to reverse an order granting, than one refusing, such an application.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 323; Dec. Dig. § 163.*]

3. Judgment (§ 143*)—Default—Opening—Right to Relief.

Where a defendant intended to contest a case, but failed to answer after his demurrer was overruled, owing to his attorney's belief, not entirely without basis, that the demurrer would not be acted upon as soon as it was, and to his failure to learn that it had been overruled, caused in part by his reliance on the custom of the clerk of the court to give counsel notice of orders overruling demurrers, and in part to his reliance on his own clerk, who, by reason of inexperience and a pardonable inadvertence, failed to ascertain the status of the case, the trial court did not abuse its discretion in granting a motion to open the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 269, 270, 272–291; Dec. Dig. § 143.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by A. T. Jergins against Samuel Schenck and another. From an order granting defendants' motion to vacate their default, plaintiff appeals. Affirmed.

Hunsaker & Britt, for appellant. Paul W. Schenck and Frederick Gros, for respondents.

SLOSS, J. The plaintiff took judgment by default upon the failure of the defendants to answer within the time allowed after the overruling of their demurrer to the second amended and supplemental complaints. The defendants moved to vacate the default and judgment on the ground of excusable neglect, and their motion was granted. From the order granting this relief, the plaintiff appeals.

The showing made by the defendants in support of their motion was not contradicted by any evidence on the part of the plaintiff. The only question is whether the facts set forth in the affidavits offered by the defendants were sufficient to authorize the court to find that the failure to answer had been the result of a neglect that was excusable.

[1, 2] The law governing this class of cases is so well settled, and has been so often declared in the decisions of this court, that we may dispense with the citation of authority. An application to be relieved from a default, under section 473 of the Code of Civil Procedure, is addressed to the sound discretion of the trial court; and the action of that court will not be set aside on appeal, unless an abuse of discretion clearly appears. Any doubt that may exist should be resolved in favor of the application, to the end of securing a trial upon the merits. The appellate court will therefore be less inclined to reverse an order granting, than one refusing, an application to open a default. Indeed, the cases in which this court has held that such relief was improperly granted are very rare; while in a number of instances an order refusing to open the default has been reversed.

[3] Applying these principles, we entertain no doubt whatever that the court below did not abuse its discretion in granting the application in this case. The affidavits filed justified the conclusions that the defendants at all times desired and intended to contest the suit; that the attorney in charge of the defense had reasons, not entirely without basis, for believing that the demurrer would not be acted upon as soon as it in fact was; that he was not aware that the demurrer

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had been overruled until after the default had been entered; and that his ignorance in this respect was due in part to his reliance upon a custom of the clerk of the court to notify counsel of orders overruling or sustaining demurrers (a custom which was not followed in this instance), and in part to reliance upon his own clerk, who, by reason of inexperience and a not unpardonable inadvertence, had failed to ascertain and to note the true status of the case. It would be useless to enter into a recital of all the details concerning these matters. It is enough to say that the neglect of defendants' representatives was not so obviously without excuse as to warrant this court in overturning the order permitting an answer and a trial upon the merits.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

162 Cal. 687

Ex parte MILLER. (Cr. 1,686.)

(Supreme Court of California. May 27, 1912. Rehearing Denied June 26, 1912.)

1. Constitutional Law (§ 208*)—Discrimination Between Sexes — Employment—Police Power.

The guaranty against discrimination in Const. art. 20, § 18, providing that no person shall, on account of sex, be disqualified from entering on or pursuing any lawful business, vocation, or profession, is subject to reasonable regulations under the police powers, and does not prevent such reasonable restrictions on the hours of labor of women as may be necessary for the protection and preservation of the public health.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649–677; Dec. Dig. § 208.*]

2. Constitutional Law (§ 89*) — Right to Contract as to Employment.

The guaranty in Const. art. 1, § 1, of right to liberty and to acquire and possess property, which includes right to contract to serve and to employ, is subject to the police powers as to public health and general welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 157; Dec. Dig. § 89.*]

3. Master and Servant (§ 13*) — Police Powers—Female Employment — Hours of Service.

Act March 22, 1911 (St. 1911, p. 437), limiting the time females may be employed—that is, engaged in the service of another—in certain establishments, including hotels, to eight hours a day, is not so manifestly unreasonable and unnecessary for the promotion and preservation of public health and welfare that it can be declared not to be a proper police regulation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. § 13.*]

4. Statutes (§ 81*)—Special Legislation—Female Employment.

Act March 22, 1911 (St. 1911, p. 437), limiting the time females may be employed in certain establishments to eight hours a day, is not special legislation because occupations not enumerated may be equally injurious to the health of women, and because being applied to hotels, and not to boarding and lodging houses, or because excepting employment in harvesting, curing, canning, or drying perishable fruits or vegetables.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 90; Dec. Dig. § 81.*]

5. Statutes (§ 107*) Title and Subject.

Act March 22, 1911 (St. 1911, p. 437), the general subject of which is the regulation of female employment, does not embrace two subjects, in contravention of Const. art. 4, § 24, because of making it a misdemeanor to require a female employé to work more hours than allowed by the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121–134; Dec. Dig. § 107.*]

In Bank. Application by F. A. Miller for writ of habeas corpus to be directed against F. P. Wilson, Sheriff of the County of Riverside. Petitioner remanded to custody.

Flint, Gray & Barker and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for petitioner. Lyman Evans, Dist. Atty., Purrington & Adair, William Denman, amicus curiæ (G. S. Arnold, of counsel), and Thos. F. Griffin and Leon Yanckwich, as amici curiæ, for respondent.

SHAW, J. The petitioner applies for release from custody on a charge of violating the provisions of the act of March 22, 1911, forbidding the employment of women in certain establishments for more than 8 hours in one day, or more than 48 hours in one week. Stats. 1911, 437. The specific charge is that on June 12, 1911, he employed and thereupon required Emma Hunt, a female, to work during that day for nine hours in the Glenwood Hotel as an employé therein. His contention is that the act is unconstitutional and void.

Three grounds are urged in support of this claim: (1) That the restrictions imposed by the statute upon the freedom of contract are in violation of section 1, art. 1, and section 18 of article 20, of the Constitution, and that it is consequently invalid; (2) that the act is special, that it is not uniform in its operation, and that it makes arbitrary discriminations between persons and classes of persons similarly situated contrary to the limitations of sections 11 and 21, art. 1, and section 25 of article 4, of the Constitution; (3) that it embraces two distinct subjects, contrary to section 24, art. 4, of the Constitution.

The material parts of the statute are as follows:

"Section 1. No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, or restaurant, or telegraph or telephone establishment or office, or by any express or transportation company in this state more than eight hours during any one day or more than forty-eight hours in one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than eight hours during the twenty-four hours of one day, or forty-eight hours during any one week; provided, however, that the provisions of this section in relation to the hours of employment shall not apply to nor affect the harvesting, curing, canning or drying of any variety of perishable fruit or vegetable.

"Sec. 2. Every employer in any manufacturing, mechanical or mercantile establishment, laundry, hotel, or restaurant, or other establishment employing any female, shall provide suitable seats for all female employés, and shall permit them to use such seats when they are not engaged in the active duties of their employment."

Section 3 declares it a misdemeanor, punishable by fine or imprisonment, or both, for any employer to require any female to work in any of the places mentioned in section 1 more than the number of hours allowed by the act during any one day of 24 hours.

[1] 1. Section 18 of article 20 of the Constitution provides that "no person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation or profession." This section prohibits any discrimination of this kind based solely on distinctions of sex. But, as in case of the other constitutional guaranties, this provision is subject to such reasonable regulations as may be imposed in the exercise of police powers. It does not forbid such reasonable restrictions upon the hours of labor of women as may be necessary for the protection and preservation of the public health. Ex parte Hayes, 98 Cal. 556, 33 Pac. 337, 20 L. R. A. 701; Foster v. Commissioners, 102 Cal. 490, 37 Pac. 763, 41 Am. St. Rep. 194.

[2, 3] 2. Recognizing the importance of personal liberty, our state Constitution at the outset declares that all persons have an inalienable right to enjoy life and liberty and to acquire and possess property. Article 1, § 1. This necessarily includes liberty to work for the purpose of acquiring property, or to accomplish any desired lawful object, and liberty to continue that work each day a sufficient time to gain more than is required for the daily needs. Hence comes right to make contracts to serve and contracts to employ such service. There can be no contract by the employé to serve without a corresponding contract by the employer to hire and receive such service. Therefore, although the act in question provides a punishment only for the employer, its prohibition applies to both, and it clearly restricts the liberty of both the employer and the employed, in the specified establishments, to freely contract with each other as to the length of a day's service or to perform such contracts, when made. Consequently it does to that extent take away the liberty guaranteed by this provision of the Constitution. Although this guaranty of the Constitution is apparently absolute and unqualified, yet it is well established that it is subject to the exercise by the Legislature of what are known as the police powers of the state.

Says the Supreme Court of the United States in Holden v. Hardy, 169 U. S. 391, 18 Sup. Ct. 388, 42 L. Ed. 780: "This right of contract, however, is in itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers," a power which "may lawfully be resorted to for the purpose of preserving public health, safety, or morals, and a large discretion is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests." See, to the same effect, Ex parte Whitwell, 98 Cal. 78, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152; Ex parte Tuttle, 91 Cal. 591, 27 Pac. 933; In re Yick Wo, 68 Cal. 297, 9 Pac. 139, 58 Am. Rep. 12; Lawton v. Steele, 152 U. S. 136, 14 Sup. Ct. 499, 38 L. Ed. 385.

Because of the great value to mankind and the consequent paramount importance of the preservation of individual liberty, it is universally admitted and held that the police powers of the Legislature are not absolute or unlimited. These personal rights cannot be taken away or impaired at the mere will of the Legislature, nor at all, unless the public welfare demands it. So far as the effect on himself alone is concerned, each person has the absolute right to judge for himself whether the hard labor which he voluntarily performs is for his best interest or not. The Legislature cannot judge for persons in this respect and interfere solely to prevent them from injuring themselves by excessive labor. The injury must be of such character and extent and to such a number of persons that it may be reasonably supposed that it will cause injury to others; that is, to the community in general, or, as it is expressed, to the public health and general welfare. Lawton v. Steele, supra. The means adopted to produce the public benefit intended, or to prevent the public injury, must be reasonably necessary to accomplish that purpose, and not unduly oppressive upon individuals. The determination of the Legislature as to these matters is not conclusive, but is subject to the supervision of the courts, and, if the above qualities are wanting, a law arbitrarily interfering with the right of contract, or imposing restrictions upon lawful occupations, will be held void. Ex parte Whitwell, supra; Lawton v. Steele, supra; Holden v. Hardy, supra; Tiedeman, Police Powers, p. 17; Freund, Police Powers, § 63; Am. & Eng. Ency. of Law, 936. In the language of Justice Harlan in Mugler v. Kansas, 123 U. S. 161, 8 Sup. Ct. 297, 31 L. Ed. 205: "If, therefore, a statute purporting to have been enacted to preserve public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge, and thereby give effect to the Constitution." If this were not so, the constitutional guaranties of the personal right to liberty and property would be wholly subject to the will of the majority acting through the Legislature.

It is settled, however, that some occupations may have a tendency to injure the health of those engaged therein, that this injury may be so general or extensive as to affect the public health and general welfare, and that in such cases the Legislature may, in the exercise of the police power of the state, enact laws limiting the time of labor therein to eight hours a day. Thus laws have been upheld restricting to eight hours the daily labor of persons working in underground mines, or in smelters and quartz mills, and the legislative judgment on the subject of the extent and effect of the injury was considered sufficiently supported to be beyond judicial interference. Holden v. Hardy, supra; In re Martin, 157 Cal. 51, 106 Pac. 235, 26 L. R. A. (N. S.) 242; In re Martin, 157 Cal. 60, 106 Pac. 239. So, also, it has been recognized that some occupations followed by women, though less arduous than those generally followed by men, may have such a tendency to injure their health, if unduly prolonged, that laws may be enacted restricting their time of labor therein to 10 hours a day. The application of these laws exclusively to women is justified on the ground that they are less robust in physical organization and structure than men, that they have the burden of childbearing, and, consequently, that the health and strength of posterity and of the public in general is presumed to be enhanced by preserving and protecting women from exertion which men might bear without detriment to the general welfare. See Commonwealth v. Hamilton Mfg. Co., 120 Mass. 383; Wenham v. State, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930; State v. Muller, 48 Or. 252, 85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88; Muller v. Oregon, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; Withey v. Bloem, 163 Mich. 419, 128 N. W. 913, 35 L. R. A. (N. S.) 628; Ritchie v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994; State v. Somerville, (Wash.) 122 Pac. 324.

Counsel for the respondent do not advance the proposition that a general restriction of all women to eight hours a day for all work would be a proper police regulation. This precise question is not involved. The act does not limit the time of occupation or exertion by females. It limits only the time for which a female may "be employed"; that is to say, engaged in service for another. The time of such service does not usually measure the whole time of daily toil, labor, or exertion.

The courts must always assume that the Legislature in enacting laws intended to act within its lawful powers, and not to violate the restrictions placed upon it by the Constitution. We must take this statute as a law intended for a police regulation to preserve, protect, or promote the general health and welfare. As has been already stated, a large discretion is vested in the Legislature to determine what measures are necessary for that purpose. Upon this question of fact, as also with regard to the facts upon which a lawful classification and discrimination depends, to be hereinafter discussed, the rule is well settled that the legislative determination that the facts exist which make the law necessary must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice. Stockton v. Stockton, 41 Cal. 159; Ex parte Tuttle, supra; In re Spencer, 149 Cal. 400, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; In re King, 157 Cal. 164, 106 Pac. 578. The power of the court to declare a statute unconstitutional is "conceded to be always one of the utmost delicacy in its exercise, and never to be exerted except when the conflict between the statute and the Constitution is palpable and incapable of reconciliation." Stockton v. Stockton, supra. If reasonable men upon a consideration of the facts might rationally reach the conclusion that the enforcement of the statute would tend to promote or preserve, in some appreciable degree, the public health or general welfare, the law must be accredited as a proper exercise of the police power, although other reasonable persons might take a different view.

The reasons which justify a restriction upon the hours of employment or labor of women, as distinguished from men, are fully stated in the cases heretofore cited upon that subject, and need not be further considered here. Restrictions to 10 hours a day have always been upheld. In Illinois a restriction to eight hours in factories was declared invalid. Ritchie v. People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315. In Washington, a similar law was held valid. State v. Somerville, supra. In the latter case the woman was employed in a factory for the manufacture of paper boxes.

The question of the effect of the various occupations in which women engage, upon their health, is one upon which medical men differ, and with respect to which the prevailing opinion changes from time to time. It has not been, and probably never will be, a settled question, either with respect to the deleterious effects of particular occupations, or the hours of labor which measure the limit of safety in each. Women who work for others usually have household or other domestic duties to perform which oblige them to continue at work each day for a much longer period than their time of service. Even those who live at their places of work generally have to make and mend their clothing and do other things for their personal welfare, in addition to the work done for their employers. In view of these circumstances affecting the generality of employed women, it could scarcely be claimed that a limitation to eight hours a day to the time of employment in many of the occupations mentioned in the act is unreasonable as a health regulation. The work in hotels may not be as severe as that in some of the other places covered by the law, but, considering the delicate frame of women as compared with men, we cannot perceive that the difference is so radical as to make it unreasonable to include employés in hotels among those protected by the law. Doubtless there is a limit below which the Legislature cannot go. But we cannot say that eight hours of employment in work of this character in addition to the labor necessary to be done before and afterward by the employé is unreasonably low and beyond the legislative discretion, or that, in the present condition of common knowledge on the subject, the limitation upon the time of employment of women in hotels is so manifestly unreasonable and unnecessary for the promotion and preservation of the health and welfare of the human race that the courts can declare that the Legislature had no rational ground for imposing it as a police regulation for that purpose. The responsibility, if the law is unwise, is with the Legislature.

[4] 3. The next objection is that the act is special because there are no reasons for making the restriction as to the particular employments mentioned in the act which do not apply with equal force to other similar occupations. There may be, and probably are, other occupations followed by women which are equally injurious to their health, and which should also be regulated. But, if this be true, it does not make the law invalid. If there are good grounds for the classification made by the act, it is not void because it does not include every other class needing similar protection or regulation. "The law is not rendered special by the mere fact that it does not cover every subject which the Legislature might conceivably have included in it." Ex parte Martin, 157 Cal. 57, 106 Pac. 237, 26 L. R. A. (N. S.) 242.

The general rules governing this subject are well settled by our decisions. They may be stated as follows: A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons composing it and others not embraced in it. It is not general or uniform, and it makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation. The following cases declare these rules: Smith v. Judge, 17 Cal. 555; Pasadena v. Stimson, 91 Cal. 251, 27 Pac. 604; Darcy v. San Jose, 104 Cal. 645, 38 Pac. 500; Bloss v. Lewis, 109 Cal. 499, 41 Pac. 1081; Marsh v. Hanly, 111 Cal. 370, 43 Pac. 975; Ex parte Jentzsch, 112 Cal. 474, 44 Pac. 803, 32 L. R. A. 664; Ex parte Giambonini, 117 Cal. 574, 49 Pac. 732; Krause v. Durbrow, 127 Cal. 684, 60 Pac. 438; Pratt v. Browne, 135 Cal. 652, 67 Pac. 1082; Ex parte Sohncke, 148 Cal. 267, 82 Pac. 956, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475.

The women employed in hotels are, for the most part, chambermaids and waitresses. It is contended that the work of such persons in hotels is no more arduous or injurious to health than that in lodging houses and boarding houses, that they are all of the same class with respect to the need of such protection, and hence that there is no substantial reason or difference in conditions which can justify the protection of those employed in hotels alone. The census returns show that in this state the number of boarding houses and lodging houses combined exceeds the number of hotels by about 50 per cent. of the number of the latter. As the hotels are usually the larger institutions, it is probable that the number of women employed therein is about equal to those employed in the other places mentioned. In the matter of numbers there appears to be no ground for distinction. But there are other obvious differences. The patrons of lodging houses and boarding houses use them as places of residence. They are for the most part permanent occupants. Such places partake more of the nature of a home or residence than does a hotel. They are not accessible, as of right, to the public generally, as is the case with hotels. The occupants may be and often are selected by the proprietor, and frequently they compose a class having similar habits, tastes, and desires. An acquaintance arises between them and the servants and the servants soon become accustomed to the wants and ways of those by whom their services are required. The occupants of a hotel are of a more transient character. They come and go and change daily. They are usually entire strangers to the servants. Their habits are likely to be irregular and of great diversity as well as unfamiliar to the employés. These respective conditions must, or at least may, make the work of such employés in the other places materially different from those similarly employed in hotels. It is not unreasonable to suppose that those in the other places will be subject to less strain and tension than those who serve the more transient, varied, and indiscriminate guests of hotels, to whom they are generally entire strangers. The Legislature, in view of all the above facts, may reasonably have so determined. In support of the law, as already stated, the courts are bound to presume that it did make this decision, and, as there are sound reasons upon which it may rest, the decision must be accepted as correct. The conditions stated appear to be a sufficient basis for the classification made. In such matters the Legislature cannot deal with individual cases. It can provide only for classes, and its decision as to the line of cleavage between classes in some particulars the same and in other particulars different must be upheld where it is based on any reasonable grounds. We are of the opinion, therefore, that the law cannot be declared invalid because of this discrimination.

We cannot say that the exemption of persons employed in harvesting, curing, canning, or drying perishable fruits or vegetables from the operation of the law makes an improper discrimination. These occupations can be carried on only for a short period of each year, the time of the annual ripening of the particular fruits or vegetables. In a cannery devoted to every kind of fruit and vegetable the work may continue much longer, but even those establishments are idle for a large part of the year. There is time for those employed therein to obtain rest and recuperation. It is also to be noted that, looking to the general welfare, there is a greater necessity for facility in obtaining employés to do such work than obtains in ordinary employments, for, unless the work is done at the proper time, great loss must ensue from the perishable nature of the products to be preserved. These are all matters which the Legislature could properly take into consideration, and they constitute a sufficient justification for the exception. See State v. Somerville, supra, where it was held that a similar exception did not vitiate the women's eight hour law of the state of Washington.

[5] 4. The title embraces but one general subject—the regulation of female employment. The subdivision of this subject by the particular details stated in the title does not make it embrace two subjects. The title is sufficient in this respect. We find no ground upon which the law can be declared void or the conviction in question invalid.

Let the petitioner be remanded to the custody of the sheriff of Riverside county.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

162 Cal. 749

McCOMBER v. KELLERMAN. (Sac. 2,877.)

(Supreme Court of California. June 4, 1912.)

1. Damages (§ 79*) — Liquidated Damages and Penalties — Construction of Oil Leases.

An oil lease granted to the lessee the right to enter on the land and drill oil wells, and provided that, if he failed to commence drilling within 90 days or to diligently prosecute such drilling, he should make certain specified payments each month to the lessor for 15 months after which the lease should be void if drilling had not been commenced and diligently prosecuted. *Held,* that the payments provided for were not by way of penalty or liquidated damages, but compensation in the nature of rental for the privilege of preserving the lessee's unexercised right to commence drilling, and hence were recoverable without any proof of actual damage to the lessor from the failure of the lessee to commence drilling.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164–169; Dec. Dig. § 79.*]

2. Damages (§ 79*)—Liquidated Damages—Question of Fixing Actual Damage.

Under Civ. Code, § 1671, authorizing parties to a contract to fix liquidated damages when from the nature of the case it would be extremely difficult to ascertain the actual damage, an oil lease providing for a royalty to the lessor and for stipulated payments to him for failure of the lessee to commence drilling shows the extreme difficulty of fixing the actual damage so as to render such stipulated payments recoverable as liquidated damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 164–169; Dec. Dig. § 79.*]

3. Mines and Minerals (§ 78*)—Construction and Operation of Oil Leases—"Suspend."

An oil lease provided for stipulated payments to the lessor for the lessee's failure to commence drilling, and also provided that the lessee might "suspend" drilling operations if the price of oil went below 75 cents a barrel. When the lease was executed, the price of oil was below 75 cents a barrel, and thereafter remained below that price. *Held,* that the lease merely authorized a suspension of drilling operations, and did not authorize a failure on the part of the lessee to commence drilling.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205–207; Dec. Dig. § 78.*

For other definitions, see Words and Phrases, vol. 8, pp. 6833, 6834.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by C. L. McComber against J. M. Kellerman. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Jones & Weller, for appellant. John W. Kemp and John S. Mitchell, for respondent.

SHAW, J. The appeal is from the judgment and from an order denying the defendant's motion for a new trial.

The complaint states a cause of action to recover the sum of $1,850, alleged to be due upon certain covenants for the payment of rent contained in a so-called oil lease. The appeal was taken to the District Court of Appeal for the Second District. That court, conceiving it to be a case not within its jurisdiction under the Constitution, made an order, as provided by the rules of this court, transferring the case to this court because of the fact that the appeal was supposed to be taken to the wrong court. In this the district court appears to have erred. The complaint is a simple action for a money judgment amounting to less than $2,000, and, under the Constitution, the appellate jurisdiction is in the District Court of Appeal. To set at rest all question concerning jurisdiction, we make a formal order transferring the cause from the District Court of Appeal to the Supreme Court.

The action is based upon a certain agreement executed between the plaintiff and defendant on June 20, 1908. By this agreement the plaintiff granted to the defendant the exclusive right to enter upon the land and drill wells thereon for the extraction of oil and remove the oil so extracted, paying therefor a certain specified royalty to the plaintiff. The defendant therein agreed that he would place a derrick and drilling outfit on the land and commence drilling on or before ninety days from the date of the lease, and would thereafter prosecute the work of drilling said well with reasonable diligence continuously to success or abandonment. The lease then proceeded with the following clause: "It is understood and agreed, however, that in the event of the failure of the party of the second part to place a derrick and drilling rig upon the above described premises, and commence drilling within the said ninety days and prosecute said drilling continuously and in good faith, as aforesaid, said second party agrees to pay to said first party, until drilling is so commenced and diligently prosecuted as aforesaid, the following amounts, viz.: For the first two months after the expiration of said period of ninety days, the sum of one hundred and fifty ($150.00) dollars per month; for the next four (4) months the sum of two hundred ($200.00) dollars per month, and for the next six (6) months, the sum of two hundred and fifty ($250.00) dollars per month, said payments to be made on the 20th day of each month for the preceding calendar month, but in no event shall the party of the second part be allowed more than one year and three months in which to commence drilling said first well, and if the said party of the second part shall fail to commence said drilling operations within one year and three months from the date of this lease, or fail to make any of the payments as above set forth, then this said lease shall be void and the party of the second part shall forfeit all right to the possession of any of the said premises under this agreement and shall not be entitled to commence drilling operations thereon according to the terms of this lease or otherwise." It further provided that, if oil was not found in the first well drilled, the second party would commence another well within ninety days and prosecute the same to completion, or, failing to do so, he would pay similar rent for a similar period, and that he should thereafter continue the operation of drilling wells on said land with at least one string of tools until he should have drilled at least one well on every five acres of the land.

The defendant did not enter upon the land or begin any drilling operations thereon, nor do anything whatever under the provisions of the lease. The plaintiff sued for the payments accruing under the clause of the leave above quoted for the period of nine months ending June 20, 1909. There is no allegation that the plaintiff suffered any damage by reason of the failure of the defendant to enter upon the premises and drill wells thereon.

[1, 2] The defendant contends that the effect of the above clause is to impose the payments mentioned as a penalty, or as liquidated damages for the breach of the agreement to begin the drilling of a well, and not to provide a rental for the premises during the period of delay allowed by the contract, or a price for the continuation of the right to begin during such delay; that if it is a penalty it is void under section 1670 of the Civil Code, and if liquidated damages the judgment is erroneous because it was neither alleged nor proven that the nature of the case is such that it would be extremely difficult or impracticable to fix the damages, referring to section 1671 of the Civil Code, allowing liquidated damages in such cases. In support of these contentions he cites Jack v. Sinsheimer, 125 Cal. 563, 58 Pac. 130, Long Beach v. Dodge, 135 Cal. 401, 67 Pac. 499, and other cases.

We do not think the agreement properly bears this construction. It gives the defendant the right to take possession of the land for the purpose of erecting a rig thereon and drilling wells therein and to continue such possession thereof for that purpose for the entire period of 15 months therein provided as the utmost limit of time within which the defendant must begin operations. The specified price appears to have been provided and fixed as the price which the defendant was to pay for the privilege of preserving and continuing his unexercised right to begin, in case he should see fit to or should be compelled to delay the beginning of the work for more than 90 days after the date of the lease. It was clearly in the nature of rental for the premises or compensation for the right, and not an attempt to fix a penalty or liquidated damages.

But, if it were considered as liquidated damages, the complaint and proof are sufficient to support the judgment. The nature of the case and the extreme difficulty of fixing damages arising from the breach of such a contract are fully shown by the lease itself. This was directly decided in Escondido, etc., Co. v. Glaser, 144 Cal. 500, 77 Pac. 1040.

[3] The fifth clause of the lease was as follows: "The party of the second part agrees to drill, operate and pump said wells constantly and with due diligence (holidays, Sundays and unavoidable accidents excepted) as long as the price of oil remains above seventy-five cents per barrel in that district for oil of similar quality, but should the price of oil go below seventy-five cents per barrel, then the party of the second part shall have the right to suspend all drilling operations until the market price in that district for oil of a similar quality shall have reached the price of seventy-five cents per barrel of forty-two gallons. It is understood, however, that the party of the second part shall continue to pump all of said wells until the price of oil shall go below sixty cents per barrel of forty-two gallons each, then he may cease pumping until the market price has again advanced to sixty cents per barrel." The complaint does not allege that the price of oil in the district in which the land was situated was 75 cents a barrel or more during the period in question. The defendant contends that this clause absolved him from the duty of beginning to drill the wells as long as the price of oil was less than 75 cents per barrel, and that the complaint should have alleged that it was of that market value at the time. We need not determine this question of pleading. The answer alleged the fact that the price of oil did not reach 75 cents per barrel during the entire period after the making of the lease. The court found this allegation to be true. Whatever benefit the defendant is entitled to from this fact he has secured from this finding, and the failure to state it in the complaint does not prejudice him.

His contention in this behalf is that, under the fifth clause above quoted, he was not required to begin drilling operations on the land until the price of oil in that district had reached 75 cents a barrel. We do not think the clause so provides. By the previous portions of the lease he was unconditionally required to place a derrick and drilling outfit on the land and begin drilling on or before 90 days from the date of the lease, or pay the monthly rent afterward as provided. The fifth clause did not exempt him from doing this. The price was below that sum when the lease was made. The clause provided that he should drill, operate, and pump the wells constantly as long as the price remained above 75 cents a barrel, and that, if it fell below that sum, he should "have the right to suspend all drilling operations" until the price again reached that sum. Pumping was to continue until the price fell below 60 cents. The price could not "go below" 75 cents, in the ordinary meaning of that phrase, unless it had reached that sum. The lessee could not "suspend" operations which he had not begun. The language was evidently chosen upon the theory that he should at all events begin the drilling of a well in good faith, but that, after having begun, he might be allowed to suspend such drilling until the price rose to 75 cents. The respondent contends with much force that this clause could not become operative until he had drilled a well and discovered oil therein. This argument is based upon the part of the clause which provides that the price stated should be for "oil of a similar quality"; that is to say, oil of a quality similar to that of the wells to be drilled on said land by the defendant. Obviously the quality of such oil could not be ascertained until the oil was discovered, and hence the price of such oil in the district could not be known until the oil was produced. In view of the fact that the price of oil was less than 75 cents a barrel at the time the lease was executed, there is reason for the contention of respondent that the clause was not intended to be effective until after the oil had been produced. But inasmuch as the defendant never began operations at all, and the clause clearly confers only the right to suspend drilling operations and not the right to refrain from commencing them, we do not find it necessary to determine whether it did or did not take effect before the production of oil began.

No other points are made in support of the appeal. We find no error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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163 Cal. 16

SMIDDY et al. v. GRAFTON. (L. A. 2,900.)

(Supreme Court of California. June 7, 1912.)

1. VENDOR AND PURCHASER (§ 134*)—CONTRACTS—IMPLICATION.

Where one makes a contract in writing to sell land without any exemption or reservation, the law implies an agreement to convey good title, free from incumbrances, and if one incumbrance is specifically provided for there is an implied agreement that the title shall be free from others.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 250–254, 258; Dec. Dig. § 134.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Landlord and Tenant (§ 92*)—Option to Purchase.

An owner of land executed a written lease giving the lessee an option of purchase, which provided for a cash payment and that the lessee might give a mortgage for the balance. At the time when the option was to be exercised, an unpaid mortgage remained on the land. *Held* that, as the agreement contained an implied covenant against incumbrances, the lessee had his election either to accept partial performance from the owner with an abatement because of the incumbrance, or to refuse to exercise the option, and so his offer to pay the amount stipulated to be paid in cash, less the amount of the incumbrance, was binding upon the owner and constituted an election to take under the contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 290–294; Dec. Dig. § 92.*]

3. Mortgages (§ 298*) — Payment — Discharge.

Where a mortgage is not due, the mortgagee cannot be compelled to accept payment and release it.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 836–854, 864, 871; Dec. Dig. § 298.*]

Department 1. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by G. W. Smiddy and another against F. H. Grafton. From a judgment for plaintiffs and an order denying a new trial, defendant appeals. Reversed.

Elmer R. McDowell, E. Earl Crandall, and William Hazlett, for appellant. H. F. Bridges and George E. Overmyer, for respondents.

SHAW, J. The defendant appeals from the judgment and from an order denying him a new trial.

The complaint states a cause of action in unlawful detainer to obtain possession of a lot in Los Angeles. The defendant answered, admitting the execution of the lease set forth in the complaint and the expiration of the term, but claiming the right to remain in possession as a purchaser, under an agreement contained in the contract of lease, whereby the plaintiffs agreed that defendant should have the right to buy the lot at any time during the term, at a price stated. The dispute concerns only the question of the terms of the option contract and the sufficiency of an offer by the defendant to accept and perform it. The findings of the court were that the offer was not made to perform in the manner agreed upon, that it was ineffectual, and that the defendant's right of possession had terminated. Judgment for restitution to the plaintiffs was given accordingly.

The contract was in writing. The first part of it was a lease of the lot by plaintiffs to the defendant for the period of six months ending July 22, 1910, at $20 monthly rental. It then provided that during that time the defendant should have the right to buy the lot at the price of $2,500, of which $1,000 was to be paid in cash when the option was to be exercised, and that the remaining $1,500 should be paid within three years thereafter, should bear 7 per cent. interest, and should be secured by "a second mortgage." There was a further provision that, if the option was exercised, the rent previously paid should be applied to pay interest at 7 per cent. on the price of $2,500 from the date of the lease to the date of purchase, and that the excess thereof over such interest should be applied as part of the cash payment of $1,000 on the price. A deed was to be made by the plaintiffs to the defendant when the payment was made and the mortgage executed.

The offer by the defendant accepting the option and tendering performance thereof was in writing. The offer, as made, was in the alternative. In explanation it is necessary to state that there was a prior mortgage for $800 on the lot, executed by plaintiffs to one Long, which was not payable by its terms until the year 1913. The first part of the offer was to pay in cash the sum of $167.50, being the difference between Long's $800 mortgage, plus $32.50 on account of the excess of rent over interest, and the first payment of $1,000, and to make a mortgage on the lot for $1,500, the remainder of the price, leaving the Long mortgage to stand as a first lien on said lot, and demanding a grant deed conveying the lot to him in fee simple, subject to the two mortgages for $800 and $1,500, respectively.

[1-3] Under the terms of the contract and in the condition of the plaintiffs' title, this tender was good. It exacted no departure from the terms of the contract which defendant was not entitled to demand, if he chose to accept such title as he could get and demand partial performance by the vendors with abatement or compensation for lack of full performance, as he had the right to do. Where one makes a contract in writing to sell and convey land, without any exception, or reservation, or provision as to the title or incumbrances, the law implies an agreement on his part to convey a good title free of incumbrance. And if one incumbrance thereon is specifically provided for, there is an implied agreement that the title shall be conveyed free from any others. Easton v. Montgomery, 90 Cal. 314, 27 Pac. 280, 25 Am. St. Rep. 123; Jonghaus v. McCormick, 18 Cal. 667; Whittier v. Gormley, 3 Cal. App. 489, 86 Pac. 726; 2 Pom. Eq. Rem. § 832; Spooner v. Cross, 127 Iowa, 259, 102 N. W. 1118; Roberts v. McFadden, 32 Tex. Civ. App. 53, 74 S. W. 105; 1 Sug. on Ven. (8th Am. Ed.) pp. 24, 456, 465; 39 Cyc. 1445, 1484; 2 Warvelle on Ven. §§ 312, 921. The plaintiffs were therefore bound to remove the Long mortgage before they could require payment of the purchase money. The contract expressly bound them to con-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

vey a title in fee simple. This could not be done while the prior mortgage was outstanding. 39 Cyc. 1485. The vendee, however, is in a different position. He has his election, as above stated, either to insist on a good title and refuse to exercise the option if it is not offered, or to accept such title as the vendors have, and demand an adjustment of the payments, in such a manner as may be just, to protect him as far as may be against loss from the defects in the title. Marshall v. Caldwell, 41 Cal. 611; Grant v. Beronio, 97 Cal. 499, 32 Pac. 556; Whittier v. Gormley, supra; 2 Story, Eq. Jur. § 779; 2 Pom. Eq. Rem. § 831; 39 Cyc. 1578. In such cases, where the defect consists of a lien on the land, the purchaser may compel the vendor to perform upon a tender of the amount due on the price, less a sum sufficient to discharge the liens. 39 Cyc. 1564, 1578; Murphy v. Hussey, 117 La. 390, 41 South. 692. In the present case the Long mortgage was not due and Long could not be compelled to accept payment or release it. The most that defendant could do, in such circumstances, if he desired to buy the land at the price fixed and was willing to waive the defect, was to offer to assume the payment of that mortgage, pay the difference, and otherwise to comply with the agreement. This he did by the part of the offer above recited. The plaintiffs could not justly or equitably demand more. They would be in no wise prejudiced by this qualified performance, in view of their implied obligations and their liability in damages for a breach thereof, if defendant had elected that remedy. Upon the face of the contract, therefore, the defendant was entitled to insist on performance in the manner specified in his tender and to remain in possession of the lot until performance was made accordingly, provided, of course, he kept his tender good.

In order to explain the alternative offer, it is necessary to state some additional features of the case. Defendant filed a cross-complaint asking a reformation of the contract on the ground that by mutual mistake it was so drawn that it did not express the real agreement. It was alleged that the actual agreement as to the option sale was that, if the $800 mortgage was removed at the time the option should be exercised, then defendant should pay $1,000, less the deductions for rent paid as stated, and should execute a mortgage for $1,500, the balance of the price; but that, if the $800 mortgage was not then removed, in that event the amount due upon it should be deducted from the $1,000 payment and defendant should be required to pay the balance only, and should make the $1,500 mortgage, as before. Reformation was asked to make the contract conform to this alleged agreement. The second part of the offer complied with the agreement as thus stated.

The court found that these allegations concerning the actual agreement and the mistake in drawing the writing were not true. The evidence sustains the findings in this respect. That offered by the defendant tended to support the allegations. But according to the evidence on behalf of the plaintiffs the actual agreement was that $2,500 was the full price of the land; that $1,000 in cash less the excess of rent paid over interest was to be paid without other conditions; and that, if the Long mortgage was not removed at the time the option was taken, the defendant was to assume its payment and execute a second mortgage for $700 to plaintiffs to make up the remainder of the $2,500. This was not the agreement alleged in the cross-complaint, and the court was therefore justified in finding that the allegations were not true. It is plain from this evidence that both parties signed the agreement under a mistake, but they do not agree with respect to the actual facts. This matter is not essential to our decision on this appeal. The first part of the offer complied with the requirements of equity and entitled defendant to such performance by plaintiffs as they were able to make in accordance with the demand and to hold possession in the meantime. The finding that defendant did not elect to exercise his option nor make a lawful offer to perform the agreement of sale is contrary to the evidence.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

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162 Cal. 755

UNION COLLECTION CO. v. OLIVER.

(S. F. 5,769.)

(Supreme Court of California. June 4, 1912. Rehearing Denied July 3, 1912.)

1. Appeal and Error (§ 594*)—Jurisdiction—Bonds.

Code Civ. Proc. § 941b, provides for the perfecting of an appeal without the giving of a bond, and section 953a provides for the preparation of papers on appeal and for a reporter's transcript in place of a bill of exceptions. *Held*, that while both of these acts were approved March 20, 1907, an appeal having been duly taken under the first section, the filing of a bill of exceptions in place of the reporter's transcript does not vitiate the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2622; Dec. Dig. § 594.*]

2. New Trial (§ 123*)—Motion—Time of Filing.

A motion for new trial is in the nature of a new and independent proceeding collateral to the judgment, and so, where notice of intention to file a motion for new trial is not given within the time limited, the trial court has no power under Code Civ. Proc. § 473, providing that it may relieve a party from the proceeding taken against him, to relieve the defeated party from his failure to promptly file his motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276–281; Dec. Dig. § 123.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. New Trial (§ 123*)—Time of Filing—Extension of Time.

Under Code Civ. Proc. § 1054, authorizing the judge to extend the time for preparing and filing a statement of intention to move for a new trial, the trial judge cannot extend the time for the motion after it has once expired.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 276–281; Dec. Dig. § 123.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Union Collection Company against Dew R. Oliver. There was a judgment for plaintiff, and, from an order denying its motion to dismiss defendant's motion for new trial, plaintiff appeals. Reversed.

J. S. Reid, for appellant. Frank H. Gould, Vincent Surr, Avery C. White, and I. F. Chapman, for respondent.

SLOSS, J. The plaintiff, having recovered a judgment in the court below, appeals from an order denying its motion to dismiss the defendant's motion for a new trial.

[1] At the outset it may be said, briefly, that the respondent's contention that the court is without jurisdiction of the appeal because the appellant failed to file a bond for costs on appeal is without merit. The "new and alternative method" of taking appeals provided by section 941b of the Code of Civil Procedure, enacted in 1907, dispenses with the necessity of an undertaking. Mitchell v. Cal., etc., Co., 154 Cal. 731, 99 Pac. 202; Estate of McPhee, 154 Cal. 385, 97 Pac. 878. The fact that a bill of exceptions was prepared in place of the reporter's transcript authorized by section 953a has no bearing upon this question. The latter section has to do with the preparation of a record on appeal. An appeal having been properly taken, in compliance with either the old or the alternative method, the record may be made up in any way permitted by the Code. Lang v. Lilley & Thurston Co., 119 Pac. 100.

[2] It appears that the verdict on which plaintiff's judgment is based was returned on September 7, 1905, and the time within which defendant was entitled to file and serve notice of intention to move for a new trial would, under section 659 of the Code of Civil Procedure as it then read, have expired on September 17, 1905. Code Amendments, 1873–74, p. 315. On the last-named day, plaintiff by written stipulation extended defendant's time to serve and file such notice to the 23d day of September, 1905. There was no further extension by stipulation or by order of court. The defendant served and filed his notice of intention on the 25th day of September. On October 7th the plaintiff moved to strike the notice from the files, whereupon defendant applied for, and on October 20th obtained from the court, an order relieving him from his default in the service and filing of said notice.

The principal contention of the appellant, and the only one that need be considered, is that the trial court was without power to relieve the defendant from the consequences of his failure to serve and file his notice of intention to move for a new trial within the time allowed by law. The argument is that where a party has failed to move for a new trial within the period limited by the Code, he has waived his right to make such motion, and that the provisions of section 473 of the Code of Civil Procedure do not authorize the court to revive the right which has thus been lost.

The position is sustained by the decisions of this court. It is true that a very liberal construction has been given to the terms of section 473. Thus, for example, it has been held that the trial court may relieve a party from the consequences of his failure to serve in time a proposed bill of exceptions (Stonesifer v. Kilburn, 94 Cal. 33, 29 Pac. 332; Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911), or statement on motion for a new trial (Vinson v. L. A. P. Ry. Co., 147 Cal. 479, 82 Pac. 53), or from a failure to present to the judge for settlement, within the time allowed, a statement on motion for new trial with the amendments thereto (Banta v. Siller, 121 Cal. 416, 53 Pac. 935). But such rulings have never been carried so far as to authorize the service and filing of a notice of intention to move for a new trial after the lapse of the time within which such notice might have been served and filed. In Little v. Jacks, 67 Cal. 165, 7 Pac. 449, the defendant within 10 days after notice of the making and filing of findings gave notice of his intention to move the court to vacate and set aside the judgment. This, as had theretofore been held, was not sufficient as a notice of intention to move for a new trial. The court made an order allowing the defendant to amend his notice of intention. The order was reversed, the court saying: "To allow a notice filed within statutory time but which was radically defective, to be amended after the expiration of that time would be in effect to extend the time allowed by statute for the giving of such notices, which the courts have no power to do." And, similarly, in Packer v. Doray, 98 Cal. 315, 33 Pac. 118, the notice of intention to move for a new trial, served and filed within time, stated that the motion would be made upon the minutes of the court and upon the ground, among other things, of errors of law occurring at the trial. The notice contained no specifications of errors of law. The moving party, after the lapse of the time within which a notice of intention to move for a new trial could have been given, applied to the court for permission to amend his notice of intention by adding thereto a specification of errors of law. The motion was based upon an affidavit showing that such specifications had been inadvertently omitted. Upon appeal an order permitting the amendment was reversed, this court holding, upon the authority of Little v. Jacks, supra, that the court below had no power to permit an amendment which would have the effect of a new notice of intention to move for a new trial. While the opinions in these two cases do not refer to section 473, an inspection of the briefs filed in support of the orders appealed from shows that in each instance the moving party relied upon the provisions of that section.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

These decisions have never been questioned, and we see no good reason for now departing from the rule thus declared. A motion for new trial, even when prosecuted within the statutory limitations, is frequently productive of great delay in the final disposition of the cause. Opportunities for further extending the pendency of an action after judgment should not be enlarged by an overliberal construction of the Code. Section 473 permits a party to apply to the court to be relieved from a "proceeding taken against him." Whatever may be said with respect to the failure to prepare or present for settlement a proposed bill of exceptions or statement, it seems quite plain that a party who has permitted the time within which he may move for a new trial to elapse has not had any proceeding taken against him. The motion for a new trial is under our practice in the nature of a new and independent proceeding collateral to the judgment in the action. Spanagel v. Dellinger, 38 Cal. 284; Brison v. Brison, 90 Cal. 323, 27 Pac. 186; Houser, etc., Co. v. Hargrove, 129 Cal. 90, 61 Pac. 660; Knowles v. Thompson, 133 Cal. 245, 65 Pac. 468. It may be availed of by the losing party on condition that he act within the time and in the manner specified by the Code. If he neglects to so act, he has simply failed to take advantage of a proceeding open to him. The case is similar to that which would be presented by his failure to take an appeal within the time allowed by law. It is not contended that either the superior court or an appellate court has power under section 473, or otherwise, to revive a right of appeal where the party has for any reason failed to serve his notice of appeal within the time allowed.

[3] The respondent suggests, however, that the rule should be different with respect to the service and filing of a notice of intention to move for a new trial, for the reason that under section 1054 of the Code of Civil Procedure the superior court may extend (for a limited period) the time within which such a notice may be given, while power to extend the time for giving a notice of appeal is expressly withheld. But, even in the cases to which section 1054 applies, an extension can be granted only within the period during which the right to give a notice is still alive. Clark v. Grane, 57 Cal. 639; Freese v. Freese, 134 Cal. 48, 66 Pac. 43. After this time has once elapsed, the case is just the same as if there were no statutory power to extend. No doubt the showing made in support of the motion to be relieved was sufficient to warrant the trial court in finding that any neglect on the part of the defendant was excusable, but this is of no consequence where the court has no power, upon any showing, to grant the relief.

The order is reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

162 Cal. 735

BRETT v. S. H. FRANK & CO.

(S. F. 5,428.)

(Supreme Court of California. May 29, 1912. Rehearing Denied June 28, 1912.)

1. Appeal and Error (§ 1195*)—Reversal—Law of Case—Amendment of Complaint.

Plaintiff was injured while taking a truck load of hides from an elevator in defendant's tannery by getting his foot caught in a belt opening near the elevator. The original complaint charged negligence only in that defendant maintained the belt opening with no surrounding guard. The answer pleaded contributory negligence, and, after reversal on appeal, plaintiff amended the complaint by adding allegations that the elevator shaft was carelessly left unguarded, and that the shaft and the belt opening were carelessly placed in close proximity to each other. The additional facts so pleaded were all shown by the evidence in the first trial, and were all involved in the issue then presented. *Held*, that the additional allegations did not materially change the issue, so as to prevent the determination on the prior appeal from operating as the law of the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

2. Appeal and Error (§ 1195*)—Prior Appeal Decision—Law of Case.

The doctrine of the law of the case, that, the Supreme Court having once decided the law, and the case having returned to the trial court for further proceedings in accordance with the law as thus established, it will not, on a second appeal, again consider the questions determined, but, if the facts are substantially the same, will treat the former decision as settled law, regardless of its accuracy, is not limited to cases where the former decision was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by Richard Brett against S. H. Frank & Co. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, it appeals. Reversed.

Chickering & Gregory, for appellant. Stafford & Stafford and H. J. Stafford (W. P. Caubu, of counsel), for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SHAW, J. Defendant appeals from the judgment, and also from an order denying its motion for a new trial.

Plaintiff's action is for damages, alleged to have been caused by defendant's negligence. The main defense is that the injury to the plaintiff was due to his own negligence. The cause was before this court upon a former appeal from an order granting a new trial. See Brett v. Frank & Co., 153 Cal. 267, 94 Pac. 1051. The order was there affirmed. The present appeals are from the judgment and order resulting from the second trial. It is claimed by defendant's counsel that the judgment and order here in question are in direct conflict with the law applicable to the evidence as settled upon the previous appeal. They also contend that the opinion upon the former appeal accurately states the law which should control the decision, irrespective of the doctrine of the law of the case. The plaintiff claims that after the decision of the former appeal the complaint was amended by charging additional acts of negligence, not involved in that appeal; and hence that neither the doctrine of the law of the case, nor the rule of law laid down in the former opinion, applies to the case as it now stands.

The manner of the injury was as follows: The plaintiff was employed by defendant as a workman in a tannery carried on by it in a building two or more stories high. An elevator was used in carrying the hides from the rolling room, on the first floor, to the drying room on the second floor. The drying room was back of the elevator, so that, in order to go thereto from the elevator opening, it was necessary to go out of the elevator, turn around, and pass by the left side thereof and on through a door in a partition wall running across the building behind the elevator shaft. This passageway to the left of the elevator was about 9 feet wide. Across it there was a rise of some 5 inches in the floor, made to permit the operation of a pulley on a shaft beneath the floor. To allow the passage of a truck over this rise, the floor was made to slope gradually off about 5 feet each way. The crest of this rise was immediately over the shaft on which the pulley below was fixed, and was on a line which, if extended, would pass in front of the elevator entrance and about one foot therefrom. The abrupt edge of this rise was parallel to and 18 inches from the side of the elevator. It extended about 6 feet farther to the front than the elevator. To the right of the elevator entrance, and 16 inches away, there was an opening in the floor, 15 inches by 24 inches in size, through which a belt was rapidly running from the ceiling above downward through the floor. The plaintiff, when hurt, was propelling a truck loaded with hides from the rolling room below to the drying room on the second floor. It was a four-wheel truck, 8 feet long and 4 feet wide over all, the two axles being about 5 feet apart, and it was moved by means of a handle or tongue fastened with a kingbolt, so as to be turned in any direction. He had pulled the truck into the elevator, so that on arriving at the second floor it was necessary to push it off backward. To reach the drying room, he should have pushed it straight back beyond the rise in the floor and then forward over the rise past the elevator into the drying room. In pushing it out of the elevator, it swerved to one side, so that the rear wheel ran against the abrupt edge of the rise, thus making it necessary to pull it forward a little to give it a new direction and back it again beyond the rise. In doing this, he did not step back into the elevator, because he feared that some one below or above might start it. He therefore stepped back on the floor toward the right-hand side of the elevator, and, failing to observe the belt hole, he stepped into it, his leg was drawn in by the belt and broken, and the skin and flesh burned by the friction of the running belt. He had been in that work for seven weeks, and was familiar with the belt hole, the rise in the floor, the elevator, the manner of doing the work, and the entire situation and conditions.

[1] The original complaint is not in the record. According to the opinion of this court on the former appeal, to which we may look, the negligence therein charged consisted only of maintaining the belt hole, aforesaid, with no guard around it to prevent a person from stepping into it. The answer set up as a defense that the plaintiff's own negligence contributed to or caused the injury. The amendment to the complaint after the former appeal and prior to the last trial consisted in adding the allegations that the elevator shaft was carelessly left unguarded, and that said shaft and said belt hole were carelessly placed in close proximity to each other. These conditions, it is claimed, both contributed to the injury and relieved the plaintiff from the charge of negligence in failing to remember or observe the belt hole, which he well knew existed and could easily have seen.

We do not think these additional allegations materially changed the issue. The additional facts were all involved in the issue presented on the first trial, and they were all shown by the evidence, and, so far as they are material, they were all considered by this court in the former opinion. It is true that the question decided upon the former appeal was that the court, at the close of the first trial, should have granted a nonsuit. But the defendant in the answer to the original complaint had pleaded contributory negligence as a defense. This made it necessary to grant a nonsuit, if the evidence given for the plaintiff showed, as matter of law, that the plaintiff's own negligence proximately contributed to his injury. The facts above related were all shown by the evidence there given on behalf of the plaintiff. The evidence on the present trial did not materially change the facts in any respect. Upon the former appeal, the court decided that contributory negligence was shown as matter of law, and that the court upon that trial should have granted the nonsuit. The proximity of the hole and the shaft to each other was shown upon the former trial and referred to in the opinion upon the former appeal. They were there stated to be only 9 inches apart, instead of 16 inches apart as here appears. Their proximity was one of the conditions considered upon the former appeal in determining the question of the plaintiff's negligence. The unguarded condition of the elevator shaft was immaterial. It could not have contributed to the plaintiff's confusion at the time; and he does not say that it did. His fear that some one might start the elevator prevented him from stepping back into it. If it had been guarded, the guard would have prevented him. Either hindrance would have made him move in some other direction, as it appears that he did. The decision rested upon substantially the same facts that are presented by the pleadings and the evidence upon the second trial. The law of the case should have controlled.

[2] We desire to say, however, that it is not necessary to resort to the doctrine of the law of the case. It has been sometimes said that the doctrine of the law of the case is invoked only when the former decision as to the law is erroneous; that its application presupposes a previous error by which the court is bound. It does, indeed, go that far, if it becomes necessary to do so. But the last decision would be the same in a case where the first decision was not erroneous. The doctrine means simply this: That, the court having once decided the law, and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, this court will not, upon a second appeal, again enter into a consideration of the question; but if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy. See Allen v. Bryant, 155 Cal. 258, 100 Pac. 704. In the present case we are entirely satisfied with the law laid down on the former appeal. The subject is there fully and carefully considered, and it is not necessary here to repeat the argument. We refer to the opinion in that case for a further statement of the reasons which led to the conclusion that there was contributory negligence on the part of the plaintiff. See, also, Ergo v. Merced, etc., Co., 161 Cal. —, 119 Pac. 101. The general verdict and the answers of the jury to the special interrogatories, to the effect that there was no contributory negligence of plaintiff, were contrary to the evidence. The motion for a new trial should have been granted.

The judgment and order are reversed.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

ANGELLOTTI, J. I concur in the judgment on the first ground stated in the opinion, viz., the law of the case.

163 Cal. 1

NOLAN v. HYATT et al. (L. A. 2,906.)

(Supreme Court of California. June 4, 1912.)

1. Judgment (§ 743*)—Conclusiveness—Title to Property.

Where a grantee of a husband brought an action against the wife to quiet title on the ground that the property was paid for out of community funds, and that the conveyance was made to the wife who received it as community property, and that subsequently the husband conveyed the property to the grantee, and the wife denied the ownership of the grantee or that the husband had conveyed the property to him, or that she had received the title as community property, and by cross-complaint alleged that she had received the title as her separate property, and held the same as such, a judgment that the grantee take nothing by his action, and that the wife take nothing under the cross-complaint, was, under Code Civ. Proc. § 1908, making a judgment conclusive between the parties a conclusive adjudication as between the parties that the property was not the separate estate of the wife, and that the grantee was not the owner of the legal title, but the judgment did not estop the wife from showing that the grantee, in a subsequent suit to compel a conveyance of the legal title, was not the owner in equity of the community property.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1275–1277; Dec. Dig. § 743.*]

2. Quieting Title (§ 15*)—Interest of Defendant—Community Property—Legal Title in Wife.

A wife to whom conveyance of real estate purchased by the husband and paid for out of community property is conveyed has sufficient interest in the community property to warrant her in opposing the claim of a grantee of the husband that he has become thereby the owner in equity, and that she be required to convey the legal title to him.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 47; Dec. Dig. § 15.*]

3. Husband and Wife (§ 267*)—Community Property—Equitable Title—Performance of Contract.

Where a husband paying out of community funds for real estate which he caused to be conveyed to the wife executed a deed to a third person who paid no consideration, except handing to the husband a check for $100 on account of the agreed price of $8,000, and who never offered or tendered any further part of the price, the third person could not, on the theory that he was the equitable owner by virtue of the deed, compel the wife to convey to him the legal title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 929–952; Dec. Dig. § 267.*]

Department 1. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by M. J. Nolan against Esther L. Hyatt and another. From a judgment for defendant named and from an order denying a new trial, plaintiff appeals. Reversed in part, and affirmed in part.

Avery & French, for appellant. F. S. Yager, E. W. Freeman, and A. D. Laughlin, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment in favor of defendant Esther L. Hyatt, and from an order denying his motion for a new trial.

The action was one brought by plaintiff against the defendants, who are husband and wife, to obtain a decree requiring defendant Esther L. Hyatt to convey to him the legal title to certain real property standing in her name, on the theory that the same constituted community property of herself and her husband, and that he (plaintiff) is the owner in equity thereof by reason of a conveyance thereof from the husband to himself. The property consists of about five acres of land, with the improvements thereon, situate in Los Angeles county. By answers and cross-complaints the defendants severally denied various allegations of the complaint, and defendant Esther L. Hyatt set up the claim that the property was her separate property and was free of all just claims on the part of either plaintiff or her husband, while the defendant W. J. Hyatt, denying all claims of plaintiff, set up the claim that the property is the community property of himself and wife, free of all just claims by plaintiff. Plaintiff answered the cross-complaints of both Mr. and Mrs. Hyatt, denying the allegations thereof and asserting that the conveyance to Mrs. Hyatt was in trust for the marital community, and that by reason of the conveyance from Mr. Hyatt he was the equitable owner thereof. He further set up as a bar to the cross-complaint of Mrs. Hyatt the proceedings and judgment in a former action brought by him against her to quiet his title to the property, which will be referred to hereafter. The trial court found that the property was the separate property of Mrs. Hyatt from the time of its acquirement in the year 1898, that Mr. Hyatt never conveyed for a valuable consideration or any consideration the title to said property to plaintiff; that plaintiff never was the "equitable or any owner" of said property or any part thereof; and that Mrs. Hyatt was not estopped by the proceedings and judgment alleged in plaintiff's answer to her cross-complaint from asserting her claims in this regard. It further found that certain agreements were entered into between Mr. Hyatt and the plaintiff, whereby Hyatt agreed to sell the property to plaintiff for $8,000 "whenever title to the same shall be perfected in the plaintiff," the plaintiff agreeing to deed to Mrs. Hyatt a small portion thereof, and to move a house thereon and improve the same at a cost of $700 or $800; that on May 24, 1905, Mr. Hyatt, by his attorney in fact, conveyed the property to plaintiff by a bargain and sale deed, and that the plaintiff on the next day executed a memorandum acknowledging receipt of this conveyance, and "that said conveyance is received by me for the purpose of perfecting title to said premises in me"; that the plaintiff never did pay any consideration whatever for said conveyance until November, 1905, when he paid Mr. Hyatt $100, which sum was subsequently tendered back to plaintiff by Hyatt, and has been deposited in court for him.

Judgment was given to the effect that plaintiff take nothing, that defendant William J. Hyatt take nothing and that defendant Esther L. Hyatt have judgment against both plaintiff and said William J. Hyatt declaring her to be the sole owner of the property, free of "all claims, demands or pretensions of" plaintiff and said William J. Hyatt, or either of them. Mr. Hyatt did not join in the motion for a new trial, and has not appealed from the judgment.

The principal question presented by appellant's opening brief is as to the effect of the proceedings and judgment in the former action. It was not claimed that the evidence was not sufficient to support the findings above referred to, if such proceedings and judgment are excluded from consideration. The trial court sustained respondent's objection to the introduction in evidence of the judgment roll in said action. The ruling of the trial court sustaining this objection and the alleged prejudicial effect thereof are the important matters discussed in appellant's brief.

[1] The former action was an action by plaintiff against Mrs. Hyatt and her son (the husband not being made a party) to quiet his alleged title in fee to said property, instituted after he had received the conveyance from Mr. Hyatt that is relied on in this action. The complaint contained two counts, the first being in the usual form of a complaint in an action to quiet title, and the second setting up in addition to the usual allegations of ownership and adverse claim the charge that upon its purchase by Mr. Hyatt the property was paid for out of community funds; that, while the conveyance was made to Mrs. Hyatt, she received it as community property, and that subsequently Mr. Hyatt conveyed the property to him. He asked for a decree quieting his title against the defendants. By her answer in that action Mrs. Hyatt denied that plaintiff was the owner of the property, or that Mr. Hyatt had conveyed the same to him, or that she ever received the title to the same as community property. By cross-complaint she alleged that she received the title to the property as her separate property and estate, and had ever since held the same as such and was in possession thereof. She asked for a decree declaring her

to be the sole owner of the property. The plaintiff answered this cross-complaint, reiterating his claim as to the community character of the property. The findings of the trial court were in favor of plaintiff upon the issues as to the character of the property. The court also found that on May 24, 1905, Mr. Hyatt "executed a deed of grant of said premises to M. J. Nolan, the plaintiff herein." The court, however, concluded upon these facts so found that the legal title was in Mrs. Hyatt "in trust for the benefit of the marital community of herself and her husband," and that plaintiff was not the owner of the legal title. Judgment was given "that plaintiff take nothing by this action, and that defendants take nothing by or under the cross-complaint filed herein," and that defendants recover their costs. Apparently no appeal was ever taken from this judgment.

We can see no reason for doubting that, as between plaintiff and Mrs. Hyatt, the proceedings and judgment in the former action estopped Mrs. Hyatt from asserting that the property was not community property of her husband and herself. By her cross-complaint in that action she sought a decree quieting her title to the property, claiming by her allegations that the same was in fact her separate property. Issue having been joined on these allegations by an answer to the cross-complaint, the trial court found against her, and by its judgment denied her any relief under her cross-complaint. It thus appears to have been directly adjudged in what was, in fact, an action by Mrs. Hyatt against plaintiff to have it determined that she was the owner of this property, free of all claim on the part of plaintiff, that the property was, in fact, community property of herself and her husband, and that she held it solely in the capacity of trustee for the marital community. Relief was denied her in the former action on that ground. It is unnecessary to cite authorities as to the conclusive effect of such proceedings and judgment in so far as this question of fact was concerned. In his written opinion, filed in deciding this case, the learned judge of the trial court, apparently conceding that the reasons actuating him in the exclusion of the judgment roll were not sound, said: "Hence it appears that the question whether or not Mrs. Hyatt held the title to the property in trust or absolutely in her own right was directly put in issue by her cross-complaint and the answer thereto. And, the judgment having been against her on this issue, none of the facts involved and necessary to support that judgment can again be the subject of litigation between the same parties or their successors in interest. The court cannot again hear evidence of the matter—it was forever settled in the former case." See, also, section 1908, Code Civ. Proc. If the judgment roll had been admitted in evidence, it would have necessitated contrary findings on the question of the character of this property, and such findings would have precluded the relief demanded by Mrs. Hyatt's cross-complaint so far as plaintiff Nolan is concerned.

But it does not follow, as we view the matter, that this conclusion requires a reversal of the judgment in so far as such judgment denies plaintiff any relief in this action against Mrs. Hyatt. The judgment roll of the former action offered by plaintiff in evidence would have undoubtedly shown him to be estopped to urge that he had acquired the legal title to the property. The judgment, following the conclusion of law that the plaintiff is not the owner of the legal title, ordered "that plaintiff take nothing by this action." Whether erroneous or not, here was clearly an adjudication as between plaintiff and Mrs. Hyatt that plaintiff did not acquire the legal title to the property by virtue of the deed from Mr. Hyatt to him or in any other way, which forever concludes that question so far as they are concerned. Recognizing the effect of this judgment, plaintiff seeks in this action a decree compelling the conveyance of the property to him upon the theory that he is the owner in equity of the property, and therefore entitled to a conveyance of the legal title. To show such ownership he alleges the same deed from the husband that was relied upon in the former action as constituting a conveyance of the legal title, alleging, further, that the same was given "for a valuable consideration" and constituted a conveyance of the property to him, and that he "now is the equitable owner of said premises." There is nothing in the record of the former action that should be held to estop Mrs. Hyatt from showing that plaintiff has not become the owner in equity of the community property here involved, notwithstanding the execution of the deed by Mr. Hyatt to him.

[2] As the wife, regardless of her adjudged capacity as trustee of the property for the benefit of the marital community, she has sufficient interest in the community property standing in her name to warrant her in opposing the claim that plaintiff has become the owner thereof in equity and that she be required to convey the legal title thereto to plaintiff.

[3] We do not see how plaintiff can be held to have become the owner in equity of this valuable property without having in fact paid some substantial consideration therefor, or at least having made a tender of such consideration. The trial court found that plaintiff did not pay any consideration whatever for said conveyance until November, 1905 (six months thereafter and long after the commencement of his original action to quiet title), when he handed to Mr. Hyatt a check for $100 on account of the $8,000 which was the agreed price. All this is shown by evidence without conflict. It does not appear that any tender of any other portion of the

purchase price was ever made, and, in fact, no part of the purchase price was due under the agreements until the title should have been perfected in plaintiff. No offer was made in the complaint in this action to pay the purchase price as a condition precedent to judgment requiring a conveyance or at all. Plaintiff's theory simply was that by virtue of the deed to him and his promise to pay for the property when he should have obtained a decree perfecting his title, or other disposition of all claims of Mrs. Hyatt, he became the owner in equity of the property, entitled to compel a conveyance of the legal title by Mrs. Hyatt. If plaintiff did not obtain the legal title by virtue of the deed from Mr. Hyatt, which, as we have seen, is conclusively established against him by the judgment roll in the former action which he sought to introduce in evidence, no reason is apparent, in view of what we have said, why he can be held to have become the equitable owner of the property. The finding of the trial court that plaintiff is not the "equitable or any owner of said premises, or any part thereof," would thus be necessarily sustained by the evidence, even though the judgment roll in the former action had been admitted. If plaintiff now has any right in relation to this property, such right would appear to be at most simply that of a vendee in a contract for the sale and purchase of real estate, who has not paid the purchase price. Whether or not he has any such right it is not necessary here to determine, for no such claim was made by him in the lower court, and manifestly this is not an action for the specific performance of a contract. But certainly, in view of the adjudication in the former action as to the want of legal title in him, and his failure to show matters essential to make him the owner in equity of the property, he has no other right or claim.

In view of what we have said, we can perceive no reason why the judgment should be disturbed in so far as it simply denies plaintiff any relief, even though the findings as to the character (community or separate) of the property be erroneous, as we are satisfied is so as between plaintiff and Mrs. Hyatt. It still is true that other findings, sufficiently sustained by competent evidence, amply support the judgment that plaintiff take nothing by this action. In so far, however, as the judgment awards Mrs. Hyatt affirmative relief against plaintiff on her cross-complaint, it must be reversed, as must also the order denying plaintiff's motion for a new trial in so far as the issues made by such cross-complaint and the answer thereto on the part of plaintiff are concerned. This will leave the judgment in full force in so far as it denies plaintiff any relief, and in so far as it awards Mrs. Hyatt certain relief on her cross-complaint against her codefendant William J. Hyatt, who has not appealed.

The judgment is reversed in so far as it awards defendant Esther L. Hyatt affirmative relief against plaintiff on her cross-complaint. In all other respects said judgment is affirmed. The order denying plaintiff's motion for a new trial is reversed in so far as it denies him a new trial of the issues made by the cross-complaint of said Esther L. Hyatt against him, and his answer thereto. In all other respects said order is affirmed.

We concur: SHAW, J.; SLOSS, J.

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162 Cal. 749

WALTER G. REESE CO., Inc., v. HOUSE et al. (L. A. 2,902.)

(Supreme Court of California. May 31, 1912. Rehearing Denied June 28, 1912.)

1. Vendor and Purchaser (§ 18*)—Contracts—Construction — Option to Purchase.

An agreement, reciting that if a broker sells described property of the owner, signing the agreement, the latter will pay a commission on the sale price, and that in consideration of a specified sum, receipt of which is acknowledged, the owner grants the broker the exclusive agency of the property described for 15 days and thereafter until written withdrawal, or optional with the broker to pay the owner a net price on specified terms, provides for the employment of the broker to sell the property, and gives him an option during the term of the agency to purchase at the specified price, and is valid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

2. Vendor and Purchaser (§ 18*)—Option—Acceptance—Effect.

Where one who obtains an option to purchase real estate accepts the option, a binding agreement of purchase and sale results, though the option is given without any consideration.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

3. Vendor and Purchaser (§ 18*)—Option—Rights of Parties.

An option to purchase real estate within a specified time supported by a consideration cannot be withdrawn, but an option unsupported by any consideration may be withdrawn at any time before acceptance, though the time limited therein has not expired.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.*]

4. Specific Performance (§ 114*) — Contracts of Sale of Real Estate — Complaint—Sufficiency.

A complaint which alleges that plaintiff was employed to procure a purchaser of real estate and was given an option to purchase, that while the option was in force the owner executed deeds of gift to grantees who had knowledge of the option, that plaintiff without any knowledge of the deeds went to the home of the owner, that the grantees who were present refused to allow an interview with the owner, that plaintiff insisted on seeing the owner, and informed the grantees that he offered to purchase the property and exercised the option and offered to pay the price, that plaintiff still ignorant of the deeds of gift notified the owner by registered mail of the acceptance of the option, that the grantees refused to receive the mail, that subsequently the owner died, and that the grantees refused to convey the property pursuant to the agreement, stated a cause of action within Civ. Code, § 1489, declaring that an offer of performance may be made at the residence of the other party, and because the facts showed that the grantees took with notice of the option.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–372; Dec. Dig. § 114.*]

5. SPECIFIC PERFORMANCE (§ 49*) — CONTRACTS ENFORCEABLE — ADEQUACY OF CONSIDERATION.

To compel the specific performance of a contract to convey real estate, it must appear affirmatively by the allegations of the complaint that the consideration is fair and adequate, and it is not enough to merely state the legal conclusion of such adequacy.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. § 49.*]

6. SPECIFIC PERFORMANCE (§ 114*) — CONTRACTS ENFORCEABLE—ADEQUACY OF CONSIDERATION.

An allegation in a complaint to compel specific performance of a contract to convey real estate that the property is reasonably worth a specified sum is an averment of a fact, and, where such sum appears to be no greater than the contract price, plaintiff has sufficiently shown by averment of appropriate facts that the consideration for the contract is adequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–372; Dec. Dig. § 114.*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Walter G. Reese Company, Incorporated, against Louise C. House, formerly Louise C. Wirth, and others. From a judgment of dismissal, plaintiff appeals. Reversed.

Alfred Siemon, for appellant. C. C. Hamilton, for respondents.

SLOSS, J. Demurrers to plaintiff's third amended complaint and to its supplemental complaint were sustained without leave to amend, and judgment of dismissal entered. From this judgment the plaintiff appeals.

The plaintiff makes no point on the ruling with respect to the supplemental complaint. The only question is whether the demurrer to the third amended complaint should have been sustained.

After setting forth the corporate character of the plaintiff, the complaint in question alleges that on or about the 16th day of June, 1910, Elizabeth Wirth was the owner and in possession of three lots and of an undivided one-half interest in two other lots in the city of Bakersfield. On said day said Elizabeth Wirth, in consideration of $1 paid to her by plaintiff, and of other good and sufficient considerations, made, executed, and delivered to plaintiff an option to purchase said property, which option was in the following words: "Bakersfield, California. Walter G. Reese Co., Inc. If Walter G. Reese Co., sells said property described hereon (of which I am owner) or if it sends me a party who buys or exchanges for said property, I hereby agree to pay said Walter G. Reese Co. for its services a commission of 5 per cent of sale price. Date 6/16/10. In consideration of $1.00 receipt of which is hereby acknowledged, I hereby grant Walter G. Reese Co., the exclusive agency of property described hereon for 15 days or one-half month from this date, and thereafter until written withdrawal, and agree to deliver said premises at price at which I have listed same hereon, less the above mentioned commission; or optional with said Walter G. Reese Co., to pay me a net price of $2400.00 on same terms named hereon. I agree and will furnish certificate of title and other necessary papers to establish clear and satisfactory title. [Signed] Elizabeth Wirth." Indorsed on said agreement was a description of the property and the figures: "$2500.00." It is alleged that no written or other withdrawal of said option has been made, and the same has at all times since its execution been and now is in full force and effect; that the sum of $2,400 mentioned therein "was and is and at all times since the execution thereof has been a fair and reasonable value of said property described therein, and that said optional agreement was and is fair and reasonable in all its parts, and that said sum $2,400 is now and at all times since the execution of said agreement has been an adequate price for the said property." On or about the 21st day of June, 1910, while plaintiff's option was in force and effect, and before any withdrawal or revocation thereof and without the knowledge or consent of the plaintiff, said Elizabeth Wirth executed and delivered certain deeds of gift, whereby she attempted to convey the said property to the defendants (her children), that said deeds were without consideration and were made at the fraudulent instigation of defendants, with the intent to avoid and defeat plaintiff's rights under said contract or option. At the time of the execution and delivery of said deeds and prior thereto, the defendants had actual knowledge of the fact that plaintiff held an option to purchase said lands, and each of said defendants knew all the terms and conditions of said option.

On June 30, 1910, and before the plaintiff had any knowledge of the execution and delivery of said deeds, plaintiff's agent, at the instance and request of the plaintiff, went to the home of said Elizabeth Wirth to give her notice of the exercise of said option and to pay for the said property; that at such time the defendants, who were present, refused to allow said agent to interview Elizabeth Wirth, and thereupon said agent stated to defendants that he had an option to purchase the property, and desired to see said Elizabeth Wirth and to pay her therefor, and to receive a deed for the said property. The defendants refused to allow said agent to see Elizabeth Wirth. The plaintiff, it is alleged, "insisted on seeing said Elizabeth Wirth; and then and there stated to the defendants that it offered to purchase said land and exercised its option thereto and offered to pay the purchase price thereof." Thereafter, on the 1st day of July, 1910, and before any written or other withdrawal of said option, and while plaintiff was still ignorant of the execution and delivery of said deeds to the defendants, the plaintiff notified Elizabeth Wirth in writing that it accepted said option and agreed to buy said property at the sum mentioned, and offered to pay said Elizabeth Wirth the purchase price of said property. Said written acceptance and offer were sent to Elizabeth Wirth by mail, duly registered and prepaid, addressed to her at her home in the city of Bakersfield. The defendants refused to receive said mail; their said refusal being made for the purpose of preventing plaintiff from giving notice of the exercise of said option. Since the 1st day of July, 1910, Elizabeth Wirth departed this life. She was at the time of her death insolvent, and left no legal estate. No administrator has been appointed, and there is no personal representative. The plaintiff is ready, willing, and able to pay the defendants the sum of $2,400 for the property, and offers to pay the same into court to be paid to the defendants on the execution and delivery of deeds to said property, and certificate of title, according to the said option. The said defendants and each of them have refused, neglected, and failed to convey said property to the plaintiff, or to perform any of the terms of said agreement.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The prayer is for judgment that the agreements so made by the plaintiff and Elizabeth Wirth be specifically performed, and that the defendants be required to convey said premises to the plaintiff and execute a good and sufficient deed therefor on payment by the plaintiff of the purchase price.

The demurrer specified two grounds: First, that the third amended complaint did not state facts sufficient to constitute a cause of action; second, that the complaint was uncertain, in that it did not show that there was a valuable and sufficient consideration for said supposed option, or that said alleged purchase price was or is adequate, and that the complaint was uncertain, further, in that it did not clearly show that a valid tender of the alleged purchase price or offer of performance had been made. We think these specifications were without merit, and that the demurrer should have been overruled.

[1] The agreement between the plaintiff and Mrs. Wirth was inartificially drawn, but its meaning and intent are sufficiently clear. The agreement provided in the first place for the employment of plaintiff as agent to sell the property for the sum of $2,500, of which the plaintiff was to receive, in case of sale, a commission of 5 per cent. There was a further agreement that the plaintiff should have the option, running concurrently with the agency, to purchase the property at and for the price of $2,400. The option was to last as long as the agency—that is to say, for 15 days—and thereafter until notice of withdrawal in writing should be given. That such an agreement is valid is not to be questioned.

[2] The first point urged by the respondent in support of its demurrer is that there is no allegation that the consideration for the option, as distinguished from the consideration for the conveyance of the land itself, was adequate. The adequacy of the consideration for the option is not a material question here. By the acceptance of the option (assuming that it was duly accepted, a point to which we shall refer later) a contract of purchase, binding Mrs. Wirth, or her successors, to sell and the plaintiff to buy, became complete. It is this contract which the plaintiff is seeking to enforce, not the agreement for an option, which was immediately executed. Even if an option be given without any consideration, a binding agreement of purchase and sale results from an acceptance of the option during its life.

[3] The only importance of a consideration as bearing upon an agreement giving an option is that, where there is a consideration, the option cannot be withdrawn during the time agreed upon for its duration, while, if there be no consideration, the party who has given the option may revoke it at any time before acceptance, even though the time limited has not expired. In the absence of a consideration, the option is nothing more than an offer to sell. But such offer, duly accepted, constitutes a contract binding upon both parties and enforceable by either. These matters are more fully discussed in Smith v. Bangham, 156 Cal. 359, 104 Pac. 689, 28 L. R. A. (N. S.) 522, and the decision in that case fully answers the points made with respect to the consideration for the option.

[4] Viewing the action, then, as one to enforce a binding agreement for the purchase and sale of the land at the price of $2,400, there is no foundation for the claim that the complaint does not sufficiently show an adequate consideration.

[5] It is, of course, established by a long line of cases that, in a case to compel the specific performance of a contract, it must be made to appear by affirmative allegation that the consideration was fair and adequate. Morrill v. Everson, 77 Cal. 116, 19 Pac. 190; Prince v. Lamb, 128 Cal. 129, 60 Pac. 689; Stiles v. Cain, 134 Cal. 171, 66 Pac. 231; White v. Sage, 149 Cal. 613, 87 Pac. 193. It is not enough to merely state the legal conclusion of such adequacy. Facts supporting the conclusion must be pleaded. But such facts are sufficiently alleged in the complaint before us, in which, as we have seen, there is a specific averment to the effect that the

sum of $2,400, mentioned in the option, is and at all times since the execution of the agreement has been a fair and reasonable value of said property. Brown v. Town of Sebastopol, 153 Cal. 704, 96 Pac. 363, 19 L. R. A. (N. S.) 178.

[6] An allegation that property is reasonably worth a certain sum is an averment of a fact, and, where such sum appears to be no greater than the price agreed upon for the sale, the plaintiff has fully complied with his obligation to show by averment of appropriate facts that the consideration for the contract sought to be specifically enforced is adequate. See White v. Sage, supra.

We think the facts alleged in the complaint were sufficient to show an acceptance of the option by plaintiff and a tender of performance on its part. Under section 1489 of the Civil Code an offer of performance may be made at the residence or place of business of the creditor, if such creditor evades the debtor. While it is not averred in so many words that Mrs. Wirth evaded the plaintiff, still the facts set out are such as to compel the inference of such evasion. In Stein v. Leeman, 119 Pac. 663, we held, under a state of facts very similar to those here presented that there had been a sufficient tender. But, apart from all this, it is alleged that during the life of the option, and before the plaintiff had exercised it, the property had been transferred by Mrs. Wirth to the defendants, who took with notice of the plaintiff's rights. By so taking, they became bound to carry out the obligation of the contract. They were, accordingly, the persons to whom notice of acceptance could properly be given, and of whom demand for conveyance could properly be made. The complaint shows that plaintiff's agent stated to the defendants that the plaintiff "offered to purchase said land and exercised its option thereto and offered to pay the purchase price thereof." This was a sufficient acceptance of the option and offer of payment to entitle the plaintiff to enforce the agreement against the defendants, even if it could be held that there was no sufficient notice and tender to Mrs. Wirth.

The judgment is reversed, with directions to the trial court to overrule the demurrer with leave to defendants to answer the third amended complaint.

We concur: SHAW, J.; ANGELLOTTI, J.

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18 Cal. App. 764

KEELING v. SCHASTEY & VOLLMER.

(Civ. 903.)

(District Court of Appeal, First District, California. April 26, 1912.)

1. Work and Labor (§ 14*) — Building Contracts—Building Destroyed by Fire.

Where a contractor agreed to alter and repair an existing building, and then contracted with a subcontractor to do part of the work and to receive payments therefor on the basis of 75 per cent. of the work done as it progressed, and 25 per cent. after the completion of the work, and where, before completion of the subcontractor's work, the building burned without the fault of either party, the subcontractor was entitled to recover from the contractor the difference between the amount paid and the reasonable value of the work done by him, and was not limited to a recovery of 75 per cent. of it.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 29–33; Dec. Dig. § 14.*]

2. Contracts (§ 319*)—Building Contracts—Compensation—Construction of Building.

Where a builder undertakes to furnish labor and material in the building of a house for a specified sum, he cannot recover for partial construction in case the building be destroyed without fault of either party, unless he is protected against such contingency by the terms of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493–1507; Dec. Dig. § 319.*]

3. Contracts (§ 319*)—Building Contracts—Compensation—"Act of God."

In order to entitle a builder to recover, full performance of the contract is necessary, unless he has been prevented by the other party, by operation of law, by the public enemy, or by the act of God; and fire is not an act of God.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1458, 1476, 1477, 1479, 1493–1507; Dec. Dig. § 319.*

For other definitions, see Words and Phrases, vol. 1, pp. 118–126.]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. G. Keeling against Schastey & Vollmer, a corporation. From a judgment for plaintiff and an order denying motion for new trial, defendant appeals. Affirmed.

Louis H. Brownstone, for appellant. Wright & Wright, for respondent.

KERRIGAN, J. This is an appeal by the defendant from a final judgment in favor of the plaintiff, taken within 60 days after entry, and from an order denying defendant's motion for a new trial, in an action in quantum meruit for labor performed and materials furnished.

[1] Briefly, the facts are that in the month of June, 1907, the defendant entered into a contract with the Cliff House Company, a corporation, to alter and repair an existing building known as the Cliff House. Subsequently the defendant made a contract with A. C. Wocker, plaintiff's assignor, whereby certain painting and plastering work in and upon said building was to be done by the latter for a sum not exceeding $4,700, and he was to accept payments on the basis of 75 per cent. of the work done from time to time as the work progressed, the remaining 25 per cent. being payable 35 days after its completion. Prior to the time Wocker was able to complete his contract, and after he

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had furnished labor and materials of the reasonable value of $3,545.96, the building was destroyed by fire without the fault of either party to the contract. At this time Wocker had received on account a payment of $1,800. This suit is to recover $1,745, alleged to be the difference between the amount paid and the reasonable value of the work as it had progressed up to the time of the destruction of the building.

[2] It is well settled that, where one undertakes to furnish labor and materials in the building of a house or other structure for another for a specified sum, the builder cannot recover for a partial construction in case the building be destroyed without the fault of either party, unless the builder is protected against such contingency by the terms of the contract.

[3] In order to entitle the builder to recover, full performance of the contract is necessary, unless he has been prevented by the act of the other party, or by operation of law, or by the act of God, or by the public enemy (Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29; Green v. Wells, 2 Cal. 584); and fire is not classified as an act of God. Pope v. Farmers' Union & Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87.

It is also very well established in this country that where one, as in this case, agrees to furnish labor and materials on an existing building, the property of another, the agreement is upon the implied condition that the building shall remain in existence, and that the destruction of it without the fault of either party will excuse performance of the contract by the person performing such labor, and entitle him to recover the reasonable value of the part performance already effected. This view, it appears, is contrary to the English doctrine (Appleby v. Dodds, 8 East. 300; Appleby v. Myers, L. R. 2 Com. Pleas, 651); but it is the uniform rule in this country (30 Am. & Eng. Ency. of Law [2d Ed.] p. 1251, and numerous cases cited), except in the state of Illinois (Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272).

In Hollis v. Chapman, 36 Tex. 1, a carpenter contracted to furnish the materials and to do the work on the defendant's brick building, then in course of construction, for a fixed sum of money, but before the work was completed the building was destroyed by fire without the fault of either party to the contract. The action was to recover for the materials furnished and labor done, and it was held that the carpenter was entitled to recover.

So in Cleary v. Sohier, 120 Mass. 210, where the plaintiff made a contract to lath and plaster a certain building for an agreed price per square yard. When the contract was about one-half performed, the building was destroyed by fire. The plaintiff sued in assumpsit for work done and materials furnished, and it was held that he was entitled to recover.

In Niblo v. Binsse, 3 Abb. Dec. 375, 40 N. Y. 476, the plaintiff's assignor contracted to do certain plumbing work in a house owned by defendant's testator. Part of the work was to be paid as it progressed, and the final payment upon its completion. During the performance of the contract the building was burnt without fault of the parties, and the plaintiff was permitted to recover for the work performed. This case, like the others, proceeded on the theory that there was a breach of the implied undertaking by the owner of the continued existence of the building, which was necessary to enable the contractor to perform his agreement.

In the case of Butterfield v. Byrne, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654, the court says: "When work is to be done under a contract on a chattel or building which is not wholly the property of the contractor and for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other [citing cases]. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest, that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived." But says the same authority: "Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure to completely perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done."

It is also contended by defendant that, if the plaintiff is entitled to recover at all, he is entitled to recover only 75 per cent. of the contract price of the work done and materials furnished up to the time of the fire. If this had been an action upon the contract, defendant's position would be sound; but this is an action for the reasonable value of the work and materials furnished, and therefore, as seen by the authorities just adverted to, the terms of the contract in this regard do not control.

The evidence is sufficient to support the findings, which cover all the material issues and support the judgment.

The judgment and order appealed from are affirmed.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 772

WEBSTER v. CARR. (Civ. 934.)

(District Court of Appeal, Second District, California. May 1, 1912.)

1. Mechanics' Liens (§ 271*)—Proceedings to Enforce—Petition.

A complaint to enforce a mechanic's lien, showing the performance of the work, nonpayment, and the filing of the claim of lien, is not insufficient because the allegations as to when the work commenced and ceased were uncertain.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494–513; Dec. Dig. § 271.*]

2. Appeal and Error (§ 232*)—Presentation of Grounds of Review in Court Below—Necessity.

Where defendant demurred to a complaint to enforce a mechanic's lien on the ground that it did not state a cause of action, he cannot on appeal assign uncertainty in the complaint as ground of objection; that ground having been waived.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1368, 1426, 1430, 1431; Dec. Dig. § 232.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by S. Webster against Chris Carr. From a judgment for plaintiff, defendant appeals. Affirmed.

J. R. Dorsey, for appellant. T. F. Allen, for respondent.

JAMES, J. [1] Plaintiff brought this action to enforce by foreclosure an alleged lien accruing to him as a mechanic who performed labor upon a building being constructed for defendant. It is alleged in the complaint that defendant entered into a contract with one Morgan for the construction of a five-room brick cottage; that the contract was in writing and duly recorded; that plaintiff was employed by Morgan, the contractor, to perform labor as a painter upon the cottage, for which Morgan agreed to pay him the reasonable value of his services; that pursuant to such employment plaintiff did, "between the 1st day of June, 1909, and the 21st day of July, 1909," perform 10 days' and 7 hours' labor in painting said cottage, which labor was of the reasonable value of $54.37. It was further alleged that the cottage was completed on the 6th day of July, 1909, but that no notice of completion was filed with the county recorder, and that on the 21st day of July, 1909, plaintiff filed and recorded his claim of lien. The complaint contained other appropriate allegations as to the description of the real property upon which the cottage was constructed, and set forth that the land described was necessary for the convenient use of the building. To this complaint a general demurrer was interposed, which was overruled by the court, and, defendant having failed to answer the complaint within the 10 days allowed him so to do, decree was thereupon entered in accordance with the prayer of the complaint. From that judgment the appeal is taken.

It is insisted on the part of appellant that the complaint of plaintiff failed to state a cause of action for the reason that it does not appear therefrom that the labor performed by the plaintiff was performed prior to the date of the completion of the building, which plaintiff alleged to be the 6th day of July, 1909. To give force to this contention plaintiff's allegation that the work performed by him was done between the 1st day of June and the 21st day of July is referred to, and it is argued that for aught that is disclosed by the complaint the 10 days' and 7 hours' work may have been performed after the 6th day of July. It is true that sufficient time had elapsed after the date upon which it is alleged the building was completed, and before the 21st day of July, to comprehend the entire term during which plaintiff alleged that he performed the work; but it is equally true that such labor may have been performed between the 1st day of June and the 6th day of July. The allegations of the complaint made it uncertain as to the particular time and date when the work commenced and when it ceased. However, this defect was not such as to render the complaint insufficient in its statement of a cause of action; that being the only ground assigned by the demurrer.

[2] Defendant having failed to assign uncertainty in the complaint as a ground of objection by demurrer, that objection was waived and cannot here be considered. San Joaquin Lumber Co. v. Welton et al., 115 Cal. 1, 46 Pac. 735, 1057.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 707

ROGERS v. WEST RIVERSIDE 350-INCH WATER CO. (two cases).

(Civ. 959, 1,110.)

(District Court of Appeal, Second District, California. April 19, 1912. Rehearing Denied by Supreme Court June 17, 1912.)

1. Waters and Water Courses (§ 156*)—Conveyance of Canal for Irrigation—Reservations.

A reservation in a deed of an irrigating canal of a right of way to carry therein a specified amount of water subject to the payment by the grantor of the proportion of the expense of maintaining and repairing the canal that 350 inches of water sustains to the entire amount of water from time to time being carried through the canal required the grantee to maintain the canal, and see to it that all of the water transported through it is delivered to the persons entitled thereto in such quantities as each is entitled to receive, and any expense incident to such oversight of the canal and distribution of the water is a part of the expense of maintenance of the canal of which the grantor must pay its proportionate part.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*]

2. WATERS AND WATER COURSES (§ 156*)—CONVEYANCE OF CANAL FOR IRRIGATION—RESERVATIONS—"FROM TIME TO TIME."

The words "from time to time" in such deed apply to the successive irrigation seasons, which may or may not be coextensive with the year, and the entire expense for such time or irrigation season is the expense incurred during the whole season, and cannot be determined, and is not payable until the close of the season, so that the average amount of water carried through the irrigating season is the proper denominator to determine the fractional amount which the grantor must pay.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*

For other definitions, see Words and Phrases, vol. 4, p. 2991; vol. 8, p. 7667.]

3. WATERS AND WATER COURSES (§ 156*)—IRRIGATING CANALS—MAINTENANCE—COST—LIABILITY.

Such reservation imposes on the grantee the duty of maintaining and repairing the canal, relying solely thereafter on his right of recovery for the proper proportion due from the grantor, and though the grantee is compelled by injunction to maintain the flow of water in the canal, and though the grantor fails to pay his part of the expense of maintenance, though requested so to do, the grantee is guilty of negligence in turning water into the canal at a time when he knew it would not stand that amount, thereby causing a break therein, and cannot compel the grantor to pay his proportionate part of the cost of repairing such break.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 158, 174–183; Dec. Dig. § 156.*]

Appeals from Superior Court, Riverside County; Benjamin F. Bledsoe, Judge.

Actions by C. W. Rogers against the West Riverside 350-Inch Water Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Modified and affirmed.

Collier, Carnahan & Craig, for appellant. E. W. McGraw, Lafayette Gill, and Purington & Adair, for respondent.

ALLEN, P. J. No. 959 is an appeal from the judgment, while No. 1,110 is an appeal from an order denying a new trial. The two appeals by an appropriate order of the Supreme Court have been transferred to this court for hearing and decision, and both of such appeals are heard and determined upon the same transcript; the questions involved in each being identical.

Plaintiff, the owner of a canal constructed for the purpose of conveying irrigating water, brought this action against defendant, the owner of an easement in said canal, to recover an alleged proportion of the expenses due plaintiff for the maintenance and repair of such canal. The canal, as constructed and operated during all of the time mentioned in the complaint, had a carrying capacity of more than 1,000 inches of water. The eastern division thereof exceeded seven miles in length, while the entire canal exceeded ten miles in length. Plaintiff owned none of the water carried in said canal, but the same was operated entirely for the benefit of irrigators possessing rights to water carried therethrough. Defendant originally owned the canal, or that portion of it constructed prior to 1890, in February of which year it conveyed the canal so owned by it to plaintiff's predecessor in interest, in which conveyance the following reservation was made: "Hereby especially reserving, however, the perpetual right of way to carry through such canal the 350 inches of water, being the same 350 inches of water reserved by first party in its conveyance of other waters to second party by indenture dated May 23, 1888, recorded," etc., "subject, however, to first party's paying the proportion of the entire expense of maintaining and repairing such canal that 350 inches of water sustains and bears to the entire amount of water from time to time being carried through said canal." By the terms of the original reservation this 350 inches of water was to be diverted and measured at a certain ranch line. Before this conveyance was made, defendant and plaintiff's predecessor in interest had entered into an amendment to the agreement by which it was especially understood that defendant should have the right to divert and use its 350 inches of water at any point it might see fit, the water to be measured at the place of diversion under a 4-inch pressure of a continuous flow, and no more.

It is obvious from an examination of the record that all of the water so reserved by defendant, and to be by it carried through and diverted from such canal, was water to the use of which the stockholders in defendant corporation, the owners of land and irrigators under such canal, were entitled; that as a fact defendant never diverted or measured the water to which it was entitled at any point selected by it, but, on the contrary, 28 or 29 gates were maintained along the canal, at each of which gates one or more of the stockholders received water for the irrigation of their lands and plaintiff, through his servants and agents, maintained a constant supervision over such gates and the distribution of the water from the same, to the end that defendant's stockholders received their irrigating water at such times and in such volumes and heads as best suited their interest in the matter of irrigation;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that, to maintain this supervision, plaintiff gave his time individually, was required to and did rent an office, where the business of the canal was conducted, hired zanjeros and other people, and actually expended a large amount of money in the maintenance and repair of the canal, including its supervision and the division of the waters carried through the same.

The court found that the amount of water from time to time carried through the canal was less than 900 inches. It is evident that the court arrived at this statement of fact in the findings through a consideration of the average amount of water carried from time to time through the irrigating season of each year, which average amount the court fixed as the denominator of the fraction which should control in fixing the proportion which defendant should pay toward the cost of maintenance and repair.

[1] The principal contention of defendant is that the maintenance charges imposed through the terms of the reservation were simply those incident to keeping the canal in condition for the transportation of water to be used in irrigation by those entitled to its use. This reservation clause was the subject of consideration in Rogers v. Riverside Land, etc., Co., 132 Cal. 9, 64 Pac. 95, where it was said by the court: "The proper construction of the terms, as used in the reservation contained in the deed to the Stearns Ranchos Company, would seem to be that the canal or ditch should be kept in such condition as to enable the owners of water, who have the right, to have the same carried or conveyed through said ditch or canal unobstructed, and with as little loss as possible, and so as to prevent others from using or appropriating the quantity to which they may be entitled." The allegations of the complaint and the findings of the court that, under the terms of the easement, defendant had the privilege of diverting the 350 inches of water at such places as it might wish to use the same, evidently refer to the division and use of the entire amount of water which defendant was entitled to have carried through the canal, not that a number of points of diversion were to be used for portions thereof by way of distribution to irrigators. But, be that as it may, the sole duty still devolved upon plaintiff, through the obligation of maintenance, to see to it that others did not use any of the quantity to which defendant was entitled. This in the very nature of things could only be accomplished through a supervision, management, and control of the water delivered to the respective users thereof. It affirmatively appears from the answer of defendant that all of the water so carried under the reservation was water owned by the irrigators. In other words, the defendant as a corporate agency of the irrigators was conveying for delivery to those who owned the water the amount to which each was entitled for use in irrigation. While the defendant had evidently parted with its ownership of the water, if such it ever possessed, nevertheless, it still was bound to cause the water to be carried to the points of diversion and there, under the maintenance clause, to be delivered by plaintiff without unnecessary loss and in such manner as to prevent appropriation thereof by those not entitled thereto. Conceding that under a strict construction of the easement clause defendant would have been entitled to divert the entire amount of water to which it was entitled at a single point, and thereby reduce to a minimum the cost and expense incident to such oversight by plaintiff with reference to preventing the misappropriation by others of such water, yet defendant did not so elect to proceed; but, on the contrary, acquiesced and presumably authorized the delivery by plaintiff at many points convenient for the use of irrigators, thereby increasing the cost of maintenance. We are of opinion, therefore, that, under a proper construction of the maintenance clause in the reservation, plaintiff was bound to see to it that all of the water so transported through the canal was delivered to the persons entitled thereto in such quantities as each was entitled to receive, and that any and all expense incident to such oversight and distribution of the water became and was a part of the maintenance of the canal, under the construction of the Supreme Court heretofore referred to. This being true, there is evidence to be found in the record sustaining the findings of the court with reference to the amount so found to be due for such maintenance. We are of opinion that the services rendered by plaintiff himself in supervision and through his zanjeros, the rent of an office, and all of the matters found by the court to be proper matters of maintenance, as set forth in the bill of particulars, were in fact proper charges of maintenance and were properly allowed by the court in that regard. Entertaining these views, it is unnecessary to pass upon many other specifications of error with reference to the introduction and exclusion of testimony, the determination of the questions involved being included within the matter hereinbefore determined.

[2] Neither do we see any error in the action of the court in its determination that the average amount of water carried during the irrigating season was the proper denominator in determining the fractional amount which defendant should pay toward the cost of maintenance. The words "from time to time," as used in the contract, were intended by the parties to apply to and mean the successive irrigation seasons, which may or may not be coextensive with the year. The "entire expense of maintaining and repairing such canal" for such time or irrigation season is the expense incurred during the whole season, and hence cannot be determined and

is not payable until the close of the season. The average flow of water during this period constitutes the entire flow for such time, and defendant's proportion of the expense for repairs and maintenance during such period is such part thereof as 350 inches bears to the average number of inches, counting the 350 inches whether carried or not, conducted daily through the canal during such season. Otherwise, plaintiff might select a month when none or but little water was being carried through the canal, and during such month clean the canal and make the necessary repairs thereof required for the entire season, and thus, since no water other than that, the carrying of which is chargeable to defendant during such period, charge the whole of such expense to defendant. The complaint divides the time from November 1, 1906, to May 1, 1908, into four periods, the expenditures during each period being set forth in a separate count. As to each one of these periods, however, the court found that the average flow of water was less than 900 inches, and fixed 900 inches as the basis upon which to determine the amount due from defendant. Hence, such division of the year into periods and findings made in no wise prejudiced defendant, for the result would have been the same had it been based upon the irrigation season. Likewise with the period extending from May 1, 1908, to September 1, 1908, covered by the fifth cause of action, and wherein the court found the average flow of water to be 1,000 inches. For aught that appears in the record, this was the irrigation season.

[3] There remains, then, but one question of serious import presented by appellant, and that is with reference to plaintiff's right to recover for repairs occasioned by a break in the canal which occurred in May, 1908. The uncontradicted evidence shows that a break occurred in the canal on the 29th of May, 1908, and that the same was occasioned by plaintiff turning the water into the canal at a time when he knew from its condition that it would not sustain the weight of such water. The repair work made necessary on account of this break was shown to have been performed and expenses connected therewith incurred between the 29th of May and the 3d of June. While the record does not disclose the exact amount allowed by the court on account of the repairs occasioned by such break, plaintiff testified that the bill for $322.40 allowed by the court, generally speaking, was for repairing this break. This is the only amount which is definitely shown to have been expended in connection therewith. Appellant's contention is that this break was occasioned through the negligence of the plaintiff in turning in the water at a time when he knew disastrous results would follow, and that he should not be allowed to recover on account of such negligent management of the ditch. It is clearly established, to our minds, that prior to the break a demand was made upon defendant to pay its proportion of the expense of maintenance and repairs and that defendant refused to make such payment unless plaintiff would accept a sum in full settlement much less than that due. It is true that among the findings of fact we find the conclusion of the court that no proper demand for the proportion of the expense of maintenance was made by plaintiff before the break occurred. It does appear, however, that demand was made, and, were it material, we should have no hesitancy in saying that this conclusion of the trial court was unfounded. But we are confronted with the decision of the Supreme Court in Smith v. Stearns Ranchos Co., 132 Cal. 180, 64 Pac. 261, 716, in which it is held, in effect, that, under the agreement connected with the operation of the ditch, the duty devolved upon plaintiff to maintain and repair the same, relying solely thereafter upon his right of recovery for the proper proportion due from the defendant. Were the question an open one, we would have no difficulty in resolving this question in harmony with the dissenting opinion of the chief justice in the case last above cited, but do not, in view of the majority opinion, feel that we are warranted in disregarding such opinion, the effect of which is to place plaintiff in a very peculiar position. An injunctional order compels him to maintain the flow of water in the canal. In obedience to this order he does so, and yet he is made chargeable with the results which follow. Regardless, however, of this apparent hardship, it seems to be written in the law that plaintiff is so obligated. Accepting, as we feel we must, the doctrine of the Smith Case, we must hold that the allowance of ${}^{326.5807}/_{900}$ of $322.40 made by the court was an improper allowance, under the circumstances of the case.

We find in the record no other reversible error, and feel that this is a proper case in which to direct a modification of the judgment. It is therefore ordered that the judgment of the trial court be modified by deducting therefrom the sum of $116.90, and, as so modified, the judgment and order are affirmed; appellant to recover one-half of costs of appeal.

We concur: JAMES, J.; SHAW, J.

18 Cal. App. 739

EDGINGTON v. SUPERIOR COURT OF YOLO COUNTY et al. (Civ. 968.)

(District Court of Appeal, Third District, California. April 23, 1912. Rehearing Denied May 23, 1912. Denied by Supreme Court June 22, 1912.)

1. INFANTS (§ 20*) — PROTECTION—"DEPENDENT PERSON."

Under Juvenile Court Law (St. 1911, pp. 658, 661, 666), providing in sections 1, 5, and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

16 that the words "dependent person" shall mean any person under 21 years who has no parent or guardian willing or capable of exercising proper parental control, or who from any cause is in danger of growing up to lead an idle, dissolute, or immoral life, and section 26, making it a misdemeanor for any person to encourage, cause, or contribute to the dependency or delinquency of such person, an information in a prosecution for causing and encouraging the delinquency of a dependent child, which alleged that she was a female child of the age of 16 years or thereabouts, and had no parents or guardian willing and capable of exercising proper control, and by reason of that fact was in danger of growing up to lead an idle, dissolute, and immoral life, sufficiently charged the dependency of the minor child.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.*

For other definitions, see Words and Phrases, vol. 2, pp. 1991–1993.]

2. INFANTS (§ 20*) — PROTECTION — DELINQUENCY.

In a prosecution under Juvenile Court Law (St. 1911, p. 672) § 26, for encouraging the delinquency of a dependent minor, an adjudication of dependency prior to the prosecution is not required; it being sufficient if the information or complaint allege the dependency.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.*]

3. INFANTS (§ 20*) — PROTECTION—CRIMINAL PROSECUTION—PROCEDURE.

Juvenile Court Law (St. 1911, p. 672) § 26, making one who contributes to the delinquency of a dependent minor child guilty of a misdemeanor gives jurisdiction of such offense to the superior court, and Penal Code, § 682, as amended by Acts Feb. 21, 1911 (St. 1911, p. 68), provides that every public offense must be prosecuted by indictment or information except misdemeanors of which jurisdiction had been conferred upon the superior court sitting as juvenile court. Code Civ. Proc. § 187, provides that when jurisdiction is, by the Constitution, conferred on a court or judicial officer, all means to carry it into effect are given, whether specifically pointed out or not, and Penal Code, § 1426, providing for the commencement of prosecutions by complaint, requires them to be verified only in prosecutions before a police judge or justice of the peace. *Held* that, regardless of the exception as to informations in cases where the superior court was sitting as a juvenile court, a prosecution begun by an information, which was sufficient as a complaint, and a preliminary examination before a magistrate, was not erroneous, the superior court having general authority to regulate such proceedings.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 20; Dec. Dig. § 20.*]

Petition by G. A. Edgington for writ of prohibition directed to the Superior Court of Yolo County and N. A. Hawkins, Judge. Writ denied.

R. Clark, for petitioner. A. G. Bailey, Dist. Atty., for respondent.

BURNETT, J. This is an application for a writ of prohibition to restrain the superior court of Yolo county and Hon. N. A. Hawkins, the judge thereof, from trying petitioner on a charge of "causing, encouraging, and contributing to the delinquency of a dependent and delinquent child." A preliminary examination of the charge was held in the justice court of Woodland township in said county and the defendant was held to answer to the superior court. Therein an information was afterward filed by the district attorney, and a motion to set it aside and a demurrer were interposed by defendant. In both these matters the ruling of the court was in favor of the people and the case was set down for trial; hence this application.

[1, 2] There are two points made by petitioner that we deem worthy of consideration. The first is that the information is totally insufficient as a basis for the prosecution, in that it does not appear therein that the complaining witness had been previously adjudged a dependent child. The prosecution, it may be said, is under section 26 of what is known as the Juvenile Court Law (Stat. of 1911, p. 672), providing that "in all cases where any child shall be dependent or delinquent under the terms of this act, the parent or parents, legal guardian or person having the custody of such person or any other person who shall, by any act or omission, encourage, cause or contribute to the dependency or delinquency of such person, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding one thousand dollars, or imprisonment in the county jail for not more than one year or both such fine and imprisonment and the juvenile court shall have jurisdiction of all such misdemeanors." Section 1 of said act defines "a dependent person," and therein is found a catalogue of 16 different conditions according to which a person may be classified as "dependent." As far as is necessary to quote herein, the said section provides that "the words 'dependent person' shall mean any person under the age of twenty-one years * * * (5) who has no parent or guardian; or who has no parent or guardian willing to exercise or capable of exercising proper parental control * * * or (16) who from any cause is in danger of growing up to lead an idle, dissolute, or immoral life." Turning to the information herein, we find the allegation in reference to the complaining witness that at the time the offense was committed, she being "then and there a female child, under the age of eighteen years, to wit, of the age of sixteen years or thereabouts, was then and there a female dependent minor child in this, that the said Hazel Douglass had no parents or guardians, willing and capable of exercising proper parental control over the said Hazel Douglass, and that the home of said Hazel Douglass was and is, by reason of neglect on the part of her guardian, an unfit place for the said Hazel Douglass and that the said Hazel Douglass was and is in danger of growing up to lead an idle, dissolute and immoral life." It is thus to be seen that from the facts al-

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leged the conclusion necessarily follows, under the definition given by the said statute, that the said Hazel Douglass was a "dependent person." We have found nothing in the law which requires that her status as such should be adjudicated prior to the prosecution of another person for contributing to her dependency, and we see no reason why, if properly alleged, the facts bringing her within said class may not be established at the trial of the defendant as other facts are shown tending to prove the charge. The principle would be the same if the defendant were accused of a crime against a minor or insane person. In such case no prior adjudication of the minority or insanity would be required, but, of course, the burden would be on the prosecution to establish this as other material averments of the crime. This view is entirely consistent with and is supported by the decision in People v. Pierro, 121 Pac. 689. In that case the information was fatally defective for the reason that facts were not alleged bringing the child within the definition of a "dependent," the district attorney contenting himself with the averment that she "was a minor female child under the age of 18 years, and was then and there a dependent child within the meaning of that certain act," etc. The Second District Court of Appeal very properly held, as stated by Mr. Justice James, that "defendant was entitled to have the information show the particulars in this regard for he was called upon to meet the issue, first, as to whether the child had in fact become a delinquent. * * * Had the child against whom the offense is alleged to have been committed been adjudicated to be a dependent child, then it would have been sufficient to plead such adjudication; but, when no adjudication is relied upon as showing a legal determination made of the character of the minor, the facts which make such minor a dependent must be pleaded in the information."

[3] The other contention of petitioner is that the said juvenile court law contemplates that no preliminary examination shall be held, but that the defendant must be "prosecuted on a complaint filed in the juvenile court charging him with the misdemeanor mentioned in the act and trying him for such misdemeanor in the juvenile court, without any examination or the filing of any information." In addition to the clause already quoted as to the jurisdiction of said court, attention is called to the amendment to section 682 of the Penal Code, approved February 21, 1911 (Stats. 1911, p. 68), providing that "every public offense must be prosecuted by indictment or information, except * * * (4) all misdemeanors of which jurisdiction has been conferred upon superior courts sitting as juvenile courts." The word "information" in this amendment is obviously used in a technical sense, and refers to the accusation filed after a preliminary examination. It is admitted by petitioner that no procedure is provided in said juvenile act for the prosecution of defendant for the crime charged, but it is contended that "where power is given a court to do a thing, that it may adopt any lawful method to carry that power into effect, and that when no method is provided by law, it can adopt any suitable method." This is in accordance with the provision of section 187 of the Code of Civil Procedure that "when jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code." But, as we view it, this concession yields the point as far as this application is concerned. It may be admitted that the preliminary examination was not required, and it may be treated as a nullity, but we still have this situation: The superior court has jurisdiction to try the offense charged. The said "Juvenile Court Law" is declared in its title to be an act providing, among other things, "for the punishment of persons responsible for, or contributing to, the dependency or delinquency of children; and giving to the superior court jurisdiction of such offenses." It is true that the court is known as the "Juvenile Court," but it is unquestionably the superior court, exercising jurisdiction over a peculiar class of offenses. There is furthermore, no question that the defendant is charged in apt language with an offense defined in said law and within the jurisdiction of said court.

The only objection of any moment is to the form of procedure, but there is nothing in the statute, confessedly, to preclude the district attorney from making the technical accusation against the defendant in the form of an information. It contains every element of a sufficient complaint. By his signature the prosecuting officer of the court has given it his sanction and the defendant's right to a fair trial has not been impaired. It is not verified, but verification is required only of the complaint filed in a justice or police court. Section 1426, Pen. Code. If it be admitted that the prosecution should be entitled in the "Juvenile Court" instead of the "Superior Court," it is sufficient to say that this is a mere irregularity, and does not affect the jurisdiction of the court. It does, however, appear in the information, as we have already suggested, that the prosecution is undertaken in the superior court acting under the provisions of said juvenile court law and as contemplated by its terms.

We think it cannot be said that there is shown to be such lack of authority in the court to try the cause as to justify the issuance of the writ. We need not, therefore, consider the question whether there is a plain, speedy, and adequate remedy by appeal.

The order to show cause is discharged and the writ denied.

We concur: CHIPMAN, P. J.; HART, J.

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18 Cal. App. 774

SEARS v. DOUTHITT et al. (Civ. 1,088.)

(District Court of Appeal, Second District, California. May 1, 1912.)

VENDOR AND PURCHASER (§ 226*) — BONA FIDE PURCHASER — UNRECORDED DEED — AGENCY.

A deed was given to one member of a law firm in payment of a fee due the firm, and he executed a reconveyance to be delivered if the fee should be paid within a certain time. The fee was paid and the reconveyance delivered by his partner without his knowledge. Subsequently he sold the property, delivered a deed, and received payment at a bank designated by the purchaser. Upon learning of the delivery of the reconveyance, and before the bank delivered his deed to the purchaser, he requested the bank not to make such delivery, but the bank disregarded his request and delivered the deed, and it was recorded. *Held* that the bank, being the agent of the purchaser, properly disregarded the request, and that the purchaser, having no knowledge of the reconveyance, acquired title as a bona fide purchaser for a valuable consideration without notice of adverse claims.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 475, 476; Dec. Dig. § 226.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by Ed. A. Sears against John F. Douthitt and another. From a judgment for plaintiff, defendants appeal. Affirmed.

C. N. Andrews, for appellants. Chas. S. Conner, for respondent.

JAMES, J. Action brought to determine conflicting claims to real property. Plaintiff and defendants deraign their asserted title from one Elgin L. McBurney as a common grantor. In July, 1898, James Story was indebted to the law firm of McBurney & McBurney, all of the parties being residents of New York City, on account of legal services rendered to him by said firm. Not being able to satisfy the debt in cash at that time, Story stated to the McBurneys that he owned some lots in California valued at about $100, and that he would give a deed to that property in payment for the services, which he did. It was agreed between the parties that, if Story should pay the amount due from him on account of attorney's fees within a year, the real estate would be deeded back to him, and a deed of reconveyance was then prepared and placed among the office files of McBurney & McBurney to be delivered to Story within a year if he should satisfy the condition of payment. The deed from Story was made to Elgin L. McBurney as grantee. In the month of September, 1900, Story paid the amount which had been owing from him to the firm of McBurney & McBurney to H. D. McBurney, a member of the firm, who thereupon delivered the deed of reconveyance heretofore mentioned. The deed from Story to Elgin L. McBurney had been duly recorded in San Diego county, where the real property was located, but the deed of reconveyance was not recorded until December 11, 1908. Meanwhile Elgin L. McBurney was not informed that his brother had delivered the deed of reconveyance, and in 1908, assuming that he held title to the real property, he negotiated with plaintiff for the sale of his interest therein. After some correspondence had passed between the parties Elgin L. McBurney wrote to the plaintiff as follows: "I will give you a quitclaim deed for whatever interest might appear to be in my name for the sum of seventy-five dollars. If you care for such a deed upon this basis, prepare the same and send to me for execution." Plaintiff made out a deed agreeable to this offer and delivered it to the cashier of the San Diego Savings Bank with instructions to send the same, together with a draft for $75, to the Fourth National Bank in New York City, with instructions to the latter to deliver the draft to McBurney when he should sign the deed. On or about the 3d day of September, 1908, McBurney went to the Fourth National Bank in New York City, signed the deed, and received the draft for $75. This deed was returned to San Diego and delivered to plaintiff, who caused the same to be recorded on September 11, 1908, in the office of the county recorder at San Diego. Meanwhile Elgin L. McBurney discovered by an examination of memoranda in his office, and consultation with his brother that a deed had been delivered to Story in the year 1900. He thereupon wired to plaintiff, directing him not to record the deed last given, as a prior deed had been discovered, and also notified the San Diego Savings Bank to hold the same deed and not to deliver it to plaintiff. This telegram to the San Diego bank was received there before the bank had delivered the deed to the plaintiff, and consequently before that deed had been recorded. The trial court found that plaintiff was the owner in fee of the real property; that he was a bona fide purchaser for valuable consideration without notice of any outstanding claims arising from any previous deed from Elgin L. McBurney, or otherwise. If the San Diego Savings Bank and its correspondent, the Fourth National Bank of New York City, acted as the agents of plaintiff in receiving the deed and transmitting and paying over the $75 paid as the purchase price of the interest of McBurney in the real property, then delivery of the deed from McBurney to the plaintiff was complete when McBurney executed the same at the Fourth National Bank in New York City, and received the $75 sent to him by plaintiff. Assuming the relation of principal and agents to have existed as just mentioned, then the moment McBurney executed the deed and received the money in New York City he became divested of any title or interest held by him in the real property and plaintiff became the owner thereof. It is conceded by counsel for appellant that such would be the legal situation resulting from the facts just assumed, and it is conceded that the conveyance of the interest of McBurney to the plaintiff under such conditions would be superior to the title attempted to be conveyed by the unrecorded deed delivered in the year 1900 by the McBurneys to Story. There was no evidence heard, so far as the bill of exceptions discloses, which would indicate that plaintiff at the time the deed from McBurney was signed and delivered at the Fourth National Bank in New York City, had any knowledge or information as to the unrecorded deed to Story having been made, and he in his testimony affirmatively asserted that he had no such knowledge or information.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The evidence was amply sufficient to justify the finding of the trial court that plaintiff was the bona fide purchaser without notice of the adverse claims of these defendants. And it must be said, too, that the Fourth National Bank in New York City and the San Diego Savings Bank acted together as the agents of the plaintiff, and not as the agents of Elgin L. McBurney. In a letter dated August 24, 1908, the plaintiff wrote to McBurney that he was sending the deed and draft for $75 as required. He then added: "You will find them the Fourth National Bank of N. Y. Sign deed and draw your money." After having delivered the $75 to McBurney, and having received the deed duly executed by the latter, the Fourth National Bank of New York City could not have relinquished the deed upon request of McBurney without rendering itself liable to any damage sustained by this plaintiff because of such act. When McBurney delivered his deed to the bank in New York, he delivered it just as effectually as though he had then handed it to plaintiff himself, or any other person authorized by plaintiff to receive it. Therefore any notices given by McBurney to either of the banks acting as transfer agents for plaintiff after the deed had been delivered in New York were ineffectual to prevent the passing of title to the property from McBurney to the plaintiff. The evidence does sustain all of the findings made by the trial court and the judgment which followed them.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

18 Cal. App. 701

EBERLE et al. v. HUBBARD et al. (LUDWIG et al., Interveners). (Civ. 1074.)

(District Court of Appeal, Second District, California. April 18, 1912.)

MANDAMUS (§ 111*)—ACQUISITION OF LAND FOR WIDENING STREET—COMPELLING PAYMENT OF AWARDS.

Where property owners were awarded damages in a proceeding by a city to acquire land for a street, and the judgment of condemnation became final, they could by mandamus compel the city to pay the awards from a fund collected for that purpose, notwithstanding an appeal to the Supreme Court by owners assessed to pay the cost seeking to have the proceedings declared void and injunctive relief preventing a sale for delinquent assessments; the city not being restrained from proceeding to adjust the awards.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 231, 232, 234; Dec. Dig. § 111.*]

Application for writ of mandate by F. X. Eberle and others against A. A. Hubbard and others, constituting the Board of Public Works of the City of Los Angeles and another, in which Henry Ludwig and others intervened. Peremptory writ issued.

Thomas C. Ridgway and Hatch, Lloyd & Hunt, for petitioners. John W. Shenk, City Atty., and Myron Westover, Deputy City Atty., for respondents. Trippet, Chapman & Biby and Valentine & Newby, for interveners.

PER CURIAM. An opinion herein was filed in this court on January 15, 1912, wherein, upon application of petitioners, a peremptory writ of mandate was ordered to be issued as prayed for. Thereafter, upon application of respondents and interveners, a rehearing of said matter was ordered. In view of the fact that this court has filed an opinion affirming the judgment of the trial court in the case of S. M. Bernard Co. et al. v. City of Los Angeles et al. (Civil No. 1127) 124 Pac. 88, wherein this proceeding originated, and, upon further consideration of the matter, being fully satisfied with the opinion heretofore filed herein, we readopt the same as the opinion of the court. The opinion referred to follows:

"After due proceedings had preliminary thereto, the city of Los Angeles, on July 3, 1907, brought an action to condemn certain lands for the purpose of adding to the width of Eighth street in said city. Interlocutory judgment was thereafter entered, determining the amount of damages to be paid for the taking of the land. Assessments were then levied upon the property of a benefited district duly described by ordinance, and subsequent thereto the sum of $161,454.48 was collected on these assessments for the purpose of paying the damages fixed by the court in the condemnation proceeding. This money was placed in a special fund in the city treasury where it has since remained. All the petitioners, except Sarah M. Hamble, are property owners who were awarded damages. No appeal was taken from the judgment of condemnation, and that judgment has become final. The defendants constituting the board of public works of the city of Los Angeles refuse to order warrants to be issued in favor of petitioners and the defendant treasurer refuses to pay to petitioners the amounts severally awarded to them by the court. For answer to the alternative writ issued herein, the defendants set up that an action is now pending on appeal in the Supreme Court, wherein the validity and regularity of the proceedings had and taken in the matter of the widening of Eighth street are brought into question, and that the city of Los Angeles has withheld payment of the awards for damages pending final decision in the case mentioned. The suit referred to was one in which one Bernard and others, owners of property which was assessed to pay the cost of the street improvement, sought to have the proceedings declared void and to have injunctive relief preventing a sale of their properties on account of delinquent assessments. The trial court refused the relief asked for and decreed that the proceedings for the widening of Eighth street were regular and valid. An application, made after judgment, for an injunction staying proceedings pending appeal, was also denied. An appeal was then taken from the judgment and from the order so made after judgment. A number of the plaintiffs who appeared in that action had filed here a complaint in intervention opposing the petitioners in this suit. It is alleged in this complaint, after setting up the facts relative to the action last referred to, that the interveners have since paid the amounts assessed against their property, but under protest and because only of the threat of the board of public works to sell their property to satisfy the amounts levied against it; and that they have notified the city of Los Angeles that they will look to it for the return of the money so paid in the event it shall finally be held that the street proceedings are invalid. The defendants, representing the city of Los Angeles, do not offer as a reason why refusal is made to disburse the fund collected for the benefit of the property owners whose property was adjudged to be damaged by reason of the proceedings, that any irregularity or informality exists in such proceedings, such as might render title to the money constituting this fund questionable, and, moreover, all of those matters have been properly submitted to a trial court which has made its determination of the issues so presented adverse to the interveners who appear here. It is not proper, in our opinion, to make this proceeding in mandamus serve to review the correctness of the conclusions reached by the trial judge in the action which is now pending in the Supreme Court. The trial court not only passed upon the issues presented, which were all resolved in favor of the city, but considered and refused an application made on the part of the interveners for an injunction to stay proceedings pending appeal. The hands of the officers of the city were left untied, and it became their plain duty under the law to proceed with the adjustment of the judgment claims of petitioners. In its practical effect, the contention of the interveners is that the trial court should have granted an order staying proceedings, and, having failed to do so, that this court should now review that action and withhold a mandate requiring the city officials to proceed in accordance with law. No doubt had the city consented to the granting of an injunction, to operate as a supersedeas pending appeal, an order providing for such stay would have been made by the trial court. Having insisted, as we may presume defendants did insist, that they be left free to act and bring to a close the proceedings for the opening of Eighth street, complaint cannot now be heard on their behalf because such action may be compelled to be taken on their part as the law requires them to take.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"We think that neither the defendants nor the interveners have shown sufficient cause why the judgment of this court, exercised within the limits of a reasonable and just discretion, should deny the relief sought by petitioners.

"A peremptory writ of mandate is ordered to be issued."

18 Cal. App. 778

R. H. HERRON CO. v. WESTSIDE ELECTRIC CO. et al. (Civ. 1,107.)

(District Court of Appeal, Second District, California. May 1, 1912. On Petition for Rehearing, May 31, 1912. Denied by Supreme Court June 28, 1912.)

1. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—JURISDICTION—SERVICE.

Code Civ. Proc. § 411, subd. 2, provides that, if suit is brought against a foreign corporation doing business and having a managing or business agent, cashier, or secretary within the state, summons may be served on such agent, cashier, or secretary. *Held*, that where it did not appear either in plaintiff's complaint or in the affidavit of service on a foreign corporation that it was doing any business in California, or that it had therein a managing or business agent, cashier, or secretary on whom service of summons could be made, an affidavit showing service by delivery of a copy to the president of the corporation personally within the state was insufficient to confer jurisdiction over the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603, 2627; Dec. Dig. § 668.*]

2. CORPORATIONS (§ 668*)—FOREIGN CORPORATIONS—ACTIONS—SERVICE.

Under Code Civ. Proc. § 411, subd. 2, authorizing service of summons on a foreign corporation, in order that the court may get jurisdiction over such a corporation, it is requisite that it shall be doing business within the state at the time the summons is served and that the service shall be made on its agent who is managing that business, or on its cashier or secretary.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603, 2627; Dec. Dig. § 668.*]

On Rehearing.

3. Appeal and Error (§ 934*) — Presumptions—Default.

Since the clerk's duty to enter a default judgment is ministerial and not judicial, where the judgment roll showed that the clerk entered judgment by default on an insufficient affidavit of service of summons, it would not be presumed on appeal that all the necessary jurisdictional facts were made to appear before the judgment was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781, 3782; Dec. Dig. § 934.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the R. H. Herron Company against the Westside Electric Company and the Kern River Mining & Power Company. Judgment for plaintiff, and defendant Kern River Mining & Power Company appeals. Reversed.

S. S. Sanders, for appellant. O'Melveny, Stevens & Millikin and Walter K. Tuller, for respondent.

JAMES, J. This is an appeal taken by defendant Kern River Mining & Power Company from a judgment entered against it by default. Plaintiff instituted the action to recover against the Westside Electric Company various sums of money for merchandise sold by it and several other vendors whose claims were assigned to plaintiff prior to the commencement of the action. Judgment was sought against appellant upon its statutory liability as a holder of shares of stock of the Westside Electric Company. In the complaint it was alleged that appellant was a corporation organized and existing under the laws of the territory of Arizona and authorized by its articles of incorporation to subscribe for, own, and hold stock in other corporations. It was not alleged that appellant was doing business in the state of California at the time of the service of summons, or at all, or that it had a managing agent, cashier, or secretary within this state.

[1] The affidavit purporting to show service of summons recited that the person making the service had "on the 29th day of August, 1910, personally served summons in said action upon defendant Kern River Mining & Power Company, in said county of Los Angeles, state of California, by then and there delivering to and leaving with H. C. Shippe, an officer of said defendant, to wit, the president thereof, personally, another and separate copy of said summons annexed to another and separate copy of the complaint in said action." Among other contentions made by appellant on this appeal, it is urged that the affidavit was insufficient to confer jurisdiction to enter the judgment. Section 411, Code of Civil Procedure, provides how summons must be served in order that jurisdiction be acquired against a foreign corporation. Subdivision 2 of that section reads as follows: "(2) If the suit is against a foreign corporation, or a nonresident joint-stock company or association, doing business and having a managing or business agent, cashier, or secretary within this state: to such agent, cashier, or secretary." It was not made to appear either in the complaint of plaintiff or the affidavit of the person making the service of summons that the appellant, at the time such summons was served upon its president, was engaged in any business in the state of California, or that it had in this state a managing or business agent, cashier, or secretary upon whom service of summons could be made.

[2] In Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 Pac. 289, where a like question was under consideration, the court said: "Under the provisions of this section, in order that the court may get jurisdiction over a foreign corporation, it is requisite that such corporation shall be 'doing business' within the state at the time the summons is served, and that the service shall be made upon its agent who is managing that business, or upon its cashier or secretary." Even though it might here be said that because the appellant was at the time of the attempted service of summons the holder of a large number of shares of stock of the Westside Electric Company, a California corporation, it was then "doing business" within the meaning of the section of the Code referred to, still it does not by any means follow that the president of a foreign corporation who is served with process within this state shall be presumed to be the managing or business agent of such foreign corporation. In our opinion, the affidavit of service was insufficient to show that the requisite jurisdiction had been acquired to authorize the entry of the default judgment.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

On Petition for Rehearing.

PER CURIAM. [3] The argument made by respondent in its petition for rehearing would be pertinent had the default judgment appealed from been one which was entered by the court. In that case it would be presumed that all of the necessary facts as to the service of summons had been made to appear. The judgment roll here exhibited shows that the clerk entered judgment upon an insufficient affidavit of service of summons, and we cannot assume that there was any other proof made of such service. The clerk's duty of entering a default judgment is a ministerial one and not judicial in its nature. The supplemental affidavit filed long after the perfecting of this appeal can constitute no proper part of the record to which we are entitled to look in determining the question presented.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Rehearing is denied.

163 Cal. 8

BUCKEYE REFINING CO. v. KELLY et al.

(L. A. 2,879.)

(Supreme Court of California. June 6, 1912. Rehearing Denied July 6, 1912.)

1. Judgment (§ 897*) — Satisfaction — Entry.

Where, pending the defendants' appeal from an adverse judgment in an action for wrongful attachment, payment of the judgment was enforced under an execution of judgment creditors of the plaintiff, the plaintiff could not object merely because defendants had taken an appeal to a satisfaction of the judgment being entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1713; Dec. Dig. § 897.*]

2. Appeal and Error (§ 158*)—Right of Review—Payment of Judgment.

The compulsory payment of a judgment pending appeal does not deprive the defendant of his right to have the judgment reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 973–977; Dec. Dig. § 158.*]

3. Judgment (§ 848*)—Assignment of Part—Payment.

The fact that the plaintiff corporation assigned a part of its judgment did not make it improper for defendants to pay the entire judgment on execution issued by judgment creditors of the plaintiff, where they had no notice of the assignment, and did not consent thereto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1556–1558; Dec. Dig. § 848.*]

4. Judgment (§ 848*)—Assignment—Notice.

The filing of the assignment of a judgment was not constructive notice, in the absence of a statute providing that it should have that effect.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1556–1558; Dec. Dig. § 848.*]

5. Judgment (§ 848*)—Assignment—Notice—Burden of Proof.

Where the assignee of a judgment has only an equitable interest, he has the burden of proving that the judgment debtor had notice of the equitable interest before paying to the party holding the legal title.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1556–1558; Dec. Dig. § 848.*]

6. Judgment (§ 505*)—Collateral Attack.

A judgment cannot be attacked collaterally on the ground that it should have been for sale of the mortgaged property with provision for recovery of deficiency, instead of for recovery of money outright, not being void even if erroneous.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 948; Dec. Dig. § 505.*]

7. NAMES (§ 18*)—IDENTITY—PRESUMPTION.

Where collateral attack is made on a judgment rendered in an action wherein the plaintiff and defendant had the same name, it will be presumed that they were different persons.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 17; Dec. Dig. § 18.*]

8. ACTION (§ 15*)—SAME PERSON PLAINTIFF AND DEFENDANT.

The same person cannot be both plaintiff and defendant in the same action, even though he sue in one capacity and defend in another.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 84; Dec. Dig. § 15.*]

9. EXECUTION (§ 123*) — LEVY — QUALIFICATION OF OFFICER.

Where a judgment creditor of a corporation caused an execution to be issued and levied on the corporation's judgment against the sheriff and others, the sheriff, not being a party to the action in which the execution was issued, was not disqualified under Pol. Code, § 4172, providing that, when a sheriff is a party to an action, all process therein must be executed by the coroner, although on general principles the execution should have been levied by another.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 278; Dec. Dig. § 123.*]

10. JUDGMENT (§ 897*)—ENTRY OF SATISFACTION—INVALID LEVY OF EXECUTION.

Where, pending the defendants' appeal from a judgment against them, payment of the judgment is enforced under a valid execution of judgment creditors of plaintiff, the fact that the levy is invalid because of the disqualification of the levying officer does not deprive the defendants of their right to have satisfaction of the judgment entered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1713; Dec. Dig. § 897.*]

Department 1. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by the Buckeye Refining Company against John W. Kelly and others. Judgment was for plaintiff, and pending appeal by defendants an order was made directing entry of satisfaction of judgment, and plaintiff appeals Order affirmed.

E. L. Foster, for appellant. W. W. Kaye, for respondents.

SLOSS, J. Appeal by plaintiff from an order directing entry of satisfaction of judgment.

The action was commenced in September, 1906, to recover damages against Kelly, the sheriff of Kern county, and the sureties on his official bond, for the wrongful seizure by said Kelly, under a writ of attachment against the property of third persons, of personal property belonging to the plaintiff. On February 9, 1909, a judgment for $3,000, with interest and costs, was entered in favor of the plaintiff and against the sheriff and his sureties. On April 9, 1909, the defendants appealed from the judgment, and on April 25, 1910, they appealed from an order denying their motion for a new trial. These appeals are still pending.

In the meanwhile the plaintiff, by reason of its failure to pay the corporation license tax imposed by the act of March 20, 1905, and its amendments (Stats. 1905, p. 493; Stats. 1906, p. 22), had forfeited its corporate charter, and the power to settle its affairs and to maintain or defend any action pending in its favor or against it had, under section 10a of said act, become vested in its directors as trustees. The directors upon whom this trust devolved were the five following named persons: W. E. Pettibone, John Mitchell, J. F. McVean, Jennie McVean, and I. J. McVean. On March 29, 1909, three of said persons, to wit, J. F., Jennie, and I. J. McVean, as trustees of the Buckeye Refining Company, signed a paper whereby they undertook to sell and assign to E. L. Foster one-third of the judgment recovered by the plaintiff in this action. Said paper was filed in the office of the clerk of the superior court on March 31, 1909.

In August, 1909, John Mitchell, as trustee under a mortgage or deed of trust executed by the Buckeye Refining Company to secure an issue of corporate bonds, filed his amended and supplemental complaint in an action against the directors and trustees of the defunct corporation, and in said complaint prayed judgment "that there is due the plaintiff, on the bonds issued, sold and delivered under the terms of said trust deed, the sum of $11,219.85," with interest and attorney's fees; that plaintiff's title to the premises covered by the instrument be quieted, and for "other and further relief." The complaint alleged, among other things, that the property thus securing the bonds issued by the corporation had been sold under a decree foreclosing the lien of a prior mortgage, and that the plaintiff, as trustee for the bondholders, had redeemed said property from the sale. Some of the defendants having defaulted, and others having answered admitting the allegations of the complaint, the court on November 27, 1909, entered its judgment that the plaintiff, as trustee, have and recover from the defendants Pettibone, Mitchell, J. F., Jennie, and I. J. McVean as directors and trustees of the Buckeye Refining Company the sum of $12,255.55 and costs. Execution was issued and was levied on November 29, 1909, on the judgment owing by the defendants in this action of Buckeye Refining Company v. Kelly et al. Upon such execution the sheriff collected from the defendant sureties the sum of $4,050.85, and, after deducting his fees, commissions, and expenses, paid the balance, $4,024.35, to the attorney for plaintiff in the action in which the execution had issued. The sheriff's return, showing these facts, was duly filed. Thereupon the defendants in this action moved the court to direct the clerk to enter satisfaction upon the ground that the judgment had been fully satisfied by payment to the sheriff on execution in the action brought by Mitchell, and the court granted the motion. The plaintiff appeals from the order so made.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It may be questioned whether the plaintiff corporation, having ceased to have any corporate existence, is in a position to take an appeal or to maintain any other proceeding in its own name. But, as no point is made on this, we pass to a consideration of the appeal on the merits.

The right of the defendants, as persons indebted to the judgment debtors in Mitchell v. Pettibone, to pay to the sheriff holding an execution in that action the amount of their debt, is not, as a general proposition, questioned. Code Civ. Proc. § 716. Nor can there be any doubt of the power and duty of the court to order the entry of satisfaction of the judgment in the case of Buckeye Refining Company v. Kelly, if that judgment had been in fact satisfied. Code Civ. Proc. § 675. The appellant, however, raises the following objections to the validity of the proceedings here taken:

[1, 2] 1. It is urged that the appeals from the judgment against Kelly and his sureties, and from the order denying their motion for a new trial, removed jurisdiction of the case to the Supreme Court, and ousted the superior court of future jurisdiction pending the appeal. There is no merit in this contention. It is true that the compulsory payment of a judgment pending appeal does not deprive the defendant of his right to have the judgment reviewed. Warner Bros. Co. v. Freud, 131 Cal. 639, 63 Cal. 1017, 82 Am. St. Rep. 400. Perhaps, therefore, satisfaction should not be entered over the defendant's objection. But the right to prosecute the appeal, notwithstanding payment, is a right of the appellant, not of the respondent. If the judgment debtor elects to have the judgment satisfied, and to waive his appeal, it is no concern of the judgment creditor. Here the defendants moved to have satisfaction entered. They may thereby have opened the door to a dismissal of their appeal, but the plaintiff certainly cannot object to their satisfying its judgment merely because they have taken an appeal. This would be true even if execution had been stayed by an undertaking, which does not appear to have been done.

[3] 2. The claim is made that the money was improperly paid to the judgment creditor of the trustees of the plaintiff corporation, because there had been a prior assignment of one-third of such judgment to E. L. Foster. Irrespective of any other consideration, we think the court below properly disregarded this assignment because it covered only a part of the judgment. An assignment of a portion of a judgment, according to most of the authorities, has no effect against the judgment debtor unless made with his consent or ratified by him. 23 Cyc. 1418; Thomas v. R. S., etc., Co., 54 Cal. 578; Loomis v. Robinson, 76 Mo. 488; Burnett v. Crandall, 63 Mo. 410; Hopkins v. Stockdale, 117 Pa. 365, 11 Atl. 368; Lewis v. Third St. R. Co., 26 Wash. 28, 66 Pac. 150; McMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852. This is in accord with the general rule governing partial assignments of choses in action. The creditor cannot split his demand, and by assignment of a portion thereof impose upon the debtor the legal obligation of paying the assignee. Clancy v. Plover, 107 Cal. 272, 275, 40 Pac. 394. There is no evidence in the record that the judgment debtors in the case at bar ever consented to the assignment of one-third of the judgment to Foster. Indeed, the fact that they paid the entire judgment on an execution against the trustees of the original plaintiff tends, rather, to show affirmatively a want of such consent.

Some of the cases hold, however, that a partial assignment of a chose in action is not entirely ineffectual, even though it be without the assent of the debtor. While it is universally conceded that such assignment vests in the assignee no legal title to any part of the demand, these cases declare that an equitable interest is thereby created. 23 Cyc. 1418. Such was the ruling of this court in Grain v. Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

But the fact that an equitable interest in the judgment had been transferred to Foster would not affect the rights of the parties here. Even if there had been a valid legal assignment, the judgment debtors would be protected if, without notice of the assignment, they had paid the judgment to the assignor. Hogan v. Black, 66 Cal. 41, 4 Pac. 943; Dodd v. Brott, 1 Minn. 270 (Gil. 205), 66 Am. Dec. 541; Frissell v. Haile, 18 Mo. 18; Chic. C. Ry. Co. v. Blanchard, 37 Ill. App. 391; McCarver v. Nealey, 1 G. Greene [Iowa] 360; Vance v. Hickman, 95 Ill. App. 554. There is nothing in the bill of exceptions to show that Kelly or his sureties (the judgment debtors) had actual notice of the assignment in this case.

[4] All that appears is that the assignment was filed, and this filing cannot operate as constructive notice in the absence of a statute providing that it shall have that effect.

[5] The only question, then, is whether the judgment debtor has the burden of showing that he had no notice when he made the payment, or whether the burden of showing notice before payment is on the assignee. Whatever might be said in the case of a valid legal transfer of the judgment, it is clear that, where the assignee has only an equitable interest, he is bound to show affirmatively that the judgment debtor had notice of the equitable interest before paying to the party holding the legal title. Bell v. Pleasant, 145 Cal. 410, 78 Pac. 957, 104 Am. St. Rep. 61.

[6] 3. An attack upon the validity of the judgment and execution in Mitchell v. Pettibone is made on the ground that the action was for the foreclosure of a mortgage, and that, therefore, a judgment for the recovery of money outright should not have been given, but only a judgment for a sale of the mortgaged property, with provision for the recovery of such deficiency as might remain after sale. Code Civ. Proc. § 726. We need not inquire whether, as is claimed by the respondents, certain facts shown by the record take the case out of the operation of the rule relied on. Assuming that Mitchell v. Pettibone was an ordinary action for the foreclosure of a mortgage, the complaint prayed for general relief, and the court, at most, committed error in giving the judgment which was given. Such judgment was not void, and its validity could not be questioned, as is attempted here, on collateral attack.

[7] 4. It is suggested that the judgment in Mitchell v. Pettibone is invalid for the reason that the action was instituted by John Mitchell, as trustee under the mortgage or deed of trust, against John Mitchell and others, as trustees of the defunct corporation.

[8] It is no doubt the established rule that the same person cannot be both plaintiff and defendant in an action, even though he sue in one capacity and defend in another. Brown v. Mann, 71 Cal. 192, 12 Pac. 51; Byrne v. Byrne, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196. But where the action has gone to judgment and the judgment is made the subject of collateral attack, mere identity of name, which is all that appears here, will not be taken to establish that plaintiff and defendant are one and the same person. On the contrary, as every presumption is in favor of the judgment, it will be presumed that the plaintiff and the defendant, although bearing the same name, were different persons. Bryan v. Kales, 3 Ariz. 423, 31 Pac. 517; Allen v. Evans, 7 Ariz. 354, 64 Pac. 414. See, also, Dorente v. Sullivan, 7 Cal. 279; Wilson v. Benedict, 90 Mo. 208, 2 S. W. 283.

[9] 5. It is claimed that the sheriff was disqualified under section 4172 of the Political Code to levy the execution because he was himself a defendant in Buckeye Refining Company v. Kelly. The case does not come within the terms of the statute cited. Section 4172 provides that "when the sheriff is a party to an action or proceeding, the process and orders therein * * * must be executed by the coroner." The statutory disqualification goes only to the execution of process in the action to which the sheriff is a party. The writ here in question was issued in the action of Mitchell v. Pettibone, to which the sheriff, Kelly, was not a party.

[10] But, without regard to the Code provision, it may well be claimed, on general principles, that the sheriff should not act when, for any reason, he is personally interested in the matter of the enforcement of process. Freeman on Execution, § 99a. The levy of execution upon a judgment against himself (and others) is no doubt such a matter. But, conceding the invalidity of the levy, we think the order directing entry of satisfaction of judgment should still be sustained. The issuing of execution in Mitchell v. Pettibone was perfectly regular. The sheriff had a right to take the writ, and could lawfully have enforced it against any property of the defendants other than their judgment against him and his sureties. If, then, he held a valid execution, the other defendants and judgment debtors in Buckeye Refining Company v. Kelly had the right, under section 716 of the Code of Civil Procedure, to pay the amount of their debt without any levy of the execution. Skelly v. School Dist., 103 Cal. 652, 37 Pac. 643. Having so paid, and the money having gone to the party entitled to receive it, they were entitled to have satisfaction entered.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

162 Cal. 714

SALA v. CITY OF PASADENA.
(L. A. 2,873.)

(Supreme Court of California. May 28, 1912.)

1. Eminent Domain (§ 74*)—Compensation—Necessity of Payment Before Taking.

Under Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation, an owner whose property is damaged by a change of the grade of a street is entitled in the absence of a waiver by, or an estoppel on him, to recover from the city compensation for the injury done and to prevent the doing of the work until the amount of the damages has been ascertained and paid.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 188–197; Dec. Dig. § 74.*]

2. Eminent Domain (§§ 79, 80*)—Compensation—Waiver.

The constitutional right of an owner of property damaged by the change of a street grade to recover compensation, and to prevent the doing of the work before compensation is paid, may be waived.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205–214; Dec. Dig. §§ 79, 80.*]

3. Eminent Domain (§§ 79, 80*)—Compensation—Bar of Right—Legislative Regulation.

The state Legislature in matters concerning public improvements may require a property owner to assert his claim for compensation for the taking of his property or injury thereto, before the commencement of the improvement, on reasonable notice, either actual or constructive, as by advertising or posting, and may provide that his failure to assert such claim within a prescribed reasonable time shall bar any subsequent action to prevent the doing of the work or to recover compensation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205–214; Dec. Dig. §§ 79, 80.*]

4. Eminent Domain (§§ 79, 80*)—Compensation—Waiver of Right—City Charter.

Where a city charter authorized the changing of street grades on public notice, and provided that within 10 days of the first publication of the ordinance any property owner might file a claim for damages, but did not contain any provision as to the effect of a property owner's failure to file such claim with reference to his right to receive compensation for injury to his property, his failure to do so was not a waiver of his constitutional right to compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 205–214; Dec. Dig. §§ 79, 80.*]

5. Appeal and Error (§ 1177*)—Reversal—New Trial.

Where, in an action to recover damages for injury to plaintiff's property by a change in a street grade, the court found that the property had been damaged in the sum of $800, but erroneously determined that plaintiff had waived his right to compensation, the court on appeal will reverse without directing a new trial, notwithstanding the city's counsel claimed that the evidence was not sufficient to support the finding of damage; the city being entitled to present its showing on that question on appeal from the judgment entered after remand by bill of exceptions containing the matters affecting the findings of fact on which the judgment rested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597–4620; Dec. Dig. § 1177.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Frank D. Sala against the City of Pasadena. Judgment for defendant, and plaintiff appeals. Reversed and rendered.

J. H. Merriam, for appellant. J. P. Wood and William J. Carr, for respondent.

ANGELLOTTI, J. This is an action by plaintiff against the city of Pasadena to obtain judgment for $2,000, in which amount he alleges that his real property fronting on Lake avenue in said city has been damaged by the city by excavating and removing earth in said avenue along the frontage of said property. The trial court found that on July 2, 1907, the city council of defendant, in response to a petition signed by the owners of a majority of the frontage upon a portion of said avenue, duly passed and adopted an ordinance declaring its intention "to change and establish the grade" of said portion of said avenue; that said ordinance was duly published in the Pasadena Star, a daily newspaper published in said city, for 10 days, commencing July 3, 1907; that no objection, remonstrance, or petition or claim for damages or compensation on account of said proposed change of grade was made or filed with defendant city or any of its officers within 10 or 30 days, after the first publication of said ordinance, by plaintiff, or any other owner of property, or until September 27, 1909, when a claim for $2,000 damages was presented by plaintiff to said city council; that on August 13, 1907, said city council duly passed and adopted an ordinance changing and re-establishing the grade of said portion of said avenue in accord with the terms of said resolution of intention; that in December, 1907, defendant regularly contracted with one Schilling to grade said portion of said avenue to such official grade as so changed and re-established; that said contractor did grade such portion of the avenue to such established grade; that this was the only interference with the earth on Lake avenue in front of plaintiff's premises; that no objection, remonstrance, or petition against the grading of said portion of Lake avenue to such new grade was ever made by plaintiff; that such changing and re-establishment of the grade and the grading of such portion of Lake avenue to the grade so established damaged plaintiff's property in the sum of $800, and no more. Upon these facts the trial court concluded as matter of law that the grade was lawfully changed, and that plaintiff "has waived any and all his right or claim against the defendant for damages or compensation to his said property" on account of such change of grade, and gave judgment that plaintiff take nothing, and that defendant recover its costs. This is an appeal by plaintiff from said judgment, and it is claimed that upon the facts found judgment should have gone for the plaintiff, in the sum of $800.

The freeholders' charter of the city of Pasadena, approved by the Legislature January 29, 1901, contains certain provisions relative to the matter of change of grade of the streets of the city. Sections 2 and 3 of article 9 of the charter (Stats. 1901, p. 910) are as follows:

"Sec. 2. Whenever the city council shall deem it expedient to alter the established grade of the whole or any part of any street, avenue, lane, alley, court, or place in said city, said council shall by ordinance declare its intention to alter such established grade, in which ordinance must be specified the grade that is proposed to be established; and shall publish such ordinance at least ten days in a daily newspaper published and circulated in the city of Pasadena.

"Sec. 3. Within ten days after the first publication of such ordinance, any owner of property fronting on such street, or part thereof whereon said change is proposed, may make and file with the city clerk a written remonstrance against the proposed change of grade, setting forth in detail the damage which will arise to him by reason of the proposed change of grade, and thereupon the same shall not be further proceeded with or made without compensation to such owner for any damage which may be occasioned to him by said change. The said damage shall be ascertained, if possible, by agreement between such owner and the council, and in case such agreement cannot be reached with such owner, the amount of damage justly payable to such owner shall be determined by an action in the name of the city against him, and in case there is remonstrance from more than one, all said remonstrants may be joined as defendants in said action and all of their damages determined therein."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

It is not questioned that the changing of street grades is essentially a municipal affair, and the provisions of the charter that are set forth above undoubtedly establish the procedure for changing grades of streets in the city of Pasadena. We are of the opinion that both the answer of defendant and the findings sufficiently show to support the judgment, both that there was an established grade of Lake avenue, and that there was a sufficient compliance with the requirements of the charter provisions in the matter of the change of such grade.

[1] Plaintiff's claim for recovery is based on section 14 of article 1 of our state Constitution, which provides that "private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for, the owner." In view of the decisions relative to this constitutional provision, it is not to be doubted that plaintiff was entitled, in the absence of waiver by or estoppel on him, to recover from the city compensation for the injury done to his property by the grading of the street to the new grade, indeed to prevent the doing of the grading work until the amount thereof had been ascertained and paid. See Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Eachus v. City of Los Angeles, 130 Cal. 492, 62 Pac. 829, 80 Am. St. Rep. 147; Tyler v. Tehama County, 109 Cal. 618, 42 Pac. 240; Wilcox v. Engebretsen, 160 Cal. 288, 298, et seq., 116 Pac. 750; Sievers v. Root, 10 Cal. App. 337, 101 Pac. 925.

[2] The material question is, then, whether plaintiff was properly held to have waived his constitutional right to damages for the injury done to his property. His rights under this provision of the Constitution, as said in Bigelow v. Ballerino, 111 Cal. 559, 44 Pac. 307, were two: "(1) The right to compensation; and (2) the right to have that compensation made or paid into court before his property is taken or injuriously affected." It was further said therein: "Either or both these rights he may waive; that is to say, he may waive his right to any compensation, or he may waive his right to prepayment of compensation. But where there is no such waiver, the property owner may rest secure in the protection which the Constitution affords him that his property shall not be taken or damaged without compensation first made."

[3] It is well settled, however, that the state Legislature, in the matter of public improvements concerning which they are authorized to legislate, may require the property owner to assert his claim for compensation for the taking of his property or injury thereto before the commencement of the improvement, upon reasonable notice of the proposed taking or injury, may prescribe in what manner and within what time he shall do this, and further provide that his failure to assert a claim within the prescribed time shall operate as a waiver of all claims and constitute a bar to any subsequent action looking either to a prevention of the work or the making of compensation. It is further settled that the notice in such cases need not be personal, but may be constructive, as by advertising or posting. It is sufficient that the notice provided is such as may reasonably be held to afford adequate opportunity for knowledge of the designed improvement by the property owner who exercises reasonable care in the matter of his property. See Wabash R. R. Co. v. Defiance, 52 Ohio St. 262, 40 Pac. 89; Id., 167 U. S. 88, 103, 17 Sup. Ct. 748, 42 L. Ed. 87; Cupp v. Seneca Co., 19 Ohio St. 173, 182, 183; Kansas City v. Duncan, 135 Mo. 571, 37 S. W. 513. This was expressly held in Potter v. Ames, 43 Cal. 75, where a statute relating to the alteration of highways provided that notice should be given by posting, that any person owning lands to be affected by the proposed alteration and who desires to apply for damages in consequence thereof shall make application therefor to the board of supervisors at a prescribed time, and that, failing to present such application at the time and in the manner prescribed, he shall be considered as waiving all right to damages, and as dedicating the lands affected by the proposed alteration to the public use as a highway. This court, after stating that the right of the property owner to receive compensation for his property is undoubted under the provisions of the Constitution, said: "While it is unquestionably competent to the Legislature to provide the several steps to be pursued in the assertion of his claim for compensation, the prescribed procedure must not destroy or substantially impair the right itself. A reasonable opportunity must be afforded him to claim and receive his damages; then if, being so afforded, it be not availed of, the statute may provide that such failure should constitute a bar to his claim." The statute was held to be free from constitutional objection. Undoubtedly, similar provision may be made in a freeholders' charter.

[4] The question here is whether any such effect can reasonably be given to the sections of the charter of defendant city that we

have heretofore quoted. These are the only provisions relied upon by learned counsel for defendant. It will be observed that there is no provision therein as to the effect of a property owner's failure to present his remonstrance and claim of damages to the council, on his right to receive compensation for injury to his property, nothing by way of express provision to the effect that, unless he does this, he shall be presumed to have waived all claim of damage or shall be barred from a recovery of any damage. He is simply given the opportunity, "within ten days after the first publication of such ordinance," to make and file his written remonstrance against the proposed change of grade, with a statement of the damage which will arise to him by reason of the proposed change. Such a remonstrance and statement he *may* make and file, and the expressed effect of such filing is that "the same shall not be further proceeded with or made without compensation to such owner for any damage which may be occasioned to him by said change." This damage is to be ascertained, if possible, by agreement, and if an agreement cannot be reached, by an action in the nature of eminent domain. And there the provision ends. There is not one word to indicate to the owner that his failure to make such written remonstrance and filing shall operate as a waiver of his constitutional right to compensation for any injury that may be done his property in the event that the street is subsequently graded to the proposed new grade, or that he must pursue this course in order to preserve his constitutional right to compensation for such injury as may be subsequently done to his property by the actual grading. However desirable it may be that the aggregate amount of damages that must be paid to property owners in the matter of the change of grade of a street should be known before the change in grade is made, we are of the opinion that no statute or charter provision looking to that end should be held effectual to bar the property owner, who has not presented his claim in accord with its terms, from an assertion of his claim for compensation for the injury actually done, in the absence of clear provision therein that such shall be the effect. In the absence of clear notice to the contrary, contained in the statutory or charter provision, he should be held to have the right to assume, in view of the constitutional provision, that he will be entitled to compensation for any injury that may be inflicted on his property. In Wabash R. R. Co. v. Defiance, supra, the statute expressly provided that a person failing to make his claim in the manner provided thereby "shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages." In Cupp v. Seneca Co., supra, there was a substantially similar provision in the statute. The same is true of Kansas City v. Duncan, supra. As we have seen, there was a substantially similar provision in the statute involved in Potter v. Ames, supra. There is no decision of this court that can reasonably be construed as making the failure of the property owner to assert his claim for damages in advance of the doing of the work, under such a statutory or charter provision as the one before us, a waiver of his constitutional right to compensation for such injury as may be inflicted by the doing of the work. The distinction between the case presented in Matter of Beale Street, 39 Cal. 495, and this case is obvious. At the time of that decision, our Constitution did not give a property owner the right to damages for *injury* to property done by the grading of a street adjoining the same. The only right of the owner in that regard was the right given him by a statute which also provided the manner in which and the time at which he should assert his claim, and the effect of the decision practically was, as stated by counsel for appellant, "that, in order to claim the benefits which were granted by the terms and conditions of that act, they must comply with the requirements and conditions imposed by the provisions of the act, before such damages could be awarded." No such question was presented in German Savings, etc., Society v. Ramish, 138 Cal. 120, 69 Pac. 89, 70 Pac. 1067, and the portion of the opinion in that case relied upon by learned counsel for the city in this regard is mere obiter dictum. That was an action to enjoin the execution of a deed to land sold because of the nonpayment of certain bonds issued for street improvements, and the question was as to the validity of the proceedings resulting in the issuance of the bonds; no question of right to damage for injury to property by reason of the work or of waiver of that right being involved. It is well settled that the fact that the property owner "may have some cause of action founded upon rights reserved by that part of the Constitution which deals with the exercise of the power of eminent domain does not make the assessment void." Hornung v. McCarthy, 126 Cal. 17, 58 Pac. 303; Duncan v. Ramish, 142 Cal. 686, 76 Pac. 661. In the case last cited it was said, substantially, that where the owner fails to claim any damage for a proposed change of grade, the law affording him proper opportunity to do so, he must be held to have waived "any right to object on that ground to the proceedings for the change of grade," and that while it may be that he still has a right of action against the city for any damage in fact suffered by reason of the change, a question not decided, he cannot defeat the assessment for the improvement by showing such damage. It was also said: "It is clear that the nonpayment of any such damages does not affect the assessment to pay the cost of the work of grading, graveling, and curbing. The two are entirely distinct and independent."

[5] We are satisfied that the facts found by the trial court should not be held to show a waiver by the plaintiff of his constitutional right to be reimbursed for the damage done to his property by the grading of the street, that the findings of fact were such as to require judgment in favor of plaintiff for $800, and that the judgment appealed from should be reversed with directions to the lower court to enter such judgment. We can see no good reason for requiring a new trial of the issue made by the pleadings as to the amount of damage done plaintiff's property, as is requested by defendant's counsel in the event of a reversal of the judgment. If, as is suggested by him, he may desire an opportunity to show that the evidence given on the trial was not sufficient to support a finding of $800 damage, he may present such showing on an appeal from the judgment entered under our direction, on which appeal he is entitled to "a bill of exceptions containing matters directly affecting the findings of fact upon which the judgment rests." Klauber v. San Diego, etc., Co., 98 Cal. 105, 32 Pac. 876; Tuffree v. Stearns Ranchos Co., 124 Cal. 306, 310, 57 Pac. 69.

The judgment appealed from is reversed, with directions to the lower court to enter judgment upon the findings in favor of plaintiff and against defendant for the sum of $800 and his costs of suit.

We concur: SHAW, J.; SLOSS, J.

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162 Cal. 701

Ex parte BECK. (Cr. 1,723.)

(Supreme Court of California. May 27, 1912.)

1. Constitutional Law (§ 65*) — Legislative Powers—Delegation of Powers.

The constitutional prohibition of the delegation of legislative powers does not necessarily prohibit a conditional statute, the taking effect of which may be made to depend upon its approval by the electors of the locality specially interested.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65.*]

2. Constitutional Law (§ 65*) — Legislative Powers—Delegation—Local Option.

The Local Option Act (St. 1911, p. 599), relating to the licensing of the sale of intoxicating liquors, and making its taking effect in any particular locality depend upon a vote of the electors therein, relates to a subject as to which legislative powers may be constitutionally delegated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 116; Dec. Dig. § 65.*]

3. Intoxicating Liquors (§ 14*)—Constitutionality of Acts—Local Option.

St. 1911, p. 599, known as the "Local Option Act," which prohibits the sale of alcoholic liquor in any incorporated city, town, or the portion of any supervisorial district not included within any such city or town, in which at least 25 per cent. of the electors petition for an election on the question, unless a majority of the electors voting declare in favor of such sale, was a legislative determination that it was inexpedient to allow the licensed sale of liquor in any territory where the inhabitants were opposed thereto and a reasonable exercise of the police power.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.*]

4. Intoxicating Liquors (§ 30*)—Local Option—Submission to Popular Vote—Territory in Which Election Ordered—Supervisor Districts.

The Legislature, in enacting a local option act in force over all the state, and making its adoption dependent upon a petition and a majority vote of the electors in certain territory, had the entire right of determining what subdivision of the state should be defined as an election unit; and hence might make a supervisor district, though not a political division of the state, a unit for the adoption of the act.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 37; Dec. Dig. § 30.*]

5. Statutes (§ 77*)—Grant of Police Powers—General Laws.

The Local Option Act (St. 1911, p. 599) does not violate Const. art. 11, § 11, which grants to counties, cities, and towns power to make and enforce "local, police, sanitary, and other regulations" not in conflict with general laws, since the act is a general law applicable to all parts of the state as to which the Legislature is empowered to enact laws relating to the sale of intoxicating liquors, including cities and towns not having freeholders' charters.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 79–82; Dec. Dig. § 77.*]

6. Statutes (§ 73*) — Delegated Police Power—Uniformity of Operation.

It is no objection to St. 1911, p. 599, which makes the licensed sale of liquor dependent upon a favorable vote of electors in certain subdivisions of the state, that the law prevailing in one locality might be different from that in another, since as to all parts of the state as to which the Legislature has the authority to legislate on the subject the law is uniform in its operation, the sale in each district being forbidden or not as the electors may determine; and since, even as to a permissible delegation of power to counties or cities, the constitutional provision that the Legislature shall not pass private, local, or special laws regulating the internal affairs of towns and counties is not intended to secure uniformity in the exercise of such delegated police powers, but to forbid the passage of a law vesting in one town or county a power of local government not granted to another.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 73, 74, 75; Dec. Dig. § 73.*]

7. Intoxicating Liquors (§ 14*) — Local Option—Submission to Popular Vote.

It is no objection to the Local Option Law (St. 1911, p. 599) that a majority of the votes cast must be in favor of license in order to authorize licensed sale of liquor, since the determination of the vote necessary to adopt the act is purely a question of policy for the determination of the Legislature.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.*]

8. Intoxicating Liquors (§ 14*) — Police Power—Suspension.

St. 1911, p. 599, known as the "Local Option Act," does not violate the constitutional provision that the police power is a continuous one, reposed somewhere, and one that cannot be barred or suspended by contract or irrepealable law.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 16; Dec. Dig. § 14.*]

In Bank. Application by C. A. Beck for writ of habeas corpus directed to the Sheriff of San Luis Obispo County. Writ discharged, and petitioner remanded to custody.

Carlton W. Greene (Herbert Choynski, of counsel), for petitioner. Charles Palmer (J. W. Joos, of counsel), for respondent. J. E. White, amicus curiæ.

ANGELLOTTI, J. The petitioner is held in custody for examination under a complaint charging him with keeping and conducting a retail liquor saloon in the city of Paso Robles, where alcoholic liquors are sold, served, and distributed in quantities of less than two gallons; said city being an incorporated city and "no-license territory," and he not being a licensed pharmacist.

The question presented by this proceeding is the constitutionality of an act of the Legislature generally known as the "Local Option Act," approved April 4, 1911 (Stats. 1911, p. 599), with reference specially to cities and towns organized and existing under the general municipal corporation act, of which the city of Paso Robles is one. It is not questioned that an election has been regularly held in such city in the manner provided by such act, that a majority of four votes was given at such election in favor of "no license," and that the complaint states a public offense if such act is a valid exercise of legislative power.

Substantially the act provides as follows in respect to all matters material here: Qualified electors of any incorporated city or town, or of that portion of any supervisorial district not included within the boundaries of any such city or town, numbering not less than 25 per cent. of the number of votes cast for all candidates for Governor in such territory at the last preceding election for that office, may petition the proper legislative authority, in the one case the city council or other similar body of the city or town, in the other the board of supervisors of the county, for an election on the question whether the sale of alcoholic liquors shall be licensed in such territory. Upon the certification of the petition by the proper officer as sufficient, such legislative body shall submit the question to the electors, either at a general state or municipal election within said territory, or at a special election, dependent upon the time after such certification within which such a general election is to be held within such territory, "provided, that no election under this act shall be held within two years of any previous election held under this act within the same territory." Any such special election is to be called and held in accordance with all the provisions of law respectively applicable to general state elections and municipal elections, according as it is within territory outside of or within an incorporated city or town. "Unless a majority of the votes cast on this question at such election are in favor of license, the territory described in the petition shall be no-license territory on and after ninety days from the date of said election," and "shall remain such until at a subsequent election, called, as herein provided, to vote on the question of whether the sale of alcoholic liquors shall be licensed therein, a majority of the votes cast on that question are in favor of license. It shall thereupon cease to be no-license territory within the meaning of this act." No license to sell or distribute alcoholic liquors in no-license territory shall be issued except to registered pharmacists and manufacturers of said liquors, and all such existing licenses, with the exceptions above stated, shall immediately become void when the territory becomes no-license territory; all holders of such licenses being entitled to a rebate of the proportion of the license fee paid for the unexpired term thereof. It is declared to be unlawful for any persons, etc., "within the boundaries of any no-license territory," to sell, furnish, distribute, or give away any alcoholic liquor, to keep, conduct, or establish, as principal or agent, any place where alcoholic liquors are sold, served, or distributed, or are kept for any of such purposes, or to solicit orders, take orders, or make agreements for the sale or delivery of alcoholic liquors, except as provided in section 16 of the act, which allows some of the prohibited acts under certain prescribed circumstances and for certain specified purposes. It is declared that any person violating any of the provisions of the act shall be deemed guilty of a misdemeanor, punishable in the first instance by a fine not exceeding $600, or by imprisonment in the county jail not exceeding seven months. All places where alcoholic liquors are sold or distributed, or are kept for sale or distribution, in violation of any of the provisions of the act, are declared to be common nuisances and abatable as such. The term "alcoholic liquors" is declared to include spirituous, vinous, and malt liquors, and any other liquor or mixture which contains 1 per cent., by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage.

The principal objection made to this act is that it is an attempted delegation by the Legislature to the electors of its power to make laws, a delegation of its legislative power which is not warranted by our Constitution. It is elementary, of course, as said in Ex parte Wall, 48 Cal. 279, 313, 17 Am. Rep. 425. that "the power to make laws conferred by the Constitution on the Legislature cannot be delegated by the Legislature to the people of the state or to any portion of the people." And if the act before us must be considered as doing this it must be held void.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Reliance is naturally placed by petitioner for his claim that such is the nature of the act here involved upon the opinion of the court in Ex parte Wall, 48 Cal. 279, 17 Am. Rep. 425, where an act differing from this in no respect material to the determination of this particular question was held void upon this ground. It is to be observed, however, that there was then a general law of the state authorizing the selling, etc., of intoxicating liquors upon the payment of a license fee prescribed by the Legislature, a system abolished by the Constitution of 1879. While it was recognized by the opinion that a statute may be conditional and its taking effect sometimes be made to depend upon a subsequent event, it was squarely held that an approval by popular vote could not be an event having such effect. It was said that: "The event must be one which shall produce such a change of circumstances as that the lawmakers—in the exercise of their own judgment—can declare it to be wise and expedient that the law shall take effect when the event shall occur. * * * If it (the law) can be made to take effect on the occurrence of an event, the Legislature must declare the law expedient if the event shall happen, but inexpedient if it shall not happen. They can appeal to no other man or men to judge for them in relation to its present or future propriety or necessity; they must exercise that power themselves, and thus perform the duty imposed by the Constitution. But in case of a law to take effect, if it shall be approved by a popular vote, no event affecting the expediency of the law is expected to happen. The expediency or wisdom of the law, abstractly considered, does not depend upon a vote of the people. If it is unwise before the vote is taken, it is equally unwise afterward."

The opinion in Ex parte Wall, supra, was concurred in by but three justices; Justices Rhodes and Crockett dissenting. In its conclusion that such an act as was there and is here under consideration is void as an unwarranted delegation of legislative power, it is now opposed to the overwhelming weight of authority in other states, as we shall show hereafter. Subsequent decisions of this court have been such, we think, as to practically overrule it as an authority upon the question we are considering.

In People v. Nally, 49 Cal. 478, the legislative act under consideration was one providing for an election in Siskiyou county on the question of the annexation to Siskiyou county of a portion of Klamath county, described in the act, and that, if a majority voted for annexation, statements of the result should be forwarded to the boards of supervisors of Klamath and Humboldt counties, and that 30 days thereafter the organization and government of Klamath county must be abandoned, and the described portion thereof annexed to Siskiyou county, and the remainder to Humboldt county. The election was held in Siskiyou county as ordered, and a majority of the votes were in favor of the annexation. The subsequent proceedings were as required by the act. Thereafter, Nally, the assessor of Klamath county, refused to prepare an assessment book for that county, claiming that it was no longer a county. The proceeding was in mandamus to compel him to prepare such a book. The writ was denied. The principal opinion in the case, that of Justice Crockett, concurred in by Justice Rhodes, declared that the act related to a matter of "purely local concern, in which the people of the district to be affected by it were alone concerned." Ex parte Wall, supra, was referred to as a case wherein the question was whether a statute authorizing a general law to be suspended in certain political subdivisions of the state, by a vote of the people of the district, was a delegation of legislative power; the basis of this statement probably being the fact that there was then a general law of the state providing for the licensing of the sale of intoxicating liquors and fixing the amount of license, which we have before referred to. The court said: "However the rule may be in that class of cases, it is settled, I think, by an overwhelming weight of authority in this and many other states, that in matters of purely local concern, it is competent for the Legislature to enact that a statute affecting only a particular locality shall take effect only upon condition that it is approved by a vote of the majority of the people whom the Legislature shall decide are those who are interested in the question." In People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66, an act providing for the formation of a new county, upon the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, was declared by the court in bank to be constitutional and not a delegation of legislative authority. It is squarely held that, as to such a question, the same being primarily one of local concern, the subsequent event upon which the taking effect of the legislative act might be made to depend could be a favorable vote of the electors primarily interested. Cooley's Constitutional Limitations, p. 141 et seq. (4th Ed.), was quoted approvingly as follows: "But it is not always essential that a legislative act should be a completed statute which must in any event take effect as a law, at the time it leaves the hands of the legislative department. A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event. Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not, at their option." In holding that such event might, as to certain questions, be a favorable vote of the electors, the decision in People v. McFadden, supra, was squarely opposed to material portions of the majority opinion in Ex parte Wall, supra. Board of Law Library Trustees v. Board of Supervisors, 99 Cal. 571, 34 Pac. 244, is still more in point. The act there involved was one providing for the establishment of county law libraries in the counties of the state, and it contained a proviso as follows: "And provided further that it shall be discretionary with the board of supervisors of any county to provide by ordinance for the application of the provisions of this act to such county." The court in bank said: "We think the Legislature had the power to provide in the act that counties might come within or remain without the provisions of the act, as the boards of supervisors of the respective counties might determine. It is not necessary to enter into a discussion of the constitutionality of this law in that regard, for in the recent case of People v. McFadden, 81 Cal. 489, 22 Pac. 851, 15 Am. St. Rep. 66, involving the constitutionality of the act creating the county of Orange, there is found an exhaustive discussion of the same principle, with the citation of many cases bearing upon the question." And finally, in Wheeler v. Herbert, 152 Cal. 224, 234, 92 Pac. 353, 357, it was declared as follows: "That it is competent for the Legislature to pass a law which shall be executed only in the event that a majority of a certain class of persons shall declare in favor of it is a principle too well settled to require discussion"—citing People v. McFadden, supra, and other cases.

[1] It thus appears that it is now settled in this state, as it is generally elsewhere, that the rule prohibiting the delegation of its legislative powers by a state Legislature does not necessarily prohibit a conditional statute, the taking effect of which may be made to depend upon such a subsequent event as its approval by the electors of the locality specially interested. See Cooley's Const. Lim. pp. 163–165, and 171, 172. It is said on the pages last referred to: "It would seem, however, that if a legislative act is, by its terms, to take effect in any contingency, it is not unconstitutional to make the time when it shall take effect depend upon the event of a popular vote being for or against it; the time of its going into operation being postponed to a later day in the latter contingency. It would also seem that, if the question of the acceptance or rejection of a municipal charter can be referred to the voters of the locality specially interested, it would be equally competent to refer to them the question whether a state law establishing a particular police regulation should be of force in such locality or not. Municipal charters refer most questions of local government, including police regulations, to the local authorities, on the supposition that they are better able to decide for themselves upon the needs, as well as the sentiments, of their constituents, than the Legislature possibly can be, and are therefore more competent to judge what local regulations are important, and also how far the local sentiment will assist in their enforcement. The same reasons would apply in favor of permitting the people of the locality to accept or reject for themselves a particular police regulation, since this is only allowing them less extensive powers of local government than a municipal charter would confer, and the fact that the rule of law on that subject might be different in different localities, according as the people accepted or rejected the regulation, would not seem to affect the principle, when the same result is brought about by the different regulations which municipal corporations establish for themselves in the exercise of an undisputed authority." And on pages 173 and 174, while admitting that there have been some decisions to the contrary, the learned author says: "Such laws are known, in common parlance, as local option laws. They relate to subjects which, like the retailing of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities, and they are sustained on what seems to us the impregnable ground, that the subject, though not embraced within the ordinary power of the municipalities to make by-laws and ordinances, is nevertheless within the class of police regulations, in respect to which it is proper that the local judgment should control."

[2] On the question whether a law relating to the retailing of intoxicating liquors relates to such a subject that its taking effect in any particular locality of the state may be made to depend upon a favorable vote of the electors, without involving a forbidden delegation of legislative power, the decisions are practically unanimous. This is so declared in Joyce on Intoxicating Liquors, §§ 368, 371. The following decisions sustain this view, viz.: State v. Wilcox, 42 Conn. 364, 19 Am. Rep. 536; McPherson v. State, 174 Ind. 60, 90 N. E. 610, 31 L. R. A. (N. S.) 188; State v. Forkner, 94 Iowa, 16, 62 N. W. 772, 28 L. R. A. 206; Stickrod v. Com., 86 Ky. 285, 290, 5 S. W. 580; Fell v. State, 42 Md. 71, 20 Am. Rep. 83; Com. v. Bennett, 108 Mass. 27; State v. Pond, 93 Mo. 606, 621, 6 S. W. 469; In re O'Brien, 29 Mont. 530, 75 Pac. 196, 1 Ann. Cas. 373; Paul v. Gloucester Co., 50 N. J. Law, 585, 15 Atl. 272, 1 L. R. A. 86; Gordon v. State, 46 Ohio St. 607, 23 N. E. 63, 6 L. R. A. 749; Fouts v. City of Hood River, 46 Or. 492, 81 Pac. 370, 1 L. R. A. (N. S.) 483, 7 Ann. Cas. 1160; Locke's Appeal, 72 Pa. 491, 13 Am. Rep. 716; State v. Barber, 19 S. D. 1, 101 N. W. 1078; State v. Scampini, 77 Vt. 92, 59 Atl. 829; State v. Donovan, 61 Wash. 209, 112 Pac. 260. Without any discussion of this particular question, local op-

tion laws of a similar character were sustained in Ladson v. State, 56 Fla. 54, 47 South. 517; City of Barnesville v. Means, 128 Ga. 197, 57 S. E. 422; Garrett v. Mayor, 47 La. Ann. 618, 17 South. 238; Feek v. Township Board, 82 Mich. 393, 47 N. W. 37, 10 L. R. A. 69; State v. Johnson, 86 Minn. 121, 90 N. W. 161; Hoover v. Thomas, 35 Tex. Civ. App. 535, 80 S. W. 859; and Willis v. Kalmbach, 109 Va. 475, 64 S. E. 342, 21 L. R. A. (N. S.) 1009. There is now practically no state holding to the contrary with the possible exception of Tennessee (see Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293); a few earlier decisions in Pennsylvania, Iowa, and Indiana having been practically overruled by later decisions, as above shown.

[3] The act involved in this proceeding is practically one prohibiting the sale, etc., of alcoholic liquor in any incorporated city or town of the state, or the portion of any supervisorial district not included within the boundaries of any such city or town, in which at least 25 per cent. of the electors petition for an election on the question, unless a majority of the electors voting on the question declare themselves in favor of such sale, etc. By it, the Legislature practically determined that it is inexpedient to allow the sale of such liquor in any such territory when the sentiment of the inhabitants thereof, as shown by the expression of its electorate, is to so large an extent opposed thereto, and denounced the sale under such circumstances as a crime. In view of what we have said on the question of delegation of power and in view of the undoubted power of the state in the matter of the regulation of the traffic in intoxicating liquors, we are satisfied that the act before us, enacted by the Legislature in the exercise of its police powers, cannot be held to be in excess of its authority either on the ground of unreasonableness or on the ground that it involves the delegation of its power by the Legislature.

[4] In the light of what we have said, there is no force in the claim that the act is void as to supervisor districts because a supervisor district is not a political subdivision of the state having powers of local government like a city or town, and has no power to enact legislation. The act calls for no legislation on the part of the supervisor district, and the vote of the electors thereof does not make the law at all. The electors thereof perform no legislative function whatever. The act is wholly one of the state Legislature, in force all over the state so far as the right of the people of the respective localities mentioned to avail themselves thereof is concerned; the only thing left to the electors of each such locality to determine being whether they will avail themselves of the prohibitions contained therein. This, as we have seen, involves no delegation by the Legislature or exercise by the electors of legislative power, or the exercise of any power of local government by the districts specified. Under these circumstances, the determination as to what subdivision of the state should be defined as the unit is entirely for the Legislature, which could prescribe such subdivisions as it saw fit. It might have prescribed election precincts, instead of supervisor districts, as has been done in some states, and as was done by the board of supervisors of Colusa county in the county ordinance considered in Denton v. Vann, 8 Cal. App. 677, 97 Pac. 675. It might even have created new subdivisions of its own for all the purposes of the act. It once being established that there is no delegation of legislative power by the Legislature, and that the act authorizes no exercise of legislative power or any power of local government by the districts specified, the result we have stated as to the power of the Legislature in the matter of prescribing the unit necessarily follows. What we have said on this point is fully sustained by some of the authorities already cited.

In view of what we have said, the other objections to the act here involved do not require very extended notice.

[5] We have seen that the act is clearly a general law, purporting to be applicable everywhere in the state, and, as a matter of fact, applicable everywhere in the state except possibly in cities having freeholders' charters. If not applicable in such cities—a question we have not considered and on which we express no opinion—such result is due entirely to certain provisions of our Constitution making such charters paramount to certain general laws. But such a result would not impair the character of the law as a general law. It is certainly applicable to all parts of the state as to which the Legislature is empowered to enact legislation relative to the sale or distribution of alcoholic liquors, including all cities and towns not having freeholders' charters.

The power granted to counties and to cities and towns by the provisions of section 11, article 11, of the Constitution, to make and enforce "local, police, sanitary and other regulations," is expressly limited by said section to such regulations "as are not in conflict with general laws." So far, therefore, as any authority of counties, cities, and towns in the matter of such regulations is based on the provisions of this constitutional grant, it is subject at all times to such general laws, and such local regulations must give way to such general laws so far as they are in conflict therewith.

It is claimed that the act gives the electors of the specified districts the power to suspend provisions of general laws of the state, such as, in the case of cities and towns organized and existing under the general municipal corporation act, provisions authorizing the licensing of the traffic in alcoholic liquors for purposes of revenue and regulation, and, in the case of portions of supervisor districts outside of cities and towns, provisions of the county government act of the same character. This claim rests on the same basis as that of there being a delegation by the Legislature of its legislative power.

As we have shown, there is no delegation of legislative power to the electors. It is the act enacted by the state Legislature that suspends the provisions referred to, and not the vote of the electors. As we have seen, the Legislature has simply enacted a law applicable to the whole state, which in substance and effect prohibits the sale or distribution of alcoholic liquor in any of the districts created by the act where, 25 per cent. of the electors insisting on an official expression of opinion thereon, a majority of the electors are not in favor of such traffic. The act constitutes a declaration by the state Legislature that such traffic is inexpedient in any such district where such a large proportion of the people are opposed thereto, and denounces such traffic under such circumstances as a crime.

[6] There is nothing in the point that by virtue of the law a different rule may prevail in one locality than prevails in another, in regard to the traffic in intoxicating liquors. As to all parts of the state as to which the Legislature has the authority to legislate on this subject, the law is uniform in its operation; the traffic in each district being forbidden or not forbidden as the electors may indicate their desire in the matter. Even as to permissible delegation of power to municipalities or counties, "a constitutional provision that 'the Legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties' is not intended to secure uniformity in the exercise of delegated police powers, but to forbid the passage of a law vesting in one town or county a power of local government not granted to another." Joyce on Intoxicating Liquors, § 370. And as a matter of fact, we know that there are almost as many differences in the regulations relating to the traffic in intoxicating liquors adopted by different cities and towns of the state, as there are cities and towns, running from the imposition of a very small license fee in some cases to absolute prohibition of the traffic in others.

[7] That a majority of the votes cast must be in favor of the traffic in order to authorize the traffic is no legal objection to the validity of the act. It was purely a question of policy for the Legislature to determine on what conditions and under what circumstances such traffic shall be allowed at all. They concluded that it should not be allowed in any district where, under the circumstances stated, a majority of the electors expressing their opinion on the question should not express themselves in favor of such allowance. Undoubtedly, as learned counsel for petitioner suggest, if they can legally do this, they could have gone further, and prohibited such sale or distribution in any district unless much more than a mere majority of such electors expressed themselves in favor thereof. The difficulty with petitioner's claim in this regard is the same as in reference to the other points we have discussed. It is based on the theory that it is the people of the respective districts or the districts themselves that are exercising legislative power, which as we have seen, is not well founded.

[8] There is in the act no forbidden suspension of the police power granted by the Constitution to counties, cities, and towns. As we have seen, this grant is expressly declared by the Constitution to be subject to general laws of the state. And, of course, there is no violation of the general rule to the effect that the police power "is a continuous one, reposed somewhere, and one that cannot be barred or suspended by contract or irrepealable law." See In re Pfahler, 150 Cal. 84, 85, 88 Pac. 276, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

There is no other point made that, to our minds, requires notice here. We are satisfied that the act here involved cannot properly be held violative of any provision of our Constitution that has been called to our attention, and we see no reason to doubt its validity. This being so, we are bound to uphold it as a valid enactment of the state Legislature.

The writ is discharged and the petitioner remanded to custody.

We concur: SHAW, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.; SLOSS, J.

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18 Cal.App. 675

CONE v. KEIL et al. (Civ. 930.)

(District Court of Appeal, First District, California. April 16, 1912.)

1. Brokers (§ 48*)—Right to Commissions—Performance of Engagement.

A broker is entitled to commissions for effecting a sale only when the purchaser, as the result of the broker's efforts, was induced to buy the property, or a prospective purchaser found was ready, able, and willing to buy on the terms and at the price specified by the owner, the broker being required to show that he procured from the prospective purchaser a valid contract, binding him to purchase the property at the price and on the terms specified, which could be enforced if his title to the property be perfect, or, in the absence thereof, by proof that the broker brought the owner and prospective purchaser together with the object in view of effecting a sale at the price and on the terms proposed by the owner.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 65; Dec. Dig. § 48.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. BROKERS (§ 52*)—RIGHT TO COMMISSIONS —PERFORMANCE OF ENGAGEMENT.

Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle a broker to commissions contracted for, even though he opens negotiations for the sale, if he finally fails in his efforts, without fault or interference of the owner, to induce the prospective purchaser to buy, or make an offer to purchase, though the owner may subsequently, either personally or through other brokers, sell the property to the same individual at the price and on the terms for which it was originally offered for sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 73; Dec. Dig. § 52.*]

3. BROKERS (§ 57*)—SALE OF PROPERTY—COMPLIANCE WITH ENGAGEMENT—RIGHT TO COMMISSIONS.

Where a broker was employed to sell two tracts of land containing 13.98 acres for $45,000 cash, or for such other price and on such other terms as the owners might thereafter agree in writing for a commission of 5 per cent., the fact that he procured a purchaser who purchased part of the tract on terms acceptable to the owners did not show a performance of his contract which was indivisible, and was therefore insufficient to entitle him to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 66, 67, 72; Dec. Dig. § 57.*]

4. BROKERS (§ 82*)—COMPENSATION—ISSUES.

Where a broker's suit for commissions was founded exclusively on the theory that plaintiff was the sole procuring cause of a sale to H. of a part of the tract plaintiff was employed to sell, and it was neither alleged in the complaint nor claimed at the trial that plaintiff was instrumental in making a subsequent sale to H. of any other lands belonging to defendants, H. having testified that he had purchased from defendants subsequent to the sale of the first tract another piece or parcel of the larger tract of land which plaintiff was originally authorized to sell, plaintiff was not entitled on redirect examination to prove by him how much more of the entire tract he had purchased than the original portion.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101–103; Dec. Dig. § 82.*]

5. APPEAL AND ERROR (§ 900*)—RECORD—SHOWING ERROR—PRESUMPTIONS.

The record on appeal must disclose affirmative error in order to justify a reversal, and, in the absence of such a showing, the presumption prevails that the rulings of the trial court were correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667–3669; Dec. Dig. § 900.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by W. H. Cone against Serena T. Keil and another. Judgment for defendants; and from an order denying plaintiff's motion for a new trial he appeals. Affirmed.

W. H. Cobb, for appellant. Goodfellow, Eells & Orrick, for respondents.

LENNON, P. J. This action was instituted to recover the sum of $1,375, alleged to be due as a broker's commission in negotiating a sale of certain real estate which belonged to the defendants. Plaintiff has appealed from a judgment of nonsuit and an order denying a new trial. The case was tried by the court without a jury, and the record before us consists of the judgment roll and a bill of exceptions which purports to set out the evidence had in the lower court.

In substance the undisputed facts of the case, as they appear from the evidence offered upon behalf of the plaintiff, are these: On November 15, 1907, the defendants, by an instrument in writing, authorized one Edgar C. Humphrey, plaintiff's assignor, to offer for sale a tract of land in Menlo Park, San Mateo county, containing 13.98 acres, and known as "Petit Forest." This tract of land consisted of two smaller parcels, designated in the authority sued upon as subdivision A, containing 6.25 acres, and subdivision B, containing 7.73 acres. By the terms of the authorization Humphrey was empowered to offer the entire tract for sale for the sum of $45,000 cash, or for such other price and upon such other terms as the defendants might thereafter agree to in writing. Humphrey's compensation in the event of his procuring a purchaser was to be a commission of 5 per cent. upon the amount of the purchase price. Exclusive authority to offer the property for sale was not conferred upon Humphrey, and the defendants never agreed, in writing or otherwise, upon any different price or terms at which the property might be offered for sale.

In October, 1908, almost a year after the authorization was given, Mr. Albert G. C. Hahn went to Menlo Park for the purpose of looking at places which were for rent. Humphrey met him at the station, and took him at once to the defendants' property, and offered the entire tract for sale for the sum of $50,000. Hahn declined to entertain the offer for the reason, as he said, that he "was seeking to rent a house, not to purchase one." Later on, in the spring of 1909, Humphrey endeavored to and did interest Hahn in the tract comprising 7.73 acres, designated in the authorization as subdivision B, and offered it for sale for the sum of $35,000. Hahn liked this particular piece of property, and felt inclined to buy it, but not at the price fixed by Humphrey. After looking at the property several times in company with Humphrey, Hahn concluded that the price asked was prohibitive, and so told Humphrey. Thereupon Hahn dropped the matter, and had no further dealings with Humphrey; but shortly thereafter an agent of the real estate firm of Baldwin & Howell approached Hahn, and offered him the identical tract of 7.73 acres for the sum of $30,000. This offer was considered by Hahn, and the property was sold to him for $27,500, but, before the negotiations for the sale were commenced, Hahn met Humphrey, and told him of the offer made by Baldwin & Howell, whereupon Humphrey requested that Hahn purchase the property at the price of $30,000 through him. Hahn declined to have any further dealings in the matter through Humphrey; and told him that, inasmuch as the firm of Baldwin & Howell had offered the property for sale for $5,000 less, the purchase would be made through them. In reply Humphrey said: "I have nothing further to say. All that I can do is to submit the bid that you offer. If you wish to make an offer for the property I will be glad to submit it for you." This ended all negotiations for the sale of the property between Hahn and Humphrey. Hahn subsequently made an offer in writing, through Baldwin & Howell, for the purchase of the property, which was accompanied by a deposit of $275.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is conceded that Hahn became interested in the property in the first instance solely through the efforts of Humphrey, and that, when the other brokers appeared in the transaction, Hahn, as the result of Humphrey's efforts, was fully informed concerning the property. Either on the day or the day after Hahn had made an offer for the property through Baldwin & Howell, Humphrey informed the defendants that he had been endeavoring to induce Hahn to buy the property. Hahn and the defendants, however, were never introduced, and Hahn did not meet or communicate directly or indirectly with either of the defendants prior to the time that the offer to purchase was made through Baldwin & Howell. It is an admitted fact in the case that Hahn never made through Humphrey, in writing or otherwise, an offer to purchase the property in question either as a whole or in part, and Hahn's testimony that he flatly refused to make an offer for the property through Humphrey stands uncontradicted.

Excepting minor details, the foregoing statement constitutes a fair résumé of the facts of the transaction upon which plaintiff relies for a recovery of the commission sued for.

The defendants' motion for a nonsuit was based upon the grounds (1) that the evidence failed to show that Humphrey ever procured a purchaser for the entire tract for the sum of $45,000; and (2) that the evidence shows that Humphrey was not the proximate and efficient cause of procuring and securing Hahn as a purchaser of the smaller tract of land.

We are of the opinion that the motion for a nonsuit was properly granted upon both of the grounds stated.

[1] A broker is entitled to his commission for effecting a sale of real or personal property only when it affirmatively appears that the purchaser, as the result of the broker's efforts, was induced to buy the property, or that a prospective purchaser was ready, able, and willing to buy upon the terms and at the price specified by the owner. In other words, the obligation of the broker under his contract to procure a purchaser is to bring about a meeting of minds between the owner and a prospective purchaser for a sale of the property at the price and upon the terms at which the property is offered for sale. Before the broker's right to a commission can accrue, he must first show that he found and secured a purchaser ready, willing, and able to buy the property offered for sale upon the terms and at the price fixed by the owner. Such a showing can be made only by proof of the fact that the broker procured from the prospective purchaser a valid contract, binding him to purchase the property at the price and upon the terms specified, which could be enforced by the owner if his title to the property be perfect, or, in the absence of such a contract, by proof that the broker brought the owner and prospective purchaser together with the object in view of effecting and securing a contract of sale at the price and upon the terms proposed by the owner. Gunn v. Bank of California, 99 Cal. 349, 33 Pac. 1105; Mattingly v. Pennie, 105 Cal. 514, 39 Pac. 200, 45 Am. St. Rep. 87; Brown v. Mason, 155 Cal. 158, 99 Pac. 867, 12 L. R. A. (N. S.) 328.

[2] Merely putting a prospective purchaser on the track of property which is on the market will not suffice to entitle the broker to the commission contracted for, and, even though a broker opens negotiations for the sale of the property, he will not be entitled to a commission if he finally fails in his efforts, without fault or interference of the owner, to induce a prospective purchaser to buy or make an offer to buy, notwithstanding that the owner may subsequently, either personally or through the instrumentality of other brokers, sell the same property to the same individual at the price and upon the terms for which the property was originally offered for sale. Markus v. Kenneally, 19 Misc. Rep. 517, 43 N. Y. Supp. 1056; Willard v. Ferguson, 125 App. Div. 868, 110 N. Y. Supp. 909. Although in the present case Humphrey was the first person to arouse Hahn's interest in the property, nevertheless he failed ultimately in his efforts to induce Hahn to buy or offer to buy, and therefore it cannot be said that Humphrey's efforts were the procuring cause of the sale subsequently made to Hahn. As was said in Sibbald v. Iron Co., 83 N. Y. 378, 38 Am. Rep. 441: "A broker may have created impressions which under later and more favorable circumstances naturally lead to and materially assist in the consummation of a sale. He may have planted the very seeds from which others reap the harvest. But all that gives him no claim. It was part of his risk that failing himself, not successful in fulfilling his obligations, others might be left to some extent to avail themselves of the fruits of his labors." At no time did Humphrey obtain from Hahn a valid or any contract to purchase the property in question. Humphrey did not succeed even in

procuring an offer for the property from Hahn, and at no time did Humphrey bring or attempt to bring the owners and Hahn together, so that the owners, if they had desired, might have negotiated a sale. Moreover, Hahn testified positively and without contradiction that prior to making an offer for the property through Baldwin & Howell he had absolutely refused to deal with Humphrey or make an offer through him. In short, it is a fair inference from the evidence offered in support of plaintiff's case that in all probability the sale never would have been made without the intervention and subsequent efforts of Baldwin & Howell.

[3] Aside from these considerations, the plaintiff's complaint sets out the written contract of the defendants authorizing a sale of the entire tract, and alleges that in accordance with the terms thereof, and while the same was in full force and effect, Humphrey procured Hahn as a purchaser for subdivision B, containing 7.73 acres of the property described in said contract. Plaintiff's complaint does not allege, and his evidence does not show, any other employment of Humphrey with relation to a sale of defendants' property. No other agreement is pleaded, and there is no evidence of any agreement to compensate Humphrey for any service which he might render to the defendants other than that contained in the original written authorization, by which he was employed and authorized to sell the defendants' property as a whole. Not having been otherwise specially authorized Humphrey's agency was limited to the particular purpose of his original employment, and his compensation depended upon his accomplishment of that purpose in accordance with the terms of his contract. It was not pleaded by the plaintiff that the original authorization was ever modified either expressly or by implication, and therefore it is apparent that the plaintiff's cause of action, if any he has, must rest upon proof of compliance with the terms of his actual contract; that, as we read and understand it, required Humphrey to procure a purchaser for the entire tract before he would be entitled to the stipulated commission. Clearly the contract in question did not authorize Humphrey to offer for sale separately either subdivision of the entire tract nor contemplate that the defendants could be required to pay a commission for the procurement of a purchaser for anything less than the entire tract.

This being so the contract was indivisible; and, before the plaintiff will be permitted to recover thereon, he must plead and prove the performance of the entire contract. For this reason, if for no other, a nonsuit was properly granted. Wittie v. Taylor, 110 Cal. 225, 42 Pac. 807; Carpenter et al. v. Atlas Imp. Co., 123 App. Div. 706, 108 N. Y. Supp. 547; 3 Devlin on Real Est. § 1536. In support of the appeal from the order denying a new trial plaintiff assigns as error two of the trial court's rulings upon questions of evidence, but we do not think the record shows that the trial court erred in either instance.

[4] The first ruling complained of arose out of the cross-examination of Hahn, the purchaser and a witness for the plaintiff, who testified that he had purchased from the defendants subsequently to the sale of the 7.73-acre tract another piece or parcel of the larger tract of land which Humphrey was originally authorized to sell. Upon redirect examination, counsel for plaintiff endeavored to show how much more of the entire tract Hahn had purchased in addition to the 7.73-acre tract. This was objected to by counsel for the defendant upon the ground that it was immaterial and not within the issues raised by the pleadings in the case.

The objection we think was well taken and rightfully sustained. If the plaintiff had pleaded a full performance of Humphrey's contract with the defendants, and had relied upon a sale of the entire tract for a recovery of the commission claimed to be due, it would have been material and relevant for the plaintiff to show, if he could, that as the result of his efforts Hahn had bought not only subdivision B, but all of subdivision A as well. Plaintiff's cause of action, however, was founded exclusively upon the theory that Humphrey was the sole procuring cause of the sale to Hahn of the 7.73-acre tract, and it was not alleged in plaintiff's complaint nor claimed at the trial that Humphrey was instrumental in making a subsequent sale to Hahn of any other lands belonging to defendants. In brief, the plaintiff's cause of action was based solely upon an assigned claim for the commission alleged to be due and owing to Humphrey for the sale of subdivision B, and therefore it was not material to know under the issues raised by the pleadings whether or not Hahn had subsequently purchased from defendants another portion of the entire tract. The fact that upon cross-examination Hahn had testified without objection to an immaterial matter did not entitle the plaintiff in the face of defendants' objection to examine further into the details of a transaction which was wholly foreign to the issues.

With reference to the second assignment of error, it will suffice to say that it does not appear from the record before us that the trial court erred in sustaining an objection to a question put to the defendant Hugo D. Keil, whereby the plaintiff attempted to show that Keil represented his wife in the sale of property which was referred to in a certain letter written by him. It does not appear to whom the letter was written, nor to what property it referred; and, as the letter was not made part of the record upon appeal, we are unable to determine whether or not the court erred in its ruling.

[5] Error must be affirmatively shown,

and, in the absence of such a showing, the presumption prevails that the ruling of the trial court was correct. Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; Barrell v. Lake View Land Co., 122 Cal. 133, 54 Pac. 594.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

18 Cal. App. 745

CHURCH v. COLLINS. (Civ. 921.)

(District Court of Appeal, Third District, California. April 24, 1912.)

1. FRAUDS, STATUTE OF (§ 116*)—REAL ESTATE BROKERS—AUTHORITY—CONTRACT TO CONVEY.

Under the express terms of Civ. Code, § 1624, subd. 5, and section 2309, and under Code Civ. Proc. §§ 1971, 1973, a broker is without power to contract to sell land, unless so authorized by his principal in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec. Dig. § 116.*]

2. FRAUDS, STATUTE OF (§ 116*)—REAL ESTATE—AUTHORITY—CONTRACT TO CONVEY.

Under Civ. Code, § 1624, subd. 5, and section 2309, and under Code Civ. Proc. §§ 1971, 1973, which require an agreement authorizing a broker to sell land to be in writing, the language conferring such authority should be certain, and a contract whereby real estate brokers were appointed "to act as agents for the sale" of property on specified terms, reserving to the principal the right to sell the property himself, was insufficient to show authority in the firm to contract to convey.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec. Dig. § 116.*]

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Action by Robert A. Church against John Collins. Judgment for defendant, and plaintiff appeals. Affirmed.

L. G. Scott, for appellant. Jos. P. Berry and H. W. A. Weske, for respondent.

HART, J. The plaintiff brought this action to recover damages for the breach of an alleged agreement for the sale of certain real property.

A general demurrer to the complaint was sustained, and this appeal is by the plaintiff from the judgment entered after and upon the order sustaining the demurrer.

It appears that on January 17, 1911, the defendant and the firm of Lyman & Briggs, real estate brokers at Sebastopol, in Sonoma county, entered into a written agreement by the terms of which the former constituted the latter as his agents for the sale of the property described in said agreement. Acting under what they conceived to be authority so to do as conferred upon them by said agreement, Lyman & Briggs on the 9th day of May, 1911, for the defendant, entered into a written contract with the plaintiff for the sale of said property to the latter, and the main question arising upon said transactions and presented here is whether said real estate brokers were authorized or empowered by their agreement with the defendant to make such or any contract, for the latter, for the sale of said property.

Although the defendant addresses some criticism to the complaint generally, his principal contention seems to be that his agreement with Lyman & Briggs merely conferred upon them the right, exercisable for a limited period and for specified compensation, to secure for him a purchaser of said property ready, willing, and able to buy the property on the terms embodied in said agreement, and, having obtained such a purchaser, their authority as thus established or conferred was completely exhausted. Upon the construction of the agreement between the defendant and the real estate brokers, it is manifest the decision of this question must depend.

The parts of the agreement between the defendant and the real estate brokers important or necessary to the consideration of the question as to the extent of the authority thereby vested in the latter read as follows: "In consideration of their efforts to sell the within described property, I hereby appoint Lyman & Briggs, of Sebastopol, California, to act as agents for the sale of said property for the sum of $6,000.00, and I agree not to offer the same for a less price before the expiration of this contract without the consent of said parties. * * * It is further agreed that any deposit which may be paid on the purchase price of said property shall be paid to Lyman & Briggs, and in the event of forfeiture by the purchaser one half of said deposit shall be paid to me, and the remaining one half shall be retained by said agents in consideration of their services. This agreement shall be binding on me for a period of 6 (six) months from the date hereof and thereafter until canceled by a written notice of at least ten days. If sale is made within ninety days after the legal expiration of this contract, by or through me, to any one to whom said property has been submitted by said agents during the term of this agreement, I agree to pay said agents a commission of 2 per cent. on sale price. I reserve the right to sell said property myself, or to sell said property through the agency of any one else, but I hereby agree that in case such sale be made by myself, or through any other agency, in consideration of their services to pay said Lyman & Briggs a commission of two (2) per cent. on sale price." The contract of sale entered into between the brokers and the plaintiff contained, substantially, the terms upon which the defendant authorized the agents to sell the property. The only difference between the two as to the terms or conditions is purely technical as distinguished from substantial, but under our conception of the transactions it is not necessary in any event to notice the alleged variance as to the conditions of the sale between the two instruments. At the time, however, of the execution of said contract of sale, the plaintiff deposited with Lyman & Briggs, as "earnest" money, or as a payment on the price at which the property was to be sold to him in the event of the consummation of the sale, the sum of $230. The agreement between the defendant and the real estate brokers and the contract of sale above referred to were annexed to and made a part of the complaint, as was also a letter, dated June 7, 1911, addressed by the plaintiff to the defendant, tendering a payment of $3,000 in coin to the latter, offering to execute a mortgage for the remainder of the purchase price, and demanding from the defendant a conveyance of the property "free and clear from all liens and incumbrances." We are of opinion that the agreement between the defendant and the real estate brokers conferred no authority upon the latter to execute a contract for the sale of the property involved here to the plaintiff or to any other party, and that, therefore, the court properly sustained the demurrer to the complaint. An agreement authorizing or employing an agent or broker to sell real estate for compensation or a commission must be committed to writing (section 1624, subd. 5, Civ. Code; sections 1971 and 1973, Code Civ. Proc.), and "an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing" (section 2309, Civ. Code).

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The result of the foregoing provisions of our law is that an agent is without power to execute an agreement for the sale of real estate, unless he is authorized by the principal, in writing, to execute such agreement for and in the latter's behalf.

[2] The rule deduced from the authorities with regard to the power or right of agents to execute contracts of sale of real property for the owners thereof is and ought to be that, if such authority is intended to be conferred, the language used in conferring it should be so clear, distinct, and certain in its meaning to that end as to leave no room for doubting that such is its purpose. "The ordinary authority of a real estate agent deputed to sell real estate," says the Supreme Court in Stemler v. Bass, 153 Cal. 791, 795, 96 Pac. 809, "is simply to find a purchaser, and he has no power to bind his principal by a contract of sale unless it appears that it was intended to confer such additional authority." And it has often been held that the construction put upon the employment of brokers "to sell" or to "close a bargain" concerning real estate conferred no more than a mere authority upon the broker to find for the principal or owner of the property a purchaser at the price specified. Duffy v. Hobson, 40 Cal. 241, 244, 6 Am. Rep. 617; Rutenberg v. Main, 47 Cal. 213, 219. Giving some of the reasons why the intention to confer authority upon a broker to sell the real estate of another should be manifested by the use of clear and distinct language, the court, in Duffy v. Hobson, supra, says: "A sale of real estate involves the adjustment of many matters in addition to fixing the price at which the property is to be sold. * * * The vendor may be unwilling to deal with a particular proposed purchaser on any terms. He may consider him pecuniarily unable to comply with the contract even if the title prove satisfactory, and he may decline to bind himself to convey to such purchaser at the end of the time necessary to examine the title, because he might thereby in the meantime have an opportunity to sell to some other person who might desire to purchase, and in whose good faith and ability to pay he reposed entire confidence. All these considerations might, and usually do, arise in the mind of the vendor."

The only covenant or provision contained in the agreement between the defendant and Lyman & Briggs which could by any possibility be made to bear the construction that the former intended by said agreement to clothe the latter with power to enter into a contract for the sale of said property is that by which the brokers were in effect authorized to receive a deposit from a proposed purchaser; but, when considered in connection with other parts of the agreement, that provision cannot reasonably be so construed or held to import an intention in the vendor to confer such authority upon the brokers. The agreement, it will be noted, merely constitutes Lyman & Briggs as the agents of the defendant "for the sale" of the property therein described, and makes other provisions usual in such agreements with brokers whose employment is limited to the securing of a purchaser, ready, willing, and able to purchase. For instance, it reserves to the owner the right "to sell said property"—that is, to find a purchaser—within the time within which the brokers are authorized "to sell" or find a purchaser, stipulating in such case, if the proposed buyer has not previously had the matter submitted to him by the brokers, to pay the latter, nevertheless, 2 per cent. on the purchase price. And the agreement contains a like provision as to compensation to the brokers in the event that the property is sold by the owner after the expiration of the time within which the brokers were authorized to procure a purchaser to a party to whom the proposition as to such sale has been previously submitted by said brokers.

In fine, the general tenor of the whole agreement is clearly demonstrative of an intention on the part of the owner to limit the authority of the brokers merely to the procurement of a purchaser, or, to state the proposition the other way, not to confer upon the brokers, the right or power to execute for him a contract of sale. Indeed, we can perceive no substantial distinction between the agreement here and the one involved in the case of Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758. There the agreement read as follows: "You are hereby authorized to sell my property, and *receive deposit on same*, situated * * * and described as follows: * * * for the sum of two hundred dollars per acre, cash. I hereby agree to pay you the sum of five per cent. for your services in case you effect a sale, or find a purchaser for the same, or will pay you two and a half per cent. of above commission should I sell the same myself, or through another agent. This authority to remain in full force for the term of three months, or until canceled by," signed by the owner. The court held that that agreement did not confer upon the real estate brokers with whom it was made the authority to execute a contract to convey, citing in support of its conclusion Duffy v. Hobson, supra.

The case here is radically different from the case of Bacon v. Davis, 9 Cal. App. 84, 98 Pac. 71. The agreement in that case expressly and specifically conferred upon the agent "the exclusive right to sell *for me, in my name* and receipt for deposit thereon" the land described in said agreement. After an exhaustive examination of the question whether the contract to convey executed by the agent was authorized by said agreement and binding on the principal, this court, referring to numerous authorities construing such agreements, held that the agent was vested by the agreement with plenary power to make the contract of sale, and that the contract was valid and binding on the owner of the property involved.

A comparison of the agreement in the case at bar with the one in the Bacon Case will readily disclose a radical distinction between the two. Here there is no such authority given the brokers as is necessarily implied from the language in the Bacon agreement, "to sell *for me, in my name*"—language that can import nothing short of an intention in the vendor to bestow upon his agent the right and the power to execute in his (the vendor's) name a contract to convey.

But there is no necessity for prolonging the discussion. It is very clear to our minds that the limit of the authority the defendant intended to confer upon Lyman & Briggs was to procure for him a purchaser of the property ready, willing, and able to buy the same, and that consequently any act on their part relative to said property beyond such authority was a nullity, so far as any effect it was designed to have on the defendant was concerned.

The view thus taken of the transactions eventuating in this action renders it unnecessary to notice other less important points urged against the validity of the alleged contract of sale and the sufficiency of the complaint to state a cause of action.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

(18 Cal. App. 715)

BIGELOW v. BOARD OF SUP'RS OF SONOMA COUNTY et al. (Civ. 977.)

(District Court of Appeal, Third District, California. April 19, 1912.)

INTOXICATING LIQUORS (§ 34*)—LOCAL OPTION—SUBMISSION TO VOTE—"GENERAL ELECTION."

Local Option Law (St. 1911, p. 601) § 6, provides that if a petition for an election is certified within six months, and not less than 40 days before the holding of the next general state or general municipal election, the question shall be submitted at said "general election" otherwise at a special election held within a certain time, and Primary Election Law (St. 1911, p. 769), as amended by St. 1911, Ex. Sess. p. 66, designates May 14, 1912, as the day on which the electors qualified to vote thereat shall select delegates to the national convention, and section 1, subd. 1, thereof, defines "primary election" as any and every primary nominating primary election provided for by this act, and subdivision 4 defines "election" as the general, or city, or city and county election as distinguished from a "primary election," and subdivision 5 defines "November election" as the presidential election. *Held*, that to be general, in the sense implied by the Legislature, the election must be one where every qualified voter of the state or district or division of the state where required by law to be held has the right to vote for whomsoever he pleased, and that the presidential primary election was not a "general election" within the meaning of that term as used in the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 34.*

For other definitions, see Words and Phrases, vol. 4, pp. 3062–3063; vol. 8, p. 7669.]

Appeal from Superior Court, Sonoma County; Thos. C. Denny, Judge.

Mandamus by Guy J. K. Bigelow against the Board of Supervisors of Sonoma County and others. Writ issued, and defendants appeal. Affirmed.

Clarence F. Lea, G. W. Hoyle, and J. W. Ford, for appellants. Ross Campbell and R. L. Thompson, for respondent.

CHIPMAN, P. J. It appears from the complaint: That a petition was filed with defendant board, signed by the requisite number of qualified electors of the First Supervisorial district of Sonoma county, praying that the said board call an election at which should be submitted to the electors of said district the following proposition: "Shall the sale of alcoholic liquors be licensed in this supervisorial district outside of incorporated cities and towns?" That thereafter, to wit, on March 7, 1912, the county clerk and ex officio clerk of said board duly certified said petition as sufficient and presented the same to the said board as required by law. That in violation of law the said board did, on March 8, 1912, at a regular session thereof, "call a pretended election for May 14, 1912, and at a time more than sixty days from the time said petition was certified as aforesaid, and upon which said last named date there is no general election to be held in said district, county or state."

The cause came on to be heard on March 16, 1912, and the court ordered the said board "to meet forthwith in legal session and rescind the order of said board made on March 8, 1912, setting an election to determine the question whether the sale of alcoholic liquors shall be licensed in the territory described in the petition for May 14, 1912, and that they do forthwith make and enter an order of said board of supervisors setting a date for the holding of said election on a legal day not less than 30 days nor more than 60 days from the 7th day of March, 1912, and do and perform all necessary duties to call and hold a special election for the purposes aforesaid according to law."

Defendants appeal from this order and all parties have stipulated that, upon the decision of this court, remittitur issue forthwith.

The local option law (section 6, Statutes 1911, p. 601) provides that, if the petition for an election is certified within six months and not less than 40 days before the holding of "the next general state or general municipal election within the territory described, such question shall be submitted at said general election; otherwise a special election shall be held for such purpose within not less than thirty or more than sixty days after the petition has been certified." Pursuant to the primary election law, approved April 9, 1911 (Statutes 1911, p. 769, as amended December 24, 1911, Statutes 1911 [Extra Sessions], p. 66), May 14, 1912, has been designated as the day on which the electors qualified to vote thereat are authorized to select delegates "to the national convention to nominate candidates for President and Vice President of the United States."

The sole question, therefore, is this: Is the presidential primary election a "general election" within the meaning of those terms as used in the local option law?

The Honorable Thomas C. Denny, trial judge, filed a written opinion in the case, which, we think, satisfactorily supports the order. We quote, in part, as follows:

"Section 1 of the 'Direct Primary Law' provides that: 'The words and phrases in this act shall, unless such construction be inconsistent with the context, be construed as follows: (1) The words "primary election," any and every primary nominating primary election provided for by this act. (2) The words "September primary election," the primary election held in September to nominate candidates to be voted for at the ensuing November election. (3) The words "May presidential primary election," any such primary election, held in May of a bissextile or leap year, as shall provide for the expression of preference in the several political parties for party candidates for president and vice-president of the United States and for the election of delegates to national party conventions. (4) The word "election," a general or city or city and county election as distinguished from a primary election. (5) The words "November election," the presidential election, the general state election, county, city or city and county election held in November.' It has been generally held that elections are either general or special, general elections being held at stated intervals upon specified dates, and special elections being those held at a time specified in the call for the election. But it seems to me that by the above-quoted section the Legislature has recognized a third election in this state, viz., a primary election. This distinction seems, also, to have been recognized by all of the courts of last resort, as in none of the cases in which the primary election is under discussion is it ever referred to as a 'general' or a 'special' election, but always as a 'primary' election. See State v. Nichols, 50 Wash. 508, 97 Pac. 728. It is true, as counsel for defendant states, that section 1 of the 'direct primary law' merely defines the use of certain words as used in that act. But it seems to me that the Legislature could not have intended that the words as defined therein should have a different meaning from that used in other acts. Thus, in subdivision 1 of section 1, they define the words 'primary election' as any and every primary election provided for by that act; in subdivision 4, that the word 'election' means a general election as distinguished from a primary election; subdivision 5, that the words 'November election' means, among other things, the general state election. Can it be that we must take from these definitions the meaning that, in primary acts, these words have a distinct and different meaning from that used in the local option act passed at the same session as the presidential primary act? That the words 'November election' in one act means the general state election and that the words 'the general state election' as used in the local option act can mean anything else than the November election? It seems to me that the question must answer itself. And the primary act differentiates and distinguishes a general election from a primary election in such a distinct way that there can be no mistake in the matter.

"Counsel for the defendants also insist

that it must have been the intention of the Legislature that the presidential primary election should be a general election so far as the local option act is concerned, inasmuch as it is held generally throughout the state and it would get the voters out as a body. But is this position tenable? Would it not have the opposite effect? The primary act provides that only those may vote who have at the time of their registration designated the party with which they intend to affiliate. By this provision all those who at the time they register refuse to give their party affiliation and all those who register as independents are precluded from voting. It also provides that no political party that failed to poll at least 3 per cent. of the entire vote of the state at the last general election may be represented on the ballot.

"There can be no question but that these provisions would prevent a large percentage of the voters in this state from participating in this election, who in consequence would not attend the primary. While the local option act is a special election, and if held on the date of the presidential primary those who could not vote at the primary could vote on the local option matter, it is a probability that those who could not vote at the primary would be of the opinion that they could not vote on the local option question, and so would not attend. Thus the privileged class of voters, who alone would be entitled to vote at the primaries, would be the only ones who would vote on the local option question. The Legislature could not have had any such absurd condition of affairs in their minds when they passed the local option act.

"Chief Justice Beatty must have had in mind the fact that there is a distinction between a general election and a primary election when he said, in Schostag v. Cator, 151 Cal. 604 [91 Pac. 502]: 'It is therefore as reasonable to require the elector to range himself with some particular party for the purpose of the primary election, as it is to require registration of all electors who desire to vote at the general election. By one registration is secured the right to vote at an election open to all registered voters; by the other is secured the right to vote at an election open to those only who belong to a particular party.' Can it be possible that an election that is open only to a select coterie of voters instead of to 'all the registered electors' can be called a general election? Black, in defining 'general,' says: 'Open or available to all; opposed to select; universal, not particularized; as opposed to special, obtaining commonly, or recognized universally; as opposed to particular; universal or unbounded; as opposed to limited.' Here we have an election open only to a select, special, particular and limited number of voters, as opposed to a general election which is open to all.

"Is this presidential primary act an election at all in the sense of a general election; and, if it is, what officers are elected, and to what office? In a general election it must be true that all of the voters can vote for any one whom they desire for any office, and that all of the candidates on all of the tickets would be under one ballot. That is what makes it general as opposed to special. But in this presidential primary we find but a part of the voters able to vote at all, and each voters ticketed and confined to the ballot of one party. * * *

"For the foregoing reasons, I am entirely satisfied that the presidential primary election to be held on May 14, 1912, is not a general election as contemplated by section 6 of the local option act, and that the writ of mandate should issue as prayed for by plaintiff."

The direct primary law, by its designation, by the definitions found in section 1, as well as by its distinguishing characteristics, would seem to be placed out of the category of general elections. The only election denominated a general election by law is the election occurring biennially the first Tuesday after the first Monday of November. Section 1041, Pol. Code. Special elections are defined by section 1043 of the same Code. Kenfield v. Irwin, 52 Cal. 164; People v. Col, 132 Cal. 334, 64 Pac. 477. We have no statutory definition of a primary election except as found in subdivision 1 of section 1 of the act, and there we have the words "primary election" merely construed as referring to "any and every primary nominating election provided for by this act." Subdivision 5 of section 1 defines the words "political party" to be an organization "of electors which at the last general election before the holding of the primary election, polled at least three per cent. of the entire vote of the state or of the county, city and county, district, or other political division for which nominations are to be made." Here we have, as well as in subdivision 3, the general election distinguished from the primary election. It is too much to say that a primary election "is no election at all," as some of the cases hold and as contended by respondent. Like any other election, it is the act of choosing a person for the performance of some office or duty and may be even by show of hands. In a sense, too, it is general, for it relates to the whole state geographically. But in its operation it is far from embracing the entire electorate.

In the sense of the elections held in November to choose officers to serve the state, it falls short of measuring up to what is commonly understood by a general election, or what we think our law regards as a general election. In Kenfield v. Irwin, supra, it was pointed out that the time for holding general elections is fixed by the statute, and hence no proclamation is necessary, but that the time at which special elections were to be held must be previously designated, without which being done the election would be void. It is urged that the primary election law requires no proclamation of the election, and fixes the time at which primary elections are to be held, and hence gives to them the character of a general election. The "Presidential Primary Act," so denominated, fixes the time for the first election on May 14, 1912, "and on the second Tuesday in May of every fourth year thereafter." Stats. 1911, Extra Sessions, p. 85. But we do not think that these elections must be held to be general elections because a time is fixed by law for holding them. That is an element entering into the true definition, but it is not in itself enough. To be general in the true sense, and in the sense employed by the Legislature, the election must be one where every qualified voter of the state or district or division of the state, where required by law to be held, shall have the right to cast his ballot for whomsoever he pleases. The general election law gives this right, but the primary election law not only places limitations upon its exercise, but withholds it altogether in some instances. The term "election" was held, in Wickersham v. Brittan, 93 Cal. 34, 28 Pac. 792, 29 Pac. 51, 15 L. R. A. 106, to carry "with it the idea of a choice, in which all who are affected with the choice participate," thereby distinguishing between an election and an appointment. If this be true, it must follow that a general election carries with it the idea of a choice in which all the electors who are affected participate. Here we have lacking this indispensable requisite of a general election. In fact, the May primaries do not make the selection of candidates, but they merely give an expression of preference of certain electors, by no means all of them, for their candidates for the presidency. Appellants cite numerous cases showing the distinction between general and special elections, but they do not aid in classifying primary elections which are of recent origin and designed to meet the demand for a reform method of nominating candidates for office. Appellants cite Marsden v. Herlocker, 48 Or. 93, 85 Pac. 329, 120 Am. St. Rep. 786, where it is said: "If by operation of law the election invariably occurs at stated intervals, without any superinducing cause, except the efflux of time, the election is general." The court was discussing the distinction between general and special elections with reference to the necessity for giving notice of the election by proclamation or otherwise. It said: "The reason for this rule [i. e., dispensing with notice where the time for holding the election is fixed by law] rests upon the doctrine that suffrage is a valuable civil right, to the exercise of which each qualified person is entitled, and he must be given or charged with notice as to when, where, and for what purpose he is to vote." Then follows the statement quoted in appellants' brief. The Oregon act casts upon the county court the duty of ordering "an election to be held at the time mentioned in such petition." All qualified voters could vote at said election and its time being fixed by the county court the opinion spoke of the election as general, but appellants did not complete the paragraph in which, continuing, the court said: "In which case all qualified persons are presumed to have knowledge thereof, and hence the failure of any officer or person upon whom the duty devolves to give a prescribed notice does not invalidate the votes cast thereat." The case throws no light on the question here.

If we were to hold that the primary election law may respond to the numerous statutes where the terms "general election" or "next general election" are used, it would introduce great confusion in our laws, for it will be found that in many statutes the "general election" is mentioned as determining when some act is to be done or some event is to transpire. By the Political Code one definite time has been fixed as answering to these terms, and we think we are unwarranted in holding that the Legislature has established a new rule as to what constitutes a general election when referred to in those terms. The case of Socialist Party v. Uhl, 155 Cal. 776, 788, 103 Pac. 181, 186, is cited and reliance is placed upon the statement in the opinion: "It is obvious from its terms that the law which the Legislature was called upon to enact was a law applying to general elections." It certainly does apply to general elections as a sort of forerunner and preparatory step, but this does not imply, and the case did not require the court to decide whether or not, the primary election is a general election in the sense used in the local option law. Some force to the argument of counsel for appellants is claimed from expressions in the opinion in Spier v. Baker, 120 Cal. 370, 378, 52 Pac. 659, 663 (41 L. R. A. 196): "The Legislature, believing a sound public policy demanded such a course, has made these elections a state institution. By the whole tenor of the act they are placed upon the same plane of the state elections, and in the consideration of the law bearing upon them must be so recognized." The law was held to be unconstitutional because of its state wide application and its inherent violations of constitutional rights as the Constitution then stood. Since then the Constitution has been amended and primary elections are now sustained. But a primary law may "apply to general elections," as was said in the Spier Case and is now insisted as true, and yet not be a "general election" law as contemplated by the Legislature in so using the terms in the local option law.

Appellants have ably presented the argument in support of their contention, but its force, strong as it is, fails to shake our convictions.

The order is affirmed. Remittitur forthwith.

We concur: HART, J.; BURNETT, J.

18 Cal. App. 732

PEOPLE v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (Civ. 948.)

(District Court of Appeal, Third District, California. April 23, 1912.)

1. PLEADING (§ 214*) — DEMURRER — ADMISSIONS.

A demurrer admits the truth of the allegations of the pleading against which it is directed.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

2. CORPORATIONS (§ 131*)—STOCK—ASSIGNMENT.

Under Civ. Code, § 324, providing that shares of stock in a corporation are personal property and may be transferred, one to whom the stock of an insolvent corporation was assigned, after it had been enjoined from carrying on the business, takes all the beneficial interest of the stock, and is entitled to have it entered in his name, though the former shareholders could not thereby avoid their liability under Const. art. 12, § 3, and Civ. Code, § 322, for debts and liabilities contracted while they were stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 490; Dec. Dig. § 131.*]

3. CORPORATIONS (§ 133*)—ACTIONS AGAINST —PARTIES.

In a proceeding against an insolvent corporation and its receiver to compel the entering of petitioner's name as a stockholder, it is unnecessary to make the directors parties, for, being mere agents of the corporation, their acts are only the acts of the corporation, which was properly made a party.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 513-520; Dec. Dig. § 133.*]

4. CORPORATIONS (§ 560*)—STOCKHOLDERS—ENTERING OF NAME.

Under Code Civ. Proc. § 568, providing that a receiver of the corporation has power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally to do such acts respecting the property as the court may authorize, the court may require a receiver, who has possession of the corporate books, the directors having absconded, to enter the name of an assignee of stock as a stockholder, of record.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2253-2260, 2262; Dec. Dig. § 560.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Proceeding by the People against the California Safe Deposit & Trust Company in which Arthur Crane petitions for an order directing the corporation and Frank J. Symmes, as receiver, to enter his name as stockholder. From an order dismissing the petition, petitioner appeals. Reversed.

See, also, 160 Cal. 374, 117 Pac. 321.

Arthur Crane, in pro. per. J. V. De Laveaga and E. D. Los Magee, for respondents. Attorney General Webb, for the People.

HART, J. This is an appeal from an order denying and dismissing petitioner's application for an order permitting or instructing the defendant corporation or the petitioner or the receiver of said corporation to enter the petitioner's name "as a stockholder of record in the stock book of the defendant corporation." The facts as shown by the petition may be summarized as follows: That "the California Safe Deposit & Trust Company," a corporation, is "now in the course of liquidation and of judgment and decree" of the superior court in and for the city of San Francisco. On the 29th day of January, 1908, said court issued a "permanent injunction against the defendant corporation and the officers thereof, enjoining them from further carrying on the business for which the said corporation was organized," and at the same time appointed as receiver of said corporation one Edward J. Le Breton, who accepted said appointment, qualified as such receiver, and entered upon the discharge of his duties as such, and took possession of all the books, papers, records, and properties of said corporation. Le Breton continued to act as such receiver until the date of his death, which occurred on the 19th day of March, 1910. On the 24th day of March, 1910, said superior court, after due proceedings, appointed Frank J. Symmes as the successor of said Le Breton, and said Symmes has since then been, and is now, the receiver of said corporation. The petition alleges that, "on or about September 20, 1909, the board of directors of said the California Safe Deposit & Trust Company obtained permission of the said court to levy an assessment upon all of the capital stock of said corporation, on the representation and promise to the court that 'no one would buy in any of the stock which would be sold for the said assessment.'" It is alleged that, in pursuance of the permission so obtained, an assessment of $10 per share was, on the 20th day of December, 1909, levied by said corporation upon all the capital stock of said corporation; that, the owners of said stock having defaulted in the payment of said assessment, an order was duly made by said corporation, on the 8th day of February, 1910, that the said stock of said corporation should be sold on March 10, 1910, to pay the assessment so made; that the assessment sale was duly advertised and regularly held at room No. 801, in the Kohl building, in said city and county of San Francisco, on said 10th day of March, 1910; that the petitioner attended said sale and bid the sum of $50.25 for five shares of said stock, said sum representing the amount of said assessment and costs; and that "said five shares were thereupon knocked down, struck off, sold, and delivered to the said plaintiff, the said plaintiff then and there paying the sum of $50.25 to the said corporation." It is further alleged that the respective owners of the several shares so purchased by the petitioner each consented to and authorized the sale of said shares to the petitioner, and each signed and executed an assignment thereof to petitioner, and that by reason thereof the latter became and is the assignee by purchase of said shares of stock. It is alleged, upon information and belief, that the petitioner is the only stockholder of the defendant corporation now in existence; that all the directors and officers of the defendant corporation have disqualified themselves from holding office as such and have abandoned such offices as directors and officers; that the petitioner is the only person in existence entitled to act for the said corporation other than the receiver of said corporation, appointed by said court as heretofore explained. The petitioner declares that, when he bid in and purchased said shares, he had no knowledge of the promise made to the court, at the time permission was thereby granted to levy the assessment referred to, that "no one would buy in any of the stock which would be sold for the said assessment." It is alleged "that said receiver at all times since his said appointment has refused, and still refuses, to allow said petitioner, or the defendant corporation, to enter petitioner's name as a stockholder in the said books, or as sole stockholder, or to himself enter said name as a stockholder, although many times requested so to do." A general and special demurrer was interposed to the petition, and, while there is no showing that the demurrer was directly passed upon, the order denying and dismissing the petition may be regarded as amounting to the same thing; that is, a ruling that the averments of the petition are not sufficient to entitle the petitioner to the relief prayed for.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The effect of the demurrer is, of course, to admit the truth of the allegations of the petition.

The respondent contends, in support of the order appealed from, that there are two reasons which justified the trial court in denying the relief asked for by the petition, viz.: (1) That the appellant was and is not a legal stockholder of the corporation; and (2) that, assuming that he is a legal stockholder, he cannot compel the receiver to enter his name as such stockholder on the books of the corporation.

[2] The argument advanced in support of the first of the foregoing points is this: That the order authorizing or permitting the directors to levy an assessment on the stock of the corporation was made after the time within which an appeal might have been taken from the order granting the injunction enjoining the directors from further transacting or conducting any of the business of said corporation; that the judgment entered upon the order granting the injunction had therefore become permanent before the making of the order permitting the assessment of the stock by the directors; and that the court was consequently without jurisdiction to make the latter order, or, as counsel put the proposition, "the lower court had no power to modify or set aside this permanent injunction to permit the directors of the California Safe Deposit & Trust Company to levy an assessment." It is therefore contended that both the assessment and the sale were absolutely void, and that the petitioner thus legally acquired no stock in the corporation.

The contention with respect to the second point is that the receiver is without authority to enter the petitioner's name in the books of the corporation as a stockholder, as such act would be in excess of his powers as such receiver.

We do not conceive it to be necessary, in our view of the main question submitted for decision, to pass upon the proposition whether the effect of the court's order permitting the board of directors to levy an assessment upon the stock was to *modify* the injunction referred to, or whether the action of the court thus complained of merely involved an act, consistent with the injunction, designed to facilitate the liquidation or the winding up of the affairs of the corporation to the best interests of the depositors, creditors, shareholders, etc. It may be suggested, however, that an injunction in such case is, as a rule, merely an ancillary or incidental remedy in aid of the purposes of liquidation and is usually directed solely against the misuse or misappropriation of the property and assets of the corporation and to prevent the doing of any new business by the directors or officers *with the public* for the corporation. But, however that may be, we do not, as stated, intend to decide that question here, because we do not think it necessary to a decision in this case to do so.

We have been aided very little by counsel in reaching a conclusion in this case. While counsel for the appellant has cited a long list of cases which he insists sustain his position that it was the duty of the court to compel the receiver to register his name in the stock book as a stockholder of the corporation, counsel for the respondent have contented themselves with the treatment of their positions on the several questions presented here as *obviously* sound, and have distinguished the cases cited by appellant from the case at bar by the declaration in effect that they *obviously* apply to "going corporations" only, or corporations not in course of liquidation and not, therefore, to insolvent corporations in custodia legis. In short, counsel for respondent have neither cited authorities, if any on the points involved are available, nor advanced any argument in support of their bald statement that their contentions are right and that the cases referred to by appellant have no application to the facts of this case.

We have very often found it to be true—at least it has been so found by the writer—that among the most troublesome tasks imposed upon reviewing tribunals are those involved in those cases in which the attorneys concerned conceive the propositions contended for by them to be so *obvious* as to require neither the citation of authorities, if any are to be had, nor the presentation of argument to support them. There may be sound legal reasons why the court below, under the circumstances which are disclosed by the petition, should not allow the name of the petitioner to be registered in the corporation books as a stockholder; but, if so, those reasons have not been presented in the briefs and argument here.

It may be conceded, for the purposes of this case, that, under the order of the court permitting the assessment of the stock of the corporation, the sale of said stock for the purpose of enforcing payment of the assessment so levied was void, and that the petitioner therefore did not acquire a legal or any title to said stock by reason of such sale. But the petitioner does not rely alone upon the title, if any, thus acquired to the stock referred to in his petition. He alleges that, in addition to buying said stock at said assessment sale, he acquired title thereto by the assignment thereof to him by the owners of said stock.

We have been shown neither any rule of law nor any reason which precludes an owner of stock in an insolvent corporation in process of liquidation from transferring the same to whomsoever he pleases. The law provides that shares of stock in a corporation, to evidence which certificates are issued, constitute personal property and may be transferred. Section 324, Civ. Code. Stock in such corporation may possess little, if any, intrinsic value; but it is, nevertheless, property, and its transfer carries with it whatever rights that would accrue to the original owner thereof. Having purchased the stock of the owners thereof in the corporation involved here and thereby become entitled to whatever rights accompanied such ownership, we can at the present time conceive of no reason why the petitioner should not be registered in the stock book of the corporation as the owner of the stock so transferred to him, and therefore as a stockholder in the concern.

There is nothing in the averments of the petition indicating that the stockholders were placed under the ban of the injunction referred to in said petition. The stockholders cannot be held to have become any less the owners of their stock or any less stockholders in the corporation simply because of the proceedings in liquidation, nor is their power or right to dispose of it, if they choose to do so, destroyed or impaired or curtailed in the slightest measure for that reason. Of course, the sale of stock by a stockholder would under no circumstances release his personal or individual liability for his proper proportion of all its debts and liabilities contracted or incurred *during the time he was a stockholder* (section 3, art. 12, Const.; section 322, Civ. Code); but, as stated, his stock is *property* which he may sell or transfer at any time or under any circumstances, so long as he is not prevented from doing so by some legal process or proceeding, involving either his rights as to such stock or the rights generally of the corporation.

[3] But respondent contends that this proceeding should have been brought against the directors of the corporation and not against the receiver, for the reason, as before stated, that it is not within the duties or powers of the last-named officer to register transfers of stock in the books of the corporation. The proceeding is directed against both the receiver and the corporation, and it is alleged that the receiver has in his possession all the books, papers, etc., of the corporation, and that he has refused "and still refuses to allow said petitioner, or *the defendant corporation*, to enter petitioner's name as a stockholder in the said books," etc. This allegation necessarily implies that the *corporation* is willing and ready to enter the name of the petitioner in the stock book as a stockholder if permitted to do so by the receiver who has sole possession of said book and all books of the corporation, and the relief asked is merely that an order be made allowing petitioner's name to be properly so registered in the proper book. The proceeding against the corporation is sufficient without making the directors parties thereto. The latter are mere agents of the corporation, and their acts as such are always those of the corporation. And, obviously, the latter can act only through its agents, and, where a corporation is compelled to do some act which it is its legal duty to perform, it can perform that act only through its duly authorized agent or agents. Therefore, if the receiver is required by the order of the court to allow the *corporation* to enter the name of the petitioner in the stock book as a stockholder, it will follow that that act will be performed by those of its officers or any officer upon whom, under the circumstances, that duty must necessarily rest.

[4] If it be true, as the petition alleges, that there are now no directors or officers of the corporation, then we can perceive no valid reason why the court should not require its receiver to perform the physical act of registering the name of the petitioner in the stock book as a stockholder by reason of his ownership of the stock mentioned in the petition. The corporation and its property and books are in the possession and control of the receiver for the court, and the receiver may, among other things, do and perform any acts respecting the property of the corporation that the court may authorize. Section 568, Code Civ. Proc. At any rate, as we have declared, we are satisfied that the petitioner is entitled to have the

evidence of his ownership of the stock described in the petition and of his corresponding rights as a stockholder of the corporation, whatever such rights may amount to, duly and properly preserved in the book of the corporation maintained for such purpose.

The order is reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

18 Cal. App. 751

PIERCY v. PIERCY. (Civ. 923.)

(District Court of Appeal, Third District, California. April 25, 1912. Rehearing Denied by Supreme Court June 24, 1912.)

1. DEEDS (§ 211*)—GRANTOR'S MENTAL CAPACITY—EVIDENCE.

In an action to set aside a deed to the grantor's son, evidence *held* to warrant a finding of mental incapacity of grantor.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647, 649; Dec. Dig. § 211.*]

2. DEEDS (§ 211*)—EXECUTION—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

In an action to set aside a deed to the grantor's son, evidence *held* to warrant a finding that he exercised undue influence over her.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637–647, 649; Dec. Dig. § 211.*]

3. DEEDS (§ 196*)—EXECUTION—UNDUE INFLUENCE—BURDEN OF PROOF.

In an action to set aside a gift of land to grantor's son on the ground of undue influence, the burden was on him to show that the gift was made freely and voluntarily and with full knowledge of the effect of the transfer.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587–593; Dec. Dig. § 196.*]

4. DEEDS (§ 208*) — DELIVERY — EVIDENCE — SUFFICIENCY.

In an action to set aside a deed, evidence *held* to warrant a finding of nondelivery.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625–632, 634; Dec. Dig. § 208.*]

5. DEEDS (§ 208*)—DELIVERY—QUESTION OF FACT.

An issue whether a deed was delivered presents a question of fact to be determined by the circumstances surrounding the particular transaction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625–632, 634; Dec. Dig. § 208.*]

6. DEEDS (§ 56*)—DELIVERY—ESSENTIAL ELEMENTS—INTENT.

Intention of the grantor to pass title is essential to a valid delivery of a deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 117–123, 125; Dec. Dig. § 56.*]

7. DEEDS (§ 59*)—DELIVERY—SUFFICIENCY.

The recording of a deed is not a delivery by the grantor, unless the deed comes from his hand or some one claiming under him.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 136–139; Dec. Dig. § 59.*]

8. WITNESSES (§ 206*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

In an action to set aside a deed on the ground of undue influence over deceased grantor, testimony of an attorney as to a conversation participated in by decedent, defendant, and himself was not incompetent as involving a privileged communication, whether the attorney acted for decedent alone or for both decedent and defendant.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 761, 764, 765; Dec. Dig. § 206.*]

9. DEEDS (§ 203*)—EXECUTION—UNDUE INFLUENCE—EVIDENCE.

In an action to set aside a deed to the grantor's son on the ground of undue influence, evidence of his conduct in attempting to keep secret the recording of the deed was properly admitted.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 602, 604–611; Dec. Dig. § 203.*]

10. EVIDENCE (§ 268*)—MENTAL CONDITION—ADMISSIBILITY OF EVIDENCE.

Where a person's mental condition at a particular time is in issue, a showing may be made of his condition both before and after as indicative of his probable condition at the particular date, and hence, in an action to set aside a deed to the grantor's son on the ground of undue influence, declarations made by the deceased grantor after the date of the deed were admissible to show the relation of the parties, especially where defendant offered proof tending to show that decedent was unwilling to prosecute the suit.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1061, 1062; Dec. Dig. § 268.*]

11. EVIDENCE (§ 268*)—EXECUTION — GRANTOR'S MENTAL CONDITION.

To be admissible to show the state of a grantor's mind when he executed a deed, declarations made by him need not be part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1061, 1062; Dec. Dig. § 268.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Andrew J. Piercy, as Mary J. Piercy's administrator, against Edward M. Piercy. Judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Williamson, for appellant. J. E. Alexander, W. W. Burnett, and Beasly & Fry, for respondent.

BURNETT, J. By a verified complaint this action was begun by Mary J. Piercy to set aside a deed in which she was the grantor and her son, Edward M. Piercy, the grantee, and after her death, the administrator, another son, was substituted as the party plaintiff. The consideration for the deed was "love and affection."

[1] The trial court found in favor of plaintiff, adjudging the deed void on the ground that it was obtained by undue influence. There was also a finding that the deed was not delivered. Both theories were adequately presented in the complaint, and it is manifest that the finding as to each is sufficient to uphold the judgment. From an examination of the record we are satisfied also that it must be held that the material findings of the court are amply supported by the evidence.

The following facts, fairly deducible from the testimony, favorable to respondent—some of which are indeed not disputed—are sufficient to reveal the character of the controversy: On March 30, 1901, the date on which the deed was signed by Mary Piercy, she was 85 years old or over. For 10 or 12 years prior thereto she could not walk without assistance, could not dress herself, and she was most of the time in bed. She was not able to attend to her household duties. If she walked from one room to another, she would be exhausted, and she was not able to get about without having some one with her. She was afflicted with a kidney or bladder disease that was the occasion of constant trouble and annoyance. At the time of the transaction in reference to the deed she was bedfast and was so weak that she had to be helped to sit up in bed to sign the instrument. As to her bodily condition, looking through the testimony of her children, we behold an old lady, enfeebled by years and disease and trouble, needing constant assistance, unable to supply her own wants, and entirely dependent upon the care of others. The court therefore properly found that, on the 30th day of March, 1901, she was and "for a long time prior thereto had been feeble in body and physically weak."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On said date she was subject to peculiar lapses of memory. In February preceding, at the funeral of her son David, she talked in a loud, childish way, showing no appreciation of the occasion. She was forgetful and "all at sea" about property affairs during the early part of 1901. Her mind was very changeable. She would be "of one mind one day and of an entirely different mind the next day." She would order things and forget immediately whether she had paid for them. She could not remember things that happened two or three days before. If she was sick with a bilious spell, she would think some one was poisoning her. A few days before the deed was signed, an attorney, Mr. Rhodes, accompanied by a notary, went to her room with the deed to obtain her signature and acknowledgment. The attorney said to her: "We have come out to—he (referring to the notary) has come out with me to take your acknowledgment to the deed from yourself to Ed." She replied: "What deed? I do not know what you are talking about. I do not want to make any such deed as this now." Mr. Rhodes then said: "This is the deed that you and Ed and I have been talking about here, and that you are to make to him conveying to him the land that came to you from the estate of your deceased son, David J. Piercy." And she replied: "Why, I do not propose to make any such deed. I do not want to do it. I am not going to do it. Why should I do it? I do not understand this. I won't do it." Other circumstances appear, but the foregoing are sufficient to justify the finding of the court that by reason of her old age and mental weakness she was incapable of transacting or understanding business transactions "in a thoroughly intelligent manner and was particularly incapable of properly understanding the nature, effects, and consequences of any act regarding the transfer of real property without independent advice and careful explanation thereof."

[2] As already seen, Edward M. Piercy was the son of Mary J. Piercy. Moreover, they lived in the house together. He hired her servants, and for a long time he had been the manager of her property and for years her agent, holding her general power of attorney. The confidential relation, therefore, so conspicuous in legal literature, existed between them in its most exacting form. The foregoing facts would warrant the inference of undue influence, and they constitute sufficient support for the judgment of the lower court. The burdens and obligations imposed by the "confidential relation" and the significance of the elements of want of consideration and of physical and mental weakness in cases like this are fully considered and the authorities reviewed in the decision of this court in Nobles v. Hutton, 7 Cal. App. 21, 93 Pac. 292. Therein it is declared that: "It is a well-settled rule of equity jurisprudence that all gifts, contracts, or benefits, from a principal to one occupying a fiduciary or confidential relation to him are constructively fraudulent and void." And furthermore that: "Persons standing in a confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can show to the satisfaction of the court that the person by whom the benefits have been conferred had independent advice in conferring them, and the advice should be given in private by some one of her own selection, and when the grantor is not surrounded with dominating influences favoring the transfer." See, also, Payne v. Payne, 12 Cal. App. 251, 107 Pac. 148; Moore v. Moore, 56 Cal. 89; Ross v. Conway, 92 Cal. 635, 28 Pac. 785; Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260.

[3] But granting that, in the absence of independent advice, under the other conditions mentioned such conveyance might be upheld, it will not and cannot be disputed that the burden is cast upon the donee to show to the entire satisfaction of the court that the gift was made freely and voluntarily with full knowledge of the facts and with entire understanding of the effect of the transfer, and, in the absence of such clear and convincing proof, the conveyance is presumed to have been obtained by undue influence and to be void.

As we view the case, it is impossible to hold that the lower court should have been convinced, or that it should have determined, that said presumption was overcome and the asserted conveyance should be held valid. Indeed, aside from the weight to be attributed to the foregoing considerations, we find in the record evidence of other circumstances affording additional support for the judgment of the lower court. Among these is the important fact, embodied in the findings, that "neither at the time of nor prior to the date of signing said deed did the said Mary Piercy have any legal or other advice except from persons acting for and in the interest of said Edward M. Piercy in reference to the said transaction or with reference to the nature, effects, and consequences to herself of her said act and deed." A distinguished lawyer, who had been for many years a friend of Mary J. Piercy, and in whom, no doubt, she had confidence, visited her and advised the execution of the deed; but the court was justified in concluding that the adviser was employed by appellant and was zealous to promote the cause of his client. The circumstance of said friendship and confidence would, of course, naturally and properly excite in the mind of the trial judge a greater distrust of the occurrence. Other facts are detailed by witnesses which strengthen the inference that appellant exercised a dominating influence over the mind of his mother and that he took advantage of the situation for his personal aggrandizement. As illustrative of these, we refer to the following incidents: At times he refused to allow the friends and neighbors to visit her. Both before and after the signing of the deed he prevented her relatives from seeing her on different occasions. In this connection the wife of plaintiff testified that, shortly before the deed transaction, she visited Mary J. Piercy, and appellant ordered her not to come there any more and not to hire any more help, as he intended to take care of that himself, and that his manner was rough and brutal, and that he subsequently ordered her out as before, saying: "You get out. Either go the back or front of the house, but you get away from here." That he intimidated his mother into signing papers, one incident being given by the last-mentioned witness, as follows: "Ed Piercy came into the room where his mother was and said to her, 'Here, come sign this paper.' She said, 'What for?' He says, 'Never mind, sign it, I tell you,' and she seemed to object again, and he demanded her again to sign it, and she did sign it. His manner was rough and cross, and she seemed to fear him." Miss Annie Higgins also testified that: "Ed Piercy was very rough spoken towards his mother. She would be frightened and would not say a word, and she would do just what he told her to do." On one occasion she was taking milk to Mrs. Piercy, and Edward Piercy said to her, "I don't want you coming over here any more." She said, "All right, why?" and he answered: "Never mind, I tell you not to come over here any more." Furthermore: "Mary Piercy spoke to Ed Piercy in my presence regarding the locking up of the gate or fence. She asked him what he did that for, and he said: 'That is my business.'" The witness testified also that she was present at different times when E. M. Piercy presented papers for his mother to sign. "He said: 'I need some money, Mother; sign this paper.' So she signed it for him. I saw him bring in papers two or three times. He would not read the papers nor explain them to his mother. He was very rough spoken and coarse. He used vulgar language toward his mother, and she would be frightened, and she would do anything he would tell her to do."

Again appellant did not record the deed for over six months after it was signed, and then he attempted to conceal the recordation from the newspapers. When Mrs. Piercy, however, learned that it was recorded, she employed an attorney, J. C. Black, to bring this action. Mr. Black testified that, after bringing the action, he received a message from Mrs. Piercy's house, and when he went there he found her in bed, and "Ed Piercy came out of the adjoining room and handed his mother a folded paper in my presence and demanded that she give it to me, and she asked Ed what it was. 'No matter,' he says, 'hand it to Mr. Black,' and his manner was decidedly excited and angry and threatening. The paper was a demand that I dismiss the suit that had been commenced against Ed Piercy." Thereafter the deposition of Mrs. Piercy was taken. Respondent says, "It is the most remarkable deposition ever submitted to a court." Our information is manifestly too limited to verify this, but the appearance of the document is certainly peculiar and calculated to excite a degree of suspicion as to its integrity. The unusual feature about it is that there are so many interlineations that contradict the original transcription. Of this, two examples will suffice. She was asked this question: "Then it is alleged here in the complaint filed by Mr. Black that on the 30th day of March last you made a deed of your interest as heir of David J. Piercy to the property; I want you to tell why you made that deed, if you made it, did you make it?" The answer as transcribed was: "I don't remember any deed making it." When corrected, this was stricken out, and the word "Yes" substituted. Again she was asked: "Well, then, I understand you to say you don't know whether or not the deed conveyed to Eddie the property that he conveyed to you?" The answer as taken down was: "No, I don't know nothing about it. I know whether or not—I don't know what you are—the meaning of what you are driving at." As corrected, the answer is "Yes." It appears also that she several times appealed to her son Edward for answers to the questions, and it is quite manifest that she was not free from the dominating influence of his stronger personality. After securing the discharge of Mr. Black, appellant procured friends of his own to represent his mother in the litigation, and the cause was tried with a result favorable to defendant. Hon. A. L. Rhodes, the trial judge, however, granted a motion for a new trial upon the ground of "irregularity in the proceedings of the defendant by which the plaintiff was prevented from having a fair trial of the action." The "irregularity" was shown by an affidavit of R. M. F. Soto to the effect that "through the wrongful procurement of defendant the action was, so far as the plaintiff's side thereof was concerned, practically tried as a mere formal matter, without any full and complete presentation of her case, and with the understanding on the part of those representing her at the trial, both that the transaction between the parties was entirely regular and valid, and that the real object of the trial was to dispose of any question as to the validity of the deed and confirm the title of defendant to the land described therein; such representatives being without knowledge as to material evidence which could have been produced in support of the cause of action stated in the complaint." Piercy v. Piercy, 149 Cal. 165, 76 Pac. 508. The cumulative effect of the foregoing circumstances upon the mind of the trial judge in the determination of the question of undue influence can be easily appreciated.

[4-6] The finding as to nondelivery, we think, can be said also to have substantial support. The question whether the deed was delivered is a question of fact and must be determined by the circumstances surrounding each particular transaction. Kenniff v. Caulfield, 140 Cal. 40, 73 Pac. 803; Moore v. Trott (Sup.) 122 Pac. 462. The actual fact to be ascertained is the intention of the grantor as to passing title. Brown v. Westerfield, 47 Neb. 399, 66 N. W. 439, 53 Am. St. Rep. 532; Huse v. Den, 85 Cal. 399, 24 Pac. 790, 20 Am. St. Rep. 232.

[7] The recording of a deed is not a delivery by the grantor to the grantee unless the deed comes from the hand of the grantor or some one claiming through or under him. Barr v. Schroeder, 32 Cal. 609. "A delivery may be effected by a grantor doing something and saying nothing, or doing nothing and saying something, or by both doing and saying something." Flint v. Phipps, 16 Or. 437, 19 Pac. 543. The court below might rationally conclude that the grantor neither did nor said anything to indicate an intention to deliver the deed or to pass the title, and that by reason of her weakened physical and mental condition she had no definite purpose in relation to the matter. That she did not actively and consciously participate in the transfer is not an unreasonable inference from the testimony of Mr. Rhodes, who said that he presented the deed to her and she signed it; that "the deed was not read to her, but its contents were explained. She was helped to sit up in bed because of her physically weak condition. After Mrs. Piercy had signed the deed, the notary took the car from her house, went down to his office, put his acknowledgment and seal on the deed, and I took it to my office. While it was being signed, of course, it was in Mrs. Piercy's hands. After it was signed, it went into the notary's hands, and from the notary's hands it went into my hands, and from my hands it went to Ed Piercy. During all the time it was at the Piercy house I saw it. Mrs. Piercy said nothing about the deed at the time she affixed her signature. She said nothing to me or Mr. Brundage or any other person after she had signed the deed. At the time of and after signing the deed Mrs. Piercy did not say anything to me or in my presence concerning the delivery of the deed." After a considerable period of time, appellant asked Mr. Rhodes for the deed, and it was given to him. From this testimony it is not unreasonable to conclude that in the transaction Mrs. Piercy was a mere passive instrument acting rather as an automaton manipulated by the agency of others than a willing and conscious actor in the formal transfer with a clear understanding and purpose that the title to the property should be vested in the grantee. As to the rulings upon the admissibility of evidence, we may say we find no prejudicial error committed by the court during the progress of the trial.

[8] Objection was made to the testimony of Mr. Rhodes as to a conversation participated in by him, Mrs. Piercy, and appellant, on the ground that it was a privileged communication by reason of his relation as attorney for Mrs. Piercy. There is a controversy as to whether said testimony was not stricken out; but, at any rate, we cannot say that the ruling was erroneous, if for no other reason, because it does not appear that he was her attorney. It is not made clear for whom he was acting. Of course, if he was the attorney for neither party, the communication was not privileged. But, assuming that he was the attorney of Mrs. Piercy, the conversation was not privileged because Edward M. Piercy was present and heard what was said. If he was the attorney for both parties, in any controversy between them the same condition would prevail. "When two parties address a lawyer as their common agent, their communication to the lawyer as far as concerns strangers will be privileged. But as to themselves, they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations. 1 Wharton on Evidence, § 587; Hanlon v. Doherty, 109 Ind. 37 [9 N. E. 782]; Greenleaf on Evidence, § 244; Michael v. Foil, 100 N. C. 178 [6 S. E. 264, 6 Am. St. Rep. 577]. In the latter case it was held that an attorney who wrote a deed could be examined as to what was said by the parties at the time relative to the transaction, whether he was acting as attorney for the one who called him or for both." In re Bauer, 79 Cal. 312, 21 Pac. 762. See, also, Murphy v. Waterhouse, 113 Cal. 467, 45 Pac. 866, 54 Am. St.

Rep. 365; Harris v. Harris, 136 Cal. 379, 69 Pac. 23.

[9] That the conduct of appellant in attempting to keep secret the recording of the deed was a proper subject for inquiry seems entirely clear. It was some evidence —open, however, to explanation—of the consciousness of fraud in connection with his acquirement of the deed. Secret, equivocal, or evasive conduct, either precedent or subsequent, is often of persuasive force in the determination of the good faith of a transaction. So, subsequent concealment or secrecy as to the deed would be indicative of knowledge of the dishonesty of the original transaction and might indicate a purpose to avert any suit to set aside the conveyance until after the death of the grantor. The principle is as true now as it ever was that "men love darkness rather than light because their deeds are evil."

[10] The court admitted evidence of the declarations of Mary Piercy made subsequent to the date of the deed. These declarations were received for the purpose of showing the "relation of the parties." It is contended that the relation of the parties existing after the deed transaction was consummated is entirely immaterial. But it is a familiar rule of evidence that, when a person's mental condition at a certain time is in issue, a showing may be made of his condition both before and after, as indicative of his probable condition at the particular date in question. Some of the evidence along this line was offered in rebuttal of an affidavit introduced by appellant. This affidavit purported to have been made by Mrs. Piercy and was to the effect that she was an unwilling plaintiff in this action, that she had not employed Mr. Black as her attorney, that she did not know that she was bringing the action, and did not fully understand the nature of the proceedings. In contradiction to these assertions, it was certainly proper for respondent to show that Mrs. Piercy did understand the situation, and that her purpose was as indicated by the complaint, which was filed. This could be shown only by evidence of her acts and declarations at the time—she being dead—and we can see no legal objection to the evidence. It is clearly within the rule declared by section 1850 of the Code of Civil Procedure that "where, also, the declaration, act or omission forms part of a transaction which is itself the fact in dispute, or evidence of that fact, such declaration, act, or omission is evidence, as part of the transaction." Words so connected with and illustrative of an act as to elucidate and define its character are considered as appertaining to the act or situation and, like expression on the human face indicating the character of the man, are received in evidence to clarify a situation that might otherwise remain obscure. Cooper v. State, 63 Ala. 80.

[11] As to the other evidence of Mrs. Piercy's statements, it may be said generally that it is brought within the principle of the decisions holding in effect that: "Declarations by the maker made subsequent to the execution of wills or deeds are admissible as showing his state of mind. Such declarations need not be part of the res gestæ, but are admissible because from a fair inference from all the circumstances such declarations show the party's mind at the time of the execution, his susceptibility to influence and his relations with those around him and the persons who are beneficiaries of his bounty. It is only necessary that the matters testified to should be sufficiently near in point of time that the testimony may be of value in determining the question directly in issue. The question of remoteness is one for the court to determine, and the weight of the testimony is to be governed according to the facts." Chambers v. Chambers, 61 App. Div. 299, 70 N. Y. Supp. 483; In re Denison's Appeal, 29 Conn. 399; Shailer v. Bumstead, 99 Mass. 112; Miller v. Livingstone, 31 Utah, 415, 88 Pac. 338; Lane v. Moore, 151 Mass. 87, 23 N. E. 828, 21 Am. St. Rep. 430. The rule is recognized by our Code (section 1870, Code of Civil Procedure, subdivision 4). There is some conflict in the authorities whether such evidence is admissible upon the issue of undue influence; but as to this, Wigmore, in volume 3 on Evidence, § 1738, declares that it "requires a consideration of many circumstances, including his state of affection or dislike for particular persons, benefited or not benefited by the will; of his inclination to obey or to resist these persons; and in general of his mental and emotional condition with reference to its being affected by any of the persons concerned. All utterances and conduct, therefore, affording any indication of this sort of mental condition, are admissible, in order that from these the condition at various times (not too remote) may be used as the basis for inferring his condition at the time in issue. This use of such data is universally conceded to be proper." The question necessarily involves two elements as pointed out by Dixon, J., in Rusling v. Rusling, 36 N. J. Eq. 603: First, the conduct of him who is charged with exercising the undue influence; and, second, the mental state of the other produced by said influence, which may require a disclosure of his strength of mind and of his purpose as to the disposition of the property both immediately before the conduct complained of and while subject to its influence. In order to show his "mental state at any given time, his declarations at that time are competent because the conditions of the mind are revealed to us only by its external manifestations, of which speech is one. Likewise the state of mind at one time is competent evidence of its state at other times, not too remote, be-

cause mental conditions have some degree of permanency."

Here the competency of the grantor to understand any business transaction was directly in issue, and it was the contention of respondent that the dominating and coercive influence of appellant extended over the entire period of inquiry. It would seem therefor that the ruling of the court admitting the declarations is unquestionably correct.

The principle is not that involved in the case of Bury v. Young, 98 Cal. 446, 33 Pac. 338, 35 Am. St. Rep. 186, and Ord v. Ord, 99 Cal. 523, 34 Pac. 83. In the former it was said that the declarations and acts of the grantor "made and done in his own interest months after the deed was delivered are not admissible as indicating his intentions in delivering the deed," and, in the latter, that a "grantor will not be permitted to disparage his deed by declarations made or acts done by him in his own interest subsequent to its execution." But in those and other similar cases there was no issue as to fraud or the mental condition of the grantor, and the testimony was offered as evidence of the truth of the facts asserted in it and was clearly self-serving and hearsay. In a case like this it is plain the witness is permitted to detail declarations which he has heard, not as evidence of the truth of the fact asserted, but of a spontaneous and unreflecting expression of the mental and emotional condition of the declarant. The distinction is marked and vital and recognized by the authorities.

An examination of the record convinces us that from a legal and equitable standpoint it would be wrong to reverse the judgment. It is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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18 Cal. App. 768

PEOPLE v. CHUTUK. (Cr. 245.)

(District Court of Appeal, Second District, California. May 1, 1912.)

1. Homicide (§ 36*)—Manslaughter—Evidence.

Defendant and deceased engaged in a controversy over the construction of a sewer, which deceased claimed unnecessarily infringed on his rights of ingress and egress to his property. At the conclusion, deceased turned to go to his house, when defendant struck him a violent blow with his fist on the side of the jaw and neck, causing a fracture of both jaws and of the thyroid and cricoid cartilages, resulting in decedent's death shortly thereafter. *Held*, that the killing resulted from an unlawful act, not amounting to a felony, and, though unintended, constituted manslaughter.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 57; Dec. Dig. § 36.*]

2. Homicide (§ 340*)—Appeal—Prejudice—Instructions.

Where accused was convicted of manslaughter only, he was not prejudiced by error in instructions with reference to murder in the first and second degrees.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715–720; Dec. Dig. § 340.*]

3. Homicide (§ 307*)—Manslaughter—Instructions.

Where the blow that killed deceased was struck in sudden anger, the court properly charged that when the blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter, that in such a case, though the intent to kill exists, it is not the deliberate and malicious intent which is an essential element of murder, but that if the intent exists, and the killing is unlawful, it will be murder, even though done on a sudden quarrel or heat of passion, unless there was adequate provocation which is not produced by opprobrious, contemptuous actions or gestures without an assault on the person, or trespass against lands or goods.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 638–641; Dec. Dig. § 307.*]

4. Homicide (§ 300*)—Instructions—Self-Defense.

Where, in a prosecution for homicide, it appeared that the killing was the result of a difficulty between defendant and deceased, the court properly charged that self-defense is not available to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault, to create a real or apparent necessity for the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614–632; Dec. Dig. § 300.*]

5. Criminal Law (§ 789*)—Instructions—Reasonable Doubt.

An instruction that, while accused could not be convicted unless his guilt was established beyond a reasonable doubt, still the law did not require demonstration, or proof, excluding possibility of error, producing absolute certainty, because such proof was rarely possible, and that moral certainty only was required, or that degree of proof which produces conviction in an unprejudiced mind, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846–1849; Dec. Dig. § 789.*]

6. Homicide (§ 293*)—Instructions.

Where a difficulty over defendant's construction of a sewer near decedent's residence resulted in defendant's killing deceased, an instruction that the sewer, during the progress of its construction, was as much the property of the defendant as if it consisted of a house and lot, was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 604; Dec. Dig. § 293.*]

7. Homicide (§ 269*)—Intent—Instructions—Province of Jury.

The intent with which defendant struck the blow that killed deceased being a matter for the jury, the court properly refused to instruct with reference thereto.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 563; Dec. Dig. § 269.*]

8. Homicide (§ 338*)—Appeal—Rulings on Evidence.

Where accused was convicted of manslaughter only, he was not prejudiced by the overruling of objections to certain testimony, the effect of which tended to show malice against decedent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709–713; Dec. Dig. § 338.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Joe Chutuk was convicted of manslaughter, and he appeals. Affirmed.

Schweitzer & Hutton, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. The defendant and appellant was informed against by the district attorney of Los Angeles county for the crime of murder. He was convicted of manslaughter, and the judgment of the court was that he suffer imprisonment in the state prison for the term of two years. He appeals from the judgment and an order denying a new trial.

[1] There is evidence in the record tending to establish these facts: The defendant, a sewer contractor, on the date of the homicide was engaged in superintending the work of excavation in front of the property of one Webb. A controversy arose between the contractor and Webb with reference to the manner in which the work was done; Webb claiming that there was an unnecessary infringement of his rights of ingress and egress to his property. Both parties seem to have become very angry over the controversy. Both were unarmed. Webb, however, at the conclusion turned to go to his house, when defendant and appellant struck him a violent blow with his fist on the side of the jaw and neck, causing a fracture of both jaws and the thyroid and cricoid cartilages. Webb from the injuries received from the blow shortly thereafter died. There can be no question but that the record discloses the unlawful killing by defendant. It may not have been intended, but resulted from an unlawful act, not amounting to a felony, and was therefore manslaughter. People v. Munn, 65 Cal. 214, 3 Pac. 650; People v. Stokes, 11 Cal. App. 760, 106 Pac. 251.

[2] Appellant specifies as error certain instructions of the trial court with reference to murder in the first and second degree. Inasmuch as defendant was acquitted of murder in the first and second degree, no prejudice is manifest. As said in People v. Quimby, 6 Cal. App. 487, 92 Pac. 493: "The jurors must be presumed to be possessed of such a degree of intelligence as to enable them to comprehend and understand the pertinency to the evidence of the court's declaration of the law, and that, under the evidence, their verdict could not be founded upon any consideration of the elements constituting the higher grades of the offense." See, also, People v. Woods, 147 Cal. 273, 81 Pac. 652, 109 Am. St. Rep. 151; People v. Chaves, 122 Cal. 140, 54 Pac. 596. The fact that the defendant was acquitted of murder in the first and second degree renders it unnecessary to consider the specification with reference to the refusal of the court to charge that such offense had not been made out.

[3] We see no error in the action of the court charging the jury: That "when the mortal blow, though unlawful, is struck in the heat of passion, excited by a quarrel, sudden and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent, and will reduce the offense to manslaughter; in such case, although the intent to kill exists, it is not that deliberate and malicious intent which is an essential element in the crime of murder." That "if the intent exists and the killing is unlawful, it will be murder, even though done upon a sudden quarrel or heat of passion, unless there was adequate provocation." That adequate provocation is not produced by opprobrious, contemptuous actions or gestures, without an assault upon the person, or trespass against lands or goods. These charges and others with reference to the intent with which the blow was struck. and which was a question of fact for the jury, were not improper.

[4] Nor do we see any error in the charge of the court to the effect that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue, and thus, through his fraud, contrivance, or fault to create a real or apparent necessity for the killing. Under the facts of the case, it was for the jury to determine whether or not this controversy had been sought by the defendant and his intent and purpose in connection therewith. Those instructions of the court with reference to the use of deadly weapons, and referring to the higher grades of the offense, could not in any degree have prejudiced defendant. As before said, he was acquitted of such charges, and the court properly charged the jury as to the presumption attaching to acts voluntarily and willfully done, and the intent as to the natural, probable, and usual consequences thereof. People v. Besold, 154 Cal. 368, 97 Pac. 871.

[5] The court properly charged the jury that, "while the defendant cannot be convicted unless his guilt is established beyond a reasonable doubt, still the law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind." This was a correct exposition of the law, and no error is apparent in connection therewith.

[6] We see no error of the court in refus-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ing an instruction to the effect that the sewer, during the process of construction, was as much the property of the defendant as if it consisted of a house and lot. We can conceive of no theory upon which such an instruction, under the record, would be permissible.

[7] The court properly refused to instruct the jury as to the intent with which the blow was struck; that was a matter for the jury to determine. Taking the instructions together, we think they fairly presented the law to the jury, and that there was nothing therein which could have a tendency either to mislead the jury or to prejudice the rights of defendant.

[8] We see no prejudicial error in the action of the court overruling objections to certain testimony, the effect of which might tend to show malice upon the part of the defendant. The jury by its verdict acquitted the defendant of any malice, and the error, if any, was harmless.

Defendant's criticism of the action of the district attorney we think unwarranted. There is nothing in the record indicating that any statement made by the district attorney was not based upon proper and logical inferences from the testimony adduced.

A careful examination of this record indicates to our minds that the defendant was clearly shown to have been guilty of manslaughter, and through the verdict and judgment there was no miscarriage of justice.

The judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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18 Cal. App. 698

PEOPLE v. MARKET STREET BANK et al.

(Civ. 941.)

(District Court of Appeal, First District, California. April 18, 1912. Rehearing Denied May 18, 1912. Denied by Supreme Court June 17, 1912.)

1. Banks and Banking (§ 65*)—Liquidation—Rights of Creditors.

Pending proceedings to liquidate an insolvent bank, a corporation organized to rehabilitate the bank issued to creditors bonds in exchange for claims against the bank. A creditor of the bank who became owner of about $8,000 worth of bonds of the corporation in exchange of claims was indebted to the bank for rent for $875. The creditor filed a claim with the receiver of the bank for about $8,000 in anticipation of redelivering the bonds to the corporation and receiving from it the claims against the bank. Subsequently the creditor and the corporation made an agreement for the return of the bonds held by the creditor in exchange for the claims against the bank. To carry out the agreement, the president of the corporation delivered to the receiver claims against the bank for about $6,000 to receive a 50 per cent. dividend on the amount of claims and paying the same to the creditor. The creditor delivered to the receiver bonds on the face value of $1,750 to enable him to retain the rent due. The receiver delivered the bonds to the corporation, and they were marked, "Paid." The receiver, with the acquiescence of the corporation, selected claims to the amount of $1,750, and retained a dividend in settlement of the rent, and delivered to the president of the corporation a check for $1,500 as part payment of the dividend on the remainder of the claims. The president tendered the check to the creditor, who refused to accept it, claiming that he was entitled to a dividend on the whole $6,000 worth of claims. *Held*, that the corporation receiving nothing from the creditor under the agreement could refuse to proceed further in the transaction; the creditor not obtaining any valid title to the claims.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 126, 127; Dec. Dig. § 65.*]

2. Banks and Banking (§ 77*)—Liquidation—Rights of Creditors.

The court properly permitted the receiver of the bank to retain the $875 dividend on $1,500 worth of claims delivered to him by the president of the corporation, since the creditor had assigned to the receiver so much of his claims as such dividend would represent, and the fact that at the time he did so he had no title to the claims did not prevent the assignment from becoming operative on the corporation subsequently delivering the claims to the receiver for the benefit of the creditor.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 165-176½; Dec. Dig. § 77.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Proceeding by the People against the Market Street Bank and others to liquidate the affairs of the bank, in which Louis H. Mooser was appointed receiver. From orders denying relief to Kelleher and Browne, claimants, they appeal. Affirmed.

Percy L. Shuman, for appellants. W. G. Harrison, J. C. Campbell, Louis H. Mooser, and Stratton & Kaufman, for respondents.

KERRIGAN, J. On June 25, 1908, the Market Street Bank of San Francisco, a corporation, was adjudged insolvent, and Louis H. Mooser was appointed receiver thereof to liquidate its affairs. Shortly thereafter certain persons interested in various ways with the bank conceived a plan of rehabilitating that institution, and for the purpose of carrying out that plan organized a corporation under the name of the Market Street Securities Company. That corporation issued to the creditors and depositors of the Market Street Bank bonds in exchange for claims and accounts against the bank, the ultimate purpose being to buy in, if possible, all of the bank's outstanding obligations. Subsequently the Securities Company passed a resolution and gave public notice to the effect that, if the proposed rehabilitation of the insolvent bank was not successful, it would return the claims, consisting of bank books and other evidences of indebtedness, to the parties who had assigned them to the Securities Company, upon the return of the bonds issued therefor, subject to the condition that the bonds returned must be the identical bonds issued to the depositor or creditor in exchange for the assignment of his claim.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The terms of this resolution are not contained in the transcript, but its existence seems to have been recognized by the parties to the litigation, and its terms are to be gathered from the briefs of counsel. It has, however, but a remote bearing upon the questions involved in the appeal, as the rights of the appellants, if any, arise out of a specific agreement alleged to have been made between them and the Securities Company.

Among other creditors of the insolvent bank who entered into the plan of its rehabilitation was the firm of Kelleher & Browne, appellants herein, who became the owners of some $8,000 worth of the bonds of the Securities Company issued as indicated, part thereof being in exchange for their deposit account with the insolvent bank, and the remainder having been acquired by them either directly from the Securities Company in exchange for assignments of other accounts against said bank, or intermediately from persons to whom they had been directly issued. Kelleher & Browne were tenants of the Market Street Bank, and it is undisputed that they were indebted to Louis H. Mooser, as receiver, in the sum of $875 for unpaid rent. Upon a sale of the assets of the insolvent bank, the court, on or about February 4, 1909, declared a dividend of 50 cents on the dollar to be paid to the owners and holders of claims against said bank. On January 7, 1909, the appellants, although they at this time were merely the owners of bonds of the Securities Company, filed a claim with the receiver of the insolvent bank for some $8,000, apparently in anticipation of redelivering their bonds to the Securities Company and receiving from it the claims and accounts for which the bonds had been issued, and they indorsed upon this claim an assignment of the sum of $875 thereof to Receiver Mooser to enable Mooser to retain this sum out of any money becoming payable by him to the appellants.

In the month of June, 1909, appellants arrived at an agreement with the Securities Company, through its president, F. M. Meigs, for the return to that company of the bonds held by them in exchange for the claims against said insolvent bank for which the bonds had been issued. In order to carry into effect this agreement, Meigs delivered to Receiver Mooser claims against the insolvent bank amounting to something over $6,000 for the purpose of receiving from Mooser the 50 per cent. dividend upon said amount of claims and paying the same to appellants, the latter in the meantime retaining their bonds. About this time appellants delivered to Receiver Mooser bonds of the face value of $1,750, for the purpose of enabling Mooser to retain, in payment of the rent due him from them, the sum of $875—the amount of the dividend payable on the claims represented by said bonds. Mooser delivered these bonds to the Securities Company, the secretary of which marked them "Paid," and it was upon this day or about this time that Mooser received from the Securities Company the $6,000 worth of claims above referred to. Out of this amount of claims Mooser, with the acquiescence of the Securities Company, selected certain of them to the amount of $1,750, and retained the dividend payable upon them—amounting to $875—in settlement of the rent due from Kelleher & Browne, giving them credit accordingly. He also delivered to Meigs, said president, a check for $1,500 on account of and as part payment of the dividend payable on the remainder of said claims. Meigs brought this check to appellants, who refused to accept it, claiming to be entitled to the dividend upon the whole $6,000 worth of claims. Shortly thereafter, by reason of an injunction suit, the payment of this check was stopped, and William Greer Harrison, who in the meantime had been appointed receiver of the Securities Company, refused to recognize the agreement made between Meigs and appellants, and now claims to be entitled, as receiver of the Securities Company, to the unpaid dividend on the remainder of said claims.

Petitions were filed by both Harrison and the appellants, each claiming to be the owner of the whole of said claims and entitled to the dividend thereon. Receiver Mooser answered, setting up the payment to himself as receiver of the $875 as aforesaid in satisfaction of the rent due from the appellants, and leaving himself at the disposition of the court as to whom he should recognize as to the owner of the claims upon which the dividend was still unpaid. The court, after hearing the testimony, made two orders, one approving the action of Mooser in retaining the said $875, and the other ordering him to turn over to Harrison, as receiver of said Securities Company, the remainder of said claims delivered to him by Meigs as aforesaid.

Kelleher & Browne appeal from both said orders. They claim, as against Harrison, to be the owners of the claims, and, as against Mooser, that he accepted certain specific bonds of the face value of $1,750 in payment of his rent, and that the claims the dividend upon which he paid to himself were not those for which said bonds were issued, but were claims issued against bonds owned and still in the possession of appellants, from which it is argued that the receiver has twice been paid the rent due him. We think both the orders appealed from were correct and proper.

[1] As to the order concerning Harrison, the execution of the agreement between Meigs and appellants did not proceed far enough to give to the latter any valid title

to the claims. If, instead of allowing the transaction to proceed as it did, the appellants had themselves taken from the Securities Company a reassignment of the claims, and redelivered to that company the bonds, the transaction would have been complete, and would have resulted in substituting appellants as the owners of said claims. But the transaction followed a different course. Meigs proceeded himself to collect the dividend on the claims—undoubtedly with the intention of turning it over to appellants and receiving from them the bonds when he should do so. He even offered them the first and only payment that he received from Mooser on account of the dividend; and this the appellants very ill advisedly rejected. The Securities Company had received nothing from the appellants under this agreement, and, upon the rejection by appellants of the check for $1,500, it had the right not to proceed any further in the transaction—which course Receiver Harrison, who was subsequently appointed, chose to pursue.

[2] As to the order permitting Mooser to retain the $875, dividend on $1,750 worth of claims delivered to him by Meigs, it must not be overlooked that the appellants had themselves assigned to Mooser so much of their claims as this dividend would represent; and, although at the time they did so they had no title to the claims, yet, when the Securities Company subsequently delivered such claims to him for the benefit of the appellants, the assignment became operative, and immediately vested in him the right to retain the dividend on the amount of claims covered by the assignment. The contention that Mooser accepted $1,750 in bonds of the Securities Company in payment of the rent is untenable. While the reading of the receipt given by Mooser for the bonds might lend color to this contention, yet it is quite apparent that appellants contemplated that the possession of the bonds entitled Mooser to the same value in claims to be received from the Securities Company. The Securities Company turned over to Mooser all the claims which the appellants claimed to be entitled to by virtue of their ownership of bonds, if the exchange arranged with Meigs should be effected; and out of such claims Mooser selected only sufficient to pay him the amount due from appellants. The claim is made by appellants' counsel that Mooser surrendered the $1,750 of bonds to the Securities Company without receiving anything therefor—intending it to be inferred that appellants suffered some prejudice thereby, and that the claims, for which the particular bonds surrendered had been issued, were negligently left with the Securities Company. An examination, however, of the record shows that the majority of the claims issued for this particular $1,750 worth of bonds were among the $6,000 of claims delivered by the Securities Company to Mooser. That Mooser did not select these particular claims on which to pay himself the dividend did not work any prejudice whatever to the appellants, for, had he done so, the claims and accounts on which he did actually pay himself the dividend would be included in the amount ordered by the court to be turned over to Receiver Harrison.

The orders appealed from are affirmed.

We concur: LENNON, P. J.; HALL, J.

18 Cal. App. 723

DAVIDSON v. ALL PERSONS. (Civ. 930.)

(District Court of Appeal, Third District, California. April 23, 1912.)

1. Judgment (§ 145*)—Vacating Judgment by Default—Meritorious Defense.

Under Code Civ. Proc. § 473, which provides that, when a summons in an action has not been personally served, the court may allow defendant, or his legal representative, at any time within one year after judgment, to answer to the merits of the original action, a defendant who has not been personally served and who moves to vacate a default judgment in an action to quiet title brought under the McEnerney act (St. 1906 [Ex. Sess.] p. 78) must show facts constituting a defense on the merits.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–295; Dec. Dig. § 145.*]

2. Judgment (§ 160*)—Vacating Judgment by Default—Affidavit of Merit.

On a motion under Code Civ. Proc. § 473, by a defendant not personally served, to set aside a default judgment in an action to quiet title under the McEnerney act (St. 1906 [Ex. Sess.] p. 78), an affidavit which alleges that plaintiff's intestate had a half interest in a part of the property involved and the sole interest in another part, all of which facts were known to plaintiff at the time of the commencement of the action, sufficiently alleged a good defense to the action on the merits, without stating the source of the title claimed to have been in plaintiff's intestate.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 314–316; Dec. Dig. § 160.*]

3. Lis Pendens (§ 25*)—Effect—Persons Bound by Judgment.

The McEnerney act (St. 1906 [Ex. Sess.] p. 78), relating to the quieting of title against the claims of all persons against whom jurisdiction is obtained by publication, by section 9 required a notice of the pendency of the action to be filed with the complaint without stating its effect, and Code Civ. Proc. § 409, makes a lis pendens constructive notice of the pendency of the action to subsequent purchasers and incumbrancers, but only of its pendency as against parties designated by their real names. *Held*, that the notice intended by the Legislature was the lis pendens provided by the Code of Civil Procedure with the same effect as in other cases, and that all parties defendant were bound by the notice whether designated by their real names or not.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. §§ 47–57; Dec. Dig. § 25.*]

4. Quieting Title (§ 19*)—Actions—Statutory Provisions.

The purpose of the McEnerney act (St. 1906 [Ex. Sess.] p. 78) is to enable the title existing at the time the action is commenced to be quieted against the claims of all persons.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 48; Dec. Dig. § 19.*]

5. JUDGMENT (§ 145*) — VACATION BY DEFAULT JUDGMENT—AFFIDAVIT—ADVERSE INTEREST AT COMMENCEMENT OF ACTION.

On a motion under Code Civ. Proc. § 473, to set aside a default judgment against a defendant not personally served, obtained in an action to quiet title, brought under the McEnerney act (St. 1906 [Ex. Sess.] p. 78), the affidavit must show that defendant had some interest in the property at the commencement of the action adverse to that asserted by the plaintiff.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–295; Dec. Dig. § 145.*]

6. JUDGMENT (§ 145*)—VACATION OF DEFAULT JUDGMENT—GROUNDS.

The McEnerney act for the quieting of titles (St. 1906 [Ex. Sess.] p. 78) by section 5 provides that plaintiff shall make affidavit that he does not know, and has never been informed, of any other person who claims any interest in the property adversely to him, and by section 6 provides that, if the affidavit declares the name of any person claiming any adverse interest, the summons shall be personally served. Code Civ. Proc. § 473, provides that, when summons in an action has not been personally served, the court may allow defendant or his legal representative within one year after judgment to answer to the merits of the original action. A defendant not personally served on motion to vacate a default judgment unequivocally stated in his affidavit that the plaintiff at the commencement of the action, and at the time judgment was rendered therein, knew that defendant had an interest in the property, and by stipulation filed the answer therein which presented issues of fact as to ownership of the property, setting forth the source of the title claimed to have been in defendant's intestate prior to the commencement of the action, and also alleged that the facts stated in the decree were not true, and that affiant had a good and meritorious defense to the action. *Held*, that defendant's motion to vacate a default judgment should be granted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292–295; Dec. Dig. § 145.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action to quiet title by Rebecca E. Davidson against all persons, etc., defendants. Judgment by default for plaintiff and Isabelle Davidson, administratrix of the estate of Hallie B. Davidson, deceased, moved for an order setting aside such judgment. Motion denied, and Isabelle Davidson appeals. Order reversed.

Henry C. Schaertzer, for appellant. Stafford & Stafford, H. I. Stafford, and W. P. Caubu, for respondent.

CHIPMAN, P. J. Action to quiet title to certain lots in the city and county of San Francisco, under the so-called McEnerney act (Stats. 1906, p. 78). The complaint describes four separate lots.

The summons was served by publication, as provided for in the said act. It does not appear that personal service was made on any defendant, and the judgment recites that no appearance was "made by any defendant," and, "proof having been adduced of all the facts alleged in the complaint and other papers and pleadings on file herein, * * * it is hereby ordered, adjudged and decreed that said plaintiff * * * is the owner in fee simple absolute and in the actual and peaceable possession of the real property hereinafter described, and the whole thereof; that no other person has any interest * * * in or to said real property; * * * and that her title thereto be, and the same is hereby, established and quieted as against all the world." This judgment was entered and filed on October 27, 1909. On October 15, 1910, appellant served and filed her notice of motion for an order setting aside said judgment, "based upon all the files, records and papers on file in said matter, upon this notice of motion, and upon the affidavit of Isabelle Davidson, administratrix of the estate of Hallie B. Davidson, deceased."

The affidavit of appellant alleges the death of Hallie B. Davidson to have occurred on December 4, 1909, less than two months after entry of said judgment, her appointment, duly made, as administratrix of his estate, on June 29, 1910, and, as to the interest of said deceased in said lots, states as follows: "That said Hallie B. Davisdon, deceased, had an interest in the property hereinafter described at the time of his death and at the time the judgment hereinafter mentioned was rendered in the above-entitled action and still continued to so have said interest in the said property hereinafter described, and that said interest in said hereinafter described property was a half interest in the property described in paragraphs 1, 2, and 3, and that, as to the lot described under paragraph marked 4, was and is a sole interest, and that he was the sole and only owner of said lot described herein as No. 4, all of which facts were fully known to the said plaintiff at the time of the commencement of the above-entitled action, and also at the time said action was heard by said superior court of the state of California, in and for the city and county of San Francisco, and at the time the decree hereinafter mentioned was entered by the above-mentioned court." Then follow certain recitals in said decree, not now material, and concluding as follows: "That the facts stated in the said decree are not true; that the said Rebecca E. Davidson is not the sole and only owner, nor has she any further or greater interest in any part or parcel of said property than a one-half interest in lots set forth and described as Nos. 1, 2, and 3, and that said Rebecca E. Davidson knew at the date of the said judgment and decree that she had no further or greater interest therein than a one-half interest in said lots and no interest whatever in the lot described herein as lot No. 4; that no personal service of summons in the above-entitled action was ever made on Hallie B. Davidson, deceased, and the said Hallie B. Davidson was never personally served with the summons issued in the above-entitled action; that the said Rebecca E. Davidson knew at the time of the commencement of said action that the said Hallie B. Davidson claimed an interest in all of the said property hereinabove mentioned, and that he, the said Hallie B. Davidson, was a party in interest in said property, and that he claimed a portion and certain parts of said property as his sole and exclusive property; that your affiant has stated all the facts in relation to this matter to her counsel, and has fully and fairly stated to him each and every and all of the matters and things and facts relating thereto, and after such statement her counsel has advised her that she has a good and meritorious defense to the above-entitled action."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1, 2] The appeal is from the order denying the motion to vacate and set aside the default judgment. Among the remedial sources of relief which may be resorted to that justice may be furthered, section 473, Code of Civil Procedure, provides as follows: "When from any cause the summons in an action has not been personally served on the defendant the court may allow, on such terms as may be just, such defendant or his legal representative at any time within one year after the rendition of any judgment in such action to answer to the merits of the original action." Gray v. Lawlor, 151 Cal. 352, 90 Pac. 691, 12 Ann. Cas. 990, was a case arising under the McEnerney act, where the defendant petitioned to have the default judgment set aside under this section. One of the questions there was the same as the principal question here, namely: Does the affidavit show that the defendant has a good defense to the action on its merits? Said the court: "From the fact that the relief to be afforded is the privilege of answering 'to the merits of the original action,' the condition is implied that the defendant must have a good defense to the action on its merits. This being one of the conditions of the statute, the defendant must show that such defense exists. The defendant in this case has complied with this rule. He avers in his affidavit that he is now, and at all times mentioned for more than 10 years last past has been, the owner of and entitled to the possession of the property described in the complaint. This, if true, is a complete defense to the cause of action sued on." We have examined the affidavit filed in that case, and find that the defendant made no attempt in his affidavit to deraign title or give its source. All that he deposed to on that subject is stated in the opinion of the court in the language of the affidavit. And apparently the averment as to ownership of the property was in itself deemed a sufficient compliance with section 473, and not only justified, but required, the vacation of the default judgment. There were some averments in the affidavit as to the long continued residence of the defendant in the city and county of San Francisco and to his being well known there and that his name was in the city directory, but these facts seem not to have influenced the decision. Respondent contends thta the affidavit in the present case was insufficient because it does not state the source of the title claimed to have been in Hallie B. Davidson; that the affidavit should show at least the facts required to appear in plaintiff's affidavit. This may be true of the answer, but the affidavit on this motion is not made under the McEnerney act, but under section 473 of the Code of Civil Procedure, and, if something more than appeared in Gray v. Lawlor is to be required in the affidavit, the rule must come from the court that decided that case. Respondent cites Hoffman v. Superior Court, 151 Cal. 386, 90 Pac. 939, where the court, referring to section 473, stated that the defendant must show facts "constituting a good defense to the proceeding—that is, facts sufficient to show that he has a valid adverse interest in the property." And it is hence claimed that the affidavit was insufficient. The two cases cited were decided about the same time—Hoffman v. Superior Court following Gray v. Lawlor—and the earlier case is cited as authority for the statement found in the later case. We discover nothing in the Hoffman Case inconsistent with or changing the rule stated in Gray v. Lawlor. A "valid adverse interest" must necessarily result from an allegation of ownership.

[3-5] Section 11 of the act provides that the judgment rendered in all such actions "shall be binding and conclusive upon every person who, at the commencement of the action, had or claims an interest, right, title or estate in and to said property or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." Respondent makes the point that the affidavit fails to state that defendant's intestate had any interest in the property at the commencement of the action. A lis pendens was filed with the complaint, the effect of which was to impart constructive notice of the pendency of the action to subsequent purchasers and incumbrancers, but, as the section provides, "only of its pendency as against parties designated by their real names." Section 409, Code Civ. Proc. See, also, sections 479, 1908. Section 9 of the McEnerney act requires a notice of the pendency of the action to be filed "at the time of filing the complaint," but does not state its effect. It must be assumed, we think, that the Legislature intended the notice to be the notice referred to in section 409, and that the same effect

is to be given to it as in other cases where it may properly be filed. It is true that the defendants were not "designated by their real names," nor was any one so designated. But the very exigency which gave rise to the act required that all persons having any interest in the property should be made defendants by the general designation of "All Persons," etc., and being thus designated, the court acquired jurisdiction of the person upon publication of the summons. Unless it be held that all persons having or claiming to have an interest in the property are subject to the operation of the notice of the pendency of the action, any person, not designated by his real name, could assert an interest acquired a day short of a year after judgment, and, under section 473, have the judgment vacated, and the provisions of the statute that the judgment shall be binding and conclusive upon every person who at the commencement of the action had or claimed any estate or interest in the property, would be shorn of all their force. Indeed, appellant contends that "Hallie B. Davidson, whom the affidavit shows to have had his interest at the time of the rendition of the judgment, could have acquired that interest subsequently even to the rendition of the judgment from one of the defendants who was not personally served, and still have had a right to move for and obtain a vacation of the judgment." We cannot accept this view of the statute.

In the case of Gray v. Lawlor, supra, the plaintiff showed in his affidavit that he was the owner of the property at the commencement of the action, and for some time prior thereto. The purpose of the act is to enable titles existing at the time the action is commenced to be quieted against the claims of all persons. That all persons claiming an interest in the property may be brought in by publication of summons, without personal service, and the title of the plaintiff conclusively decreed to be free from the claims of the whole world as of the date of the commencement of the action, has been settled by our Supreme Court. Title, etc., Co. v. Kerrigan, 150 Cal. 289, 88 Pac. 363, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199. Speaking of the substituted service by which all persons are made defendants, the court said: "Where, as here, the summons describing the nature of the action, the property involved, the name of the plaintiff and the relief sought, is posted upon the property, and is published in a newspaper for two months, and a lis pendens containing the same particulars is recorded in the recorder's office and entered upon the recorder's map of the property, we cannot doubt that, so far as concerns possible claimants, who are not known to plaintiff, the notice prescribed by the act is as complete and full as, from the nature of the case, could reasonably be expected." It seems to us that we must, in order to preserve the integrity of the act, give to the lis pendens the same effect to all defendants, whether named or not named, and, doing so, a defendant, seeking relief under section 473, must show that he had some interest in the property at the commencement of the action, adverse to that asserted by the plaintiff.

[6] Appellant claims that such an interest appears from her affidavit by necessary implication to have existed in her intestate. It is averred in the affidavit that appellant's intestate was the owner of a certain interest in the property at the time the judgment was rendered, "all of which facts were fully known to the said plaintiff at the time of the commencement of the above-entitled action, and also at the time the said action was heard by said superior court, * * * and at the time the decree hereinafter mentioned was entered by the above-entitled court." It is further averred: That plaintiff "knew at the time of the commencement of said action that the said Hallie B. Davidson claimed an interest in all of the said property hereinabove mentioned, and that he, the said Hallie B. Davidson, was a party in interest in said property, and that he claimed a portion and certain parts of said property as his sole and exclusive property." The implication contended for may not clearly appear, although there is some force in the suggestion that, if plaintiff knew at the commencement of the action that Davidson had an interest in the property, he must then have claimed an interest therein. However this may be, it would seem to us unconscionable to deny the motion in view of the facts alleged. Section 5 of the act requires that the plaintiff shall make affidavit, "fully and explicitly setting forth and showing" certain facts, and, among them: "(3) That he does not know and has never been informed of any other person who claims or who may claim, any interest in, or lien upon, the property or any part thereof, adversely to him, or, if he does know or has been informed of any such person, then the name and address of such person," and section 6 provides that, "if the said affidavit discloses the name of any person claiming an interest in, or lien upon, the property adverse to the plaintiff, the summons shall be personally served upon such person if he can be found in the state, together with a copy of the complaint and a copy of said affidavit." We do not think the findings and decree should be held to be conclusive of the truth of the affidavit as against a person not served who asks relief under section 473, and directly and unequivocally states in his affidavit that the plaintiff knew at the commencement of the action and when he took his decree that affiant had an interest in the property. It appears by the stipulation of the parties that "Isabelle Davidson, administratrix as aforesaid, submitted and placed in the hands of the court, the hereunto attached answer, which she requested in said motion to be al-

lowed to file." This answer is verified and distinctly presents issues of fact as to the ownership of said property, setting forth the source and nature of the title claimed to have been in appellant's intestate prior to the commencement of the action. The notice of the motion did not specifically refer to this answer, but it is in the record and was before the trial court when the motion was heard and appellant in her motion requested leave to file it. While strictly not made a part of the record on the motion, the learned trial court might well have so considered it, and, under the circumstances, we think should have given it its proper weight in determining the motion. But, irrespective of this consideration, we are clearly of the opinion that appellant presented facts sufficient to show that she had a good defense to the action on its merits, and that her motion should have been granted.

Section 473 expressly extends to "the legal representative" of the defendant the right "to answer to the merits of the action." See, also, section 1582, Code Civ. Proc.

The order is reversed.

We concur: HART, J.; BURNETT, J.

163 Cal. 84

PEOPLE v. SELBY SMELTING & LEAD CO. (Sac. 1,847.)

(Supreme Court of California. June 12, 1912. Rehearing Denied July 12, 1912.)

1. NUISANCE (§ 84*) — PUBLIC NUISANCE—ABATEMENT—JURISDICTION.

Under St. 1899, p. 103, authorizing the district attorney of any county in which a public nuisance exists to sue to abate it, the district attorney of a county, over which fumes from a smelter located in another county escaped in such manner as to constitute a nuisance, may maintain a suit in the first-mentioned county to abate the nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 196–199; Dec. Dig. § 84.*]

2. NUISANCE (§ 84*) — PUBLIC NUISANCE—ABATEMENT — REMEDY — "ABATE" — "ENJOIN."

Under St. 1899, p. 103, which authorizes suit by the district attorney of a county to "abate" a public nuisance existing therein, suit lies to enjoin maintenance of a public nuisance by permitting noxious vapors to escape from a smelter, though, strictly construed, the words "abate" and "enjoin" have technically different meanings.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 196–199; Dec. Dig. § 84.*

For other definitions, see Words and Phrases, vol. 1, pp. 13, 14; vol. 8, p. 7559; vol. 3, p. 2397.]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

3. Nuisance (§ 84*) — Public Nuisance—Abatement.

In a suit to enjoin maintenance of a public nuisance by permitting noxious vapors to escape from a smelter, it was not an abuse of discretion to make the decree for plaintiff effective immediately without further opportunity to defendant to experiment to determine whether smelting could be conducted without producing the injuries complained of, where more than three years intervened between the filing of the suit and entry of the decree.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 196–199; Dec. Dig. § 84.*]

4. Nuisance (§ 84*) — Public Nuisance—Decree—Validity.

A decree enjoining operation of defendant's smelter "as conducted by defendant" in permitting escape of noxious gases and smoke, etc., was not objectionable as enjoining more than that which constituted a nuisance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 196–199; Dec. Dig. § 84.*]

5. Nuisance (§ 84*) — Public Nuisance—Evidence—Sufficiency.

In a suit to enjoin maintenance of a public nuisance by permitting vapors to escape from a smelter, evidence *held* to warrant a finding that the quantity of noxious vapors discharged had increased.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 196–199; Dec. Dig. § 84.*]

6. New Trial (§ 102*)—Newly Discovered Evidence—Diligence.

A new trial asked on the ground of newly discovered evidence is properly refused, if the evidence might have been produced at the trial by due diligence.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. § 102.*]

7. Appeal and Error (§ 981*)—Review—Judicial Discretion—New Trial.

The exercise of a trial judge's discretion in refusing a new trial, asked on the ground of newly discovered evidence of a cumulative nature, will be interfered with only for manifest abuse.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Solano County; L. G. Harrier and A. J. Buckles, Judges.

Action by the People of the State of California against the Selby Smelting & Lead Company. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed.

Rehearing denied; Beatty, C. J., dissenting.

Chickering & Gregory and F. W. Hall (Curtis H. Lindley and Henry M. Hoyt, 2d, of counsel), for appellant. J. M. Raines, T. T. C. Gregory, and Houghton & Houghton, for the People.

MELVIN, J. This is an action prosecuted in the name of the state by the district attorney of Solano county for the abatement of a nuisance. Judgment was in favor of the state. By it the defendant corporation was enjoined and restrained from permitting fumes from its smelting works to blow over and upon parts of Solano county. From this judgment and from an order denying its motion for a new trial defendant appeals.

[1] The first question presented here relates to the jurisdiction of the superior court of Solano county over the cause of action. The prosecution was instituted under the authority of the statute passed in 1899 (Stats. 1899, p. 103), which provides that "the district attorney of any county of this state in which a public nuisance may now or hereafter shall exist may * * * bring a civil action in the name of the people of the state to abate said nuisance." Appellant contends that since the source of the odors and gases found to be injurious to the inhabitants and crops in a part of Solano county was the smelter located in Contra Costa county, and since the enjoining order must of necessity operate upon this place of production of the noxious vapors, therefore the statute gave the power of suing to abate the nuisance to the district attorney of Contra Costa county and not to the district attorney of Solano county. Appellant's attorneys argue that the nuisance, if any, was the misuse or abuse of the processes used in carrying on the business of smelting ores; that as such it existed in the county of Contra Costa alone; and that, even if injurious to persons and property in another county, the nuisance as such did not exist in any county except where the tortious acts were performed. They insist that the district attorney is a county officer who may only act within the limits of his own county. The cause of action, they say, being not for damages but to *abate* a nuisance, it is strictly local, and the nuisance only "exists" for the purposes of its abatement in the county in which the objectionable fumes and gases are liberated into the air during the processes of smelting ores. They are of the opinion that, under the language of the statute, both the *existence* and the *abatement* in such cases must be local to the same county. Authorities are cited in support of the position taken by appellant that the jurisdiction of an action to abate a nuisance is in the place where the nuisance has its genesis. Undoubtedly that is the law in some jurisdictions. In re Eldred & Ford, 46 Wis. 545, 1 N. W. 175, was a matter arising out of an application made by persons who had been indicted for maintaining a dam not authorized by law, in such way that it obstructed a public highway by causing water to stand thereon. The court, after an elaborate analysis of the cases, held that the offense was indictable only in the county in which the dam was maintained and not in that in which the particular injury was averred. This case, however, seems to be no longer authority in Wisconsin. In the later case of Lohmiller v. Indian Ford Co., 51 Wis. 683, 8 N. W. 601, which was an action for the abatement of a dam alleged to be a nuisance, the court

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said: "In support of the first of these causes of demurrer, the learned counsel for the defendant insists that there is an improper joinder of causes of action for the reason that the lands injured are in Jefferson county, while the dam which occasions the injury is in Rock county; consequently the causes of action so united required different places of trial. The gravamen of the complaint, surely, is for an injury to the plaintiff's land in Jefferson county occasioned by a dam in Rock county. * * * We are inclined to think the action was properly brought in the county in which the subject of the action was situated. * * * Under section 1, c. 123, Tay. Stats. It is true, the cause of the injury is in another county." In Horne et al., Water Com'rs, v. City of Buffalo, 49 Hun, 76, 1 N. Y. Supp. 801, the action was one brought to restrain the authorities of the city of Buffalo from depositing filth in Niagara river so that it should be carried by the current to a place in another county where it would pollute the water supply of the city of Suspension Bridge. In that case the court held that the cause of action was in Erie county, in which Buffalo is situated, and not in Niagara county, where the water was taken from the river for use for the inhabitants of Suspension Bridge. The conclusion reached in that case seems to be dependent, in part at least, upon the particular statute involved, for the court said: "The intention of the Legislature to (make) an action for the abatement of a nuisance local is clearly manifested by classifying it with actions which are in their nature local, such as ejectment and waste. I am clearly of the opinion that the nuisance described in the complaint is situated in the county of Erie, at the place where the defendants are in the habit of dumping foul substances in Niagara river." Appellant also cites Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 539 (Fed. Cas. vol. 23, p. 83), in which it was held that, where injury to property in Connecticut was caused by an unwarranted canal maintained in Rhode Island, the jurisdiction pertained to the circuit in which Rhode Island was situated; but the exclusive remedy sought was injunction, and the court held that, the canal being in Rhode Island, its use could be enjoined only in the circuit in which that state was included. In the case at bar there is no such clash of jurisdictions. If the district attorney of Solano county is authorized to institute the action in that county, the superior court, which has powers that are state-wide, may stretch forth the hand of equity into any county, and restrain the operation of a nuisance-creating agency. In Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 16, 81 C. C. A. 207, Stillman v. White Rock Mfg. Co., supra, is cited with apparent approval. Other interesting cases are called to our attention by appellant; but we need not review them here, as we are of the opinion that the weight of authority, especially in California, is against appellant's view of the law. Our statute defining "nuisance" does not refer to that which produces the injurious substance as the nuisance. The offensive gases, and not the factory emitting them, would come within the definition given by section 3479 of the Civil Code. That section is, in its essential part, as follows: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, * * * is a nuisance." Under this section it seems clear that the offensive matter, and not its source, is regarded. Section 392, C. C. P., provides that an action for injury to real property must be tried in the county in which the property is situated. In the case of City of Marysville v. North Bloomfield Gravel Min. Co., 66 Cal. 343, 5 Pac. 507, in the opinion of the court the following language is found: "This action was brought to abate a nuisance, which it was alleged was causing injury to real property in the county of Yuba, where the action was commenced and is still pending. An action for injuries to real property must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in the Code. C. C. P. § 392. Being an action 'for injuries to real property,' it is not within the class of cases which 'must be tried in the county in which the defendants, or some of them, reside at the commencement of the action.'"

It has been held that an action for an injunction to prevent a defendant from diverting water from a ditch located partly in one county and partly in another may be maintained in the county in which the consequential damage is sustained, although the actual cause of diversion is not in that county. It has also been held that an action to prevent the erection of a dam in one county which, when completed, would cause damage to real property in another county, should be tried in the latter county. Drinkhouse v. Spring Valley Waterworks, 80 Cal. 309, 22 Pac. 252; Last Chance Water Ditch Co. v. Emigrant Ditch Co., 129 Cal. 277, 61 Pac. 960.

In American Strawboard Co. v. State, 70 Ohio St. 140, 71 N. E. 284, the Supreme Court of Ohio was considering an indictment found in Sandusky county for nuisance consisting in the pollution of a stream flowing through that county. The actual corruption of the stream occurred in Seneca county. A statute of Ohio gave jurisdiction of the offense in any county where its inhabitants were aggrieved thereby, but it was urged that this law was in violation of the constitutional provision that an accused shall be tried "by a jury of the county or district in which the offense is alleged to have been committed." This objection was held unsound, the court saying, among other things: "The gravamen of the complaint made in this indictment is not that the American Strawboard Company polluted a water course known as the Sandusky river, but the gist of the complaint is that it so corrupted and polluted the same to the 'damage, prejudice, and common nuisance of the citizens of Sandusky county.' While the offense so charged may grow out of, and may result from, an unlawful act of said Strawboard Company done or committed in Seneca county, yet the specific crime charged is consummated, completed, and takes effect only in Sandusky county. Until such consummation, the crime charged was incomplete; and, until such time as the rights of the citizens of Sandusky county were actually invaded, the particular crime charged in this indictment was not committed." See, also, State v. Lord, 16 N. H. 357; Stamm v. City of Albuquerque, 10 N. M. 491, 62 Pac. 973. The case at bar was properly commenced in Solano county, and there was therefore no error committed by the superior court in overruling the demurrer to the complaint.

[2] By the judgment of the superior court the defendant was enjoined and restrained from permitting the injurious fumes emitted from its works to blow over and upon the premises described in the complaint. Appellant insists that, whatever may be the powers of the court when the Attorney General sues for the elimination of a nuisance, under the statute giving limited power to a district attorney to institute such an action as this, the court could grant no other relief than that of abatement, which alone is mentioned in the act; that the failure to specify the remedy by injunction indicates, under the doctrine "expressio unius est exclusio alterius," that the Legislature never intended to confer upon the district attorney the right to set the machinery of the law in motion for the removal of any nuisances except those necessarily susceptible of abatement. Appellant's attorneys therefore contend that the judgment rendered was beyond the power of the court and void, and that, however desirable it might be in an action of this sort to give the court the power to enjoin the operation of the works producing the nuisance, such power has been withheld and cannot be lawfully exercised. While it is undoubtedly true that, strictly considered, the words "abate" and "enjoin" have technically different meanings (Ruff v. Phillips, 50 Ga. 133), in California the rule is well established that in proper cases injunctive relief, which accomplishes the purposes of abatement without its harsh features, is permissible. In Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. Rep. 51, abatement was the remedy prayed for in plaintiff's bill, and the jury found, as part of their verdict, that the nuisance should be abated. The judgment enjoined defendant from continuing the nuisances complained of. The court said: "An abatement of a nuisance is accomplished in a court of equity by means of an injunction proper and suitable to the facts in each case. Wood on Nuisances, §§ 777–794." See, also, McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 546, 78 Pac. 7; City of Fresno v. Fresno Canal & I. Co. et al., 98 Cal. 184, 32 Pac. 943; Byers v. Colonial Irr. Co., 134 Cal. 555, 66 Pac. 732. The judgment rendered was within the power conferred by the statute in reliance upon which the district attorney instituted the action.

[3] Appellant asserts that the injunction is too sweeping in its terms and assigns that alleged fact as error. The first objection made in that behalf is that the injunction operates immediately, thus giving no opportunity to appellant for experiments to determine whether or not smelting of ores with sulphur bases may be conducted without producing the injuries to property in Solano county for the prevention of which the action was commenced. Our attention is called by counsel for respondent to the fact that the complaint was filed March 14, 1905; the cause was tried in August, 1906; the findings were filed in April, 1907; and the judgment was entered in July, 1908. Evidently the appellant was given ample time and opportunity for experimentation, and there was no abuse of discretion by the chancellor in making the final decree.

[4] The next criticism is that the decree enjoined more than that which constituted a nuisance. An examination of its language, however, fails to convince us that the criticism is well founded. The decree commands that the operation of defendant's works "*as conducted by defendant* in liberating at and therefrom into the air sulphurous and other injurious and noxious gases and smoke and also smoke and fumes and gases, so in the findings of fact herein found to be so offensive to the senses so as to interfere with the comfortable enjoyment of life and property in the manner and to the community and neighborhood as in the said findings of fact set forth and described, generated or produced by such operations without condensing or otherwise disposing of the same or eliminating the same before reaching open air, is as to said city of Benicia and said portion of said Solano county mentioned and referred to in said findings, a public nuisance for the period commencing at or about the middle of the month of March of each year, for eight months in each and every year including the latter half of said month of March." The abatement of the nuisance is then decreed, and defendant and its officers, agents, and servants are enjoined from operating upon ores during the period in each year of the prevalence of the

wind blowing from the defendant's factory towards Benicia without condensing or otherwise disposing of smoke, fumes, and certain enumerated kinds of noxious and injurious gases "so found to be so offensive to the senses, * * * in such a manner so that the same will not reach the open air and will not be blown or carried by said winds over or into or upon the city of Benicia." Read as a whole, the judgment does not restrain the operation of the works except in such manner as to produce smoke, fumes, and gases offensive to the senses and destructive of the property of the people residing in and around Benicia. In other words, appellant is enjoined from maintaining the same sort of nuisance that had proved injurious in the way charged in the complaint and proved on the trial. Judson v. Los Angeles Sub. Gas. Co., 157 Cal. 173, 106 Pac. 581, 26 L. R. A. (N. S.) 183, 21 Ann. Cas. 1247.

In their discussion of the appeal from the order denying the motion for a new trial, appellant's attorneys have abandoned all exceptions taken to the admission of evidence during the trial save the first one, which raises the same question as that presented by the demurrer to the complaint. As we have previously disposed of that question herein, we need discuss it no further.

[5] One of the findings is attacked on the ground that it is not supported by the evidence. It was to the effect that during the three years before the trial, and prior thereto, defendant had gradually increased the size of its works, and that the amount of sulphurous and other noxious fumes and gases had been "increased during such time." Appellant calls our attention to the fact that Mr. Von der Ropp, a witness, said at the trial that the smelting plant was giving off 5½ tons of sulphur a day as against 12 tons formerly poured into the atmosphere. But the same witness testified that there was a gradual increase in the quantity of fumes emitted from the furnaces up to 1895; that since that time it had been "fairly steady"; and that the increase in production due to the remodeling of the entire plant had been going on "right along." It is true that a decrease in the amount of sulphur-bearing ores roasted at the works of appellant was shown. This was due to the sending of certain ores to other mills, but the decrease occurred after the complaint was filed and could have no effect upon the findings which are made as of the time of the commencement of the action. It is true that the proof showed a practical elimination of all danger from the escape of lead fumes into the air due to the construction of a bag house. But the evidence showed that the damage was caused principally by sulphurous gases. It makes no difference that other actions against this defendant by private persons were based upon the theory that the lead fumes caused damage to people and stock. Neither the allegations nor proof of plaintiff here nor the court's findings were limited to that theory or its establishment. The finding, which is attacked, was supported by the evidence. No other findings are specifically criticised by appellant's counsel in their brief. Therefore we proceed to the consideration of that part of the motion for new trial based upon the assertion of newly discovered evidence.

[6, 7] We pass respondent's contention that the affidavits of newly discovered evidence are not properly authenticated in the record. Our examination of them has been such that we are prepared to pass upon the merits of the claim that the court abused its discretion in refusing to grant a new trial. By a series of experiments appellant sought to show, and offered affidavits tending to prove, that complaints were made by residents of Benicia and vicinity of the nuisance produced by fumes from the smelter on days when it was not in operation; and that the disagreeable odors were traceable to sources other than the Selby smelter, notably to the petroleum refineries of the Union Oil Works. But these facts were all such as might have been produced by due diligence before the trial. Indeed, at the trial there was testimony upon the part of Prof. O'Neill, Mr. F. E. Wyman, Mr. W. D. Hyde, Prof. Osterhaut, Mr. Albert S. Colton, and Mr. Von der Ropp, to the effect that disagreeable fumes were emitted by the refineries of the Union Oil Works and other manufactories on the shores of the bay. Evidence of later experiments would be at best but cumulative. Evidence of complaints on days when the smelter was inactive tended merely to show that other causes of discomfort existed—another phase of the evidence adduced at the trial regarding the oil refineries. Proof that such complaints had been erroneously made against appellant would be likewise cumulative. After a careful examination of these affidavits, we cannot say that they exhibit so strong a defense that the court below abused its discretion in failing to grant a new trial. Undoubtedly, affidavits presenting evidence of a cumulative character may, and often do, cause a trial judge to grant a motion for a new trial; but, whether such motion receives favorable or adverse ruling, the whole matter is addressed to the judge, whose discretion will not by this court be interfered with except in cases of manifest abuse. Oberlander v. Fixen Co., 129 Cal. 692, 62 Pac. 254.

Appellant seeks the benefit of the doctrine of comparative injuries, sometimes known as "the balance of hardship," asserting that since the discomfort and injury caused to the inhabitants of Solano county by the fumes from the smelter are much less than the hardship suffered by the corporation in the partial suppression of its business, injunctive process should be denied. A similar question was discussed in one of the opinions in Hulbert v. California Portland Cement Co., 118 Pac. 931, but that opinion was not signed by a majority of the court, as the matter was not regarded by some of the justices as being essential to the determination of the proceeding then before the court. As this is an "appeal on the merits," and as the question is now squarely presented, we adopt the views expressed in the above-mentioned opinion.

It follows from the foregoing discussion that the judgment and order from which the defendant has appealed must be affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.

BEATTY, C. J., dissents. See 124 Pac. 1135.

(163 Cal. 60)

WORLEY v. SPRECKELS BROS. COMMERCIAL CO. (L. A. 2,864.)

(Supreme Court of California. June 11, 1912. Rehearing Denied July 11, 1912.)

1. Appeal and Error (§ 528*) — Record — Sufficiency—Action on Motion for New Trial.

A record containing a copy of a minute order denying a motion for a new trial, properly certified by the clerk in his certificate attached to the transcript, sufficiently shows an order denying a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2374, 2384–2388; Dec. Dig. § 528.*]

2. Master and Servant (§ 129*)—Injury to Employé—Proximate Cause.

In an employé's personal injury action, there can be no recovery on account of defective machinery or appliances, or unsafe place in which to work, unless the same was the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

3. Master and Servant (§ 129*)—Injury to Employé—Proximate Cause.

In an action for injury to a longshoreman who was crushed between iron rails on one side of a car and a load which was being hoisted from a ship, caused by a winch driver moving the load in the wrong direction, the presence of the rails cannot be deemed the proximate cause of the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. § 129.*]

4. Master and Servant (§§ 173, 177*)—Fellow Servants—Employer's Liability.

An employer of a longshoreman is not liable for injury to him while unloading a vessel, caused by mere negligence of a fellow employé in operating a winch, but is liable if the fellow employé was incompetent, and if the employer knew of such incompetency or could have known of it by ordinary care in employing or retaining the fellow employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 307, 343–346, 352–353; Dec. Dig. §§ 173, 177.*]

5. Appeal and Error (§ 1002*)—Review—Findings—Conclusiveness.

Findings sustained by substantial evidence are conclusive on appeal, however strongly the evidence may be opposed to other evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

6. Master and Servant (§ 279*)—Injury to Longshoreman—Incompetency of Fellow Employé—Evidence—Sufficiency.

In an action for injury to a longshoreman while unloading a vessel caused by a winch driver moving a load in the wrong direction, evidence *held* to sustain a finding that the winch driver was incompetent and that defendant was negligent in employing him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973–975, 978, 980; Dec. Dig. § 279.*]

7. Master and Servant (§ 170*)—Fellow Servants — Employment — "Ordinary Care."

The "ordinary care" exacted in employing servants is that degree of care that a man of ordinary prudence would use in view of the nature of the employment and the consequences of employing an incompetent person.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 336; Dec. Dig. § 170.*

For other definitions, see Words and Phrases, vol. 6, pp. 5029–5042; vol. 8, pp. 7739–7740.]

8. Master and Servant (§ 297*)—Findings—Consistency with General Verdict.

In an employé's personal injury action, special findings that the condition of a flat car, the failure of a fellow employé to obey a signal, his incompetency and negligence in his employment, each was the proximate cause of plaintiff's injury, are not so inconsistent as to vitiate a general verdict for plaintiff; it appearing that the jury meant that all those things contributed to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195–1198; Dec. Dig. § 297.*]

9. Master and Servant (§ 264*)—Injury to Employé—Liability—Grounds.

Recovery may be had against an employer for injury caused by negligence in providing an unsafe place to work, or negligence in employing an incompetent servant; proof of both kinds of negligence being unnecessary.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861–876; Dec. Dig. § 264.*]

10. Master and Servant (§ 271*)—Incompetency of Fellow Employé—Evidence.

Generally evidence of particular acts tending to show negligence or incompetency of a fellow employé is admissible to show that he was unfit or incompetent, and hence in an action for injury to a longshoreman who was caught between a load which was being moved from a ship onto a flat car, through a winch driver moving the load in the wrong direction on receiving a signal, testimony that the winch driver on a previous occasion had "smashed up some furniture or boxes" was admissible as tending to show that he was unfit or incompetent for his duties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 347, 928–931; Dec. Dig. § 271.*]

11. Witnesses (§ 380*)—Adverse Witnesses—Surprise.

That a party was surprised by a witness' failure to give testimony expected of him does not entitle the former to show statements made by the witness inconsistent with his testimony, where the testimony is not adverse.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1210–1219; Dec. Dig. § 380.*]

12. Appeal and Error (§ 1048*)—Harmless Error—Admission of Testimony.

On an issue of the incompetency of a fellow employé, a winch driver, through whose negligence plaintiff was injured, any error in permitting plaintiff to ask his own witness whether witness had not said that he "had to keep after the winch driver all the time," and that "there was always something wrong," to show statements contradicting unexpected testimony that witness could not say whether the winch driver was competent, was harmless to defendant, where the witness answered that he did not remember stating that "there was always something wrong" and testified that he had "to keep after" all winch drivers.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. § 1048.*]

13. Witnesses (§ 390*)—Impeachment—Inconsistent Statements.

Testimony that a witness made statements out of court inconsistent with his testimony is admissible to impeach him, though the impeaching evidence be inadmissible for any other purpose; but the inconsistency must appear prima facie before the impeaching declaration can be introduced.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.*]

14. Witnesses (§ 390*)—Impeachment—Inconsistent Statements.

Where on an issue of incompetency of a winch driver, through whose negligence in moving a load plaintiff, a fellow employé, was injured, a witness for defendant testified that, when the winch driver worked for him, he never had any difficulty in understanding witness' orders, and that witness never heard any complaint against him, plaintiff was properly permitted to show that witness had said to him that he did not want to be "drawn into this case," but that he would not have a fellow like the winch driver drive a winch for him unless he had to.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.*]

15. Pleading (§ 356*)—Answer—Amendment—Filing—Leave—Necessity.

An amended answer filed after joinder of issue and without leave of court, or consent of plaintiff, is properly stricken on plaintiff's motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1111–1119; Dec. Dig. § 356.*]

16. Appeal and Error (§ 681*)—Review—Amendment of Pleading.

A ruling refusing to allow an amended answer to be filed is not reviewable where the nature of the amendment desired does not appear.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2883, 2884; Dec. Dig. § 681.*]

17. Master and Servant (§ 220*)—Incompetent Fellow Servant — Employer's Responsibility.

In an action for injury to a longshoreman, based on incompetency of a fellow employé, a winch driver, through whose negligence plaintiff was injured, it was no defense that plaintiff and the winch driver were comembers of a longshoremen's union, and that plaintiff made no objection as to the winch driver's competency.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 625–637, 641, 644–647; Dec. Dig. § 220.*]

18. Master and Servant (§ 294*)—Injury to Employé—Instructions.

In an action for injury to a longshoreman through incompetency of a fellow employé, it was proper to instruct that, as to any obligation which the law imposes upon an employer, all of which had been specified in prior instructions, the employer is liable notwithstanding neglect to perform it is that of an agent to whom he has delegated performance, even though the employer used due care in selecting the agent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1157, 1161, 1162–1167; Dec. Dig. § 294.*]

19. Appeal and Error (§ 1068*)—Harmless Error—Instructions.

In an employé's personal injury action, any error in an instruction on assumption of risk was harmless where the jury found that the injury was proximately caused by negligence of a fellow employé in employing whom the employer was negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225, 4228, 4230; Dec. Dig. § 1068.*]

20. Trial (§ 199*)—Instructions—Refusal.

In an employé's personal injury action, an instruction that, if the proximate cause of the accident was the furnishing of an unsafe place in which to work, plaintiff was guilty of contributory negligence, and the jury must find for defendant, was properly refused where the evidence was not such as to make the question of contributory negligence one of law for the court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 467–470; Dec. Dig. § 199.*]

21. Appeal and Error (§ 1068*)—Instructions—Refusal—Prejudice.

In an employé's personal injury action, it was not prejudicial error to refuse to instruct that plaintiff and another employé, through whose negligence plaintiff was injured, were fellow servants, where the jury found that such other employé was incompetent and that defendant employer had knowledge thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

22. Trial (§ 260*)—Instructions—Refusal—Matter Covered.

An instruction covered by other instructions given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

Department 1. Appeal from Superior Court, San Diego County; W. R. Guy, Judge.

Action by H. O. Worley against Spreckels Bros. Commercial Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Harry L. Titus, James E. Wadham, and Clark A. Nichols, for appellant. Crouch & Crouch, for respondent.

ANGELLOTTI, J. This is an action for damages for personal injuries alleged to have been suffered by reason of the negligence of defendant. Plaintiff had verdict and judgment. Defendant appeals from the judgment and from an order denying its motion for a new trial. There is no force in the objection made by plaintiff to a consideration of the defendant's bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Counsel for plaintiff is in error in his statement that the record does not show that an order has been made denying defendant's motion for a new trial. It does contain a copy of the minute order to that effect, properly certified in his certificate attached to the transcript by the clerk. Mendocino County v. Peters, 2 Cal. App. 24, 28, 82 Pac. 1122.

At the time he received the injuries on account of which this action was brought, namely, on July 20, 1909, plaintiff, who was a longshoreman, was working for defendant as a slingman in helping unload the steamer Nevadan at San Diego. He had been engaged in this particular work only since about 2:30 o'clock of the preceding afternoon. The ship was lying at a wharf, and loads of merchandise were being hoisted from its hold by a steam winch and lowered to flat cars on the wharf, whence they were trucked into a warehouse a few feet away. The ship was being unloaded from its three hatches, two winch drivers and a slingman being allotted to each hatch. Plaintiff's duty was to receive the loads coming from hatch No. 3 as they were lowered to a flat car, and to there unhook them, and in the performance of this duty it was necessary for him to stand on the car. The winches were operated by steam power, and caused to either go ahead or reverse by the use of a lever after turning a screw which let in the steam. At hatch 3 one Vargas, a longshoreman who had been assigned to this particular duty, was acting as "amidships winch driver," and another man was acting as "burden winch driver." There was evidence to support a conclusion that plaintiff did not know that Vargas was acting as the amidships winch driver. The load is raised from the ship by the amidships winch and lowered to the flat car by the burden winch. When, so being lowered, it reaches its destination, it may easily be unhooked if the rope has been sufficiently slackened. If this has not been done, it becomes necessary for the amidships winch driver to slacken the rope by moving his winch in the opposite direction from that in which it was moved in hoisting the load from the ship. The winch drivers operated in response to signals, made by the hand or by words, given either directly by a hatch tender on the ship, or by the sling tender on shore, through the hatch tender or directly. The usual directions by words were "come back," "go ahead," and "hold it," and when the load had been lowered by the burden winch, and it was desired that the rope should be slackened, "come back on the amidships," a direction to the amidships winch driver to reverse, or "come back." At the time of the accident, the hatch tender had gone below, and it was necessary for plaintiff to give such signals as were required directly to the winch drivers. Loads of coils of wire were being taken out of hatch 3 and lowered to the flat car on which plaintiff was working. A load of such coils was lowered, coming down partially on said car, and plaintiff proceeded to unhook it. Finding that the rope was not slack enough to permit this to be done, standing with his back to the ship and facing the load, he called out "come back on the amidships," and at the same time gave the signal therefor with his hand. Vargas, instead of "coming back," went ahead with his winch, thereby pulling the load over against the plaintiff, who was thus caught between the load and some iron beams which had previously been unloaded from the ship and piled along the side of the car nearest the ship. Although he and some of the other men working there continued to call out "come back," Vargas for some little time continued to go ahead, with the result that, before he finally stopped, plaintiff was very seriously injured by being crushed between the load and the iron beams. No claim is made in this court that the damages awarded by the jury are excessive in amount.

The evidence clearly shows that plaintiff and Vargas were fellow servants, and, under the law as it was at the time of the accident, plaintiff could not hold his employer liable for injuries due solely to the mere negligence of Vargas. The claim of plaintiff is that defendant negligently failed to furnish him a safe place in which to work, and that it failed to use ordinary care in the selection or retention of Vargas as winch driver, whose alleged incompetency, it is claimed, was the proximate cause of the accident.

The jury, in addition to their general verdict, answered certain questions submitted to them on particular issues of fact. They found, in answer to such questions (a) that the condition on the surface of the car on which plaintiff worked was the proximate cause of his injury; (b) that the failure of Vargas to obey the signal given him by plaintiff was the proximate cause of his injury; (c) that defendant failed to use ordinary care in selecting and retaining Vargas as winch driver, and that Vargas was incompetent to act as such; (d) that defendant either had knowledge of such incompetency or should have had it prior to plaintiff's injury; and (e) that the failure of defendant to use ordinary care in the selection and retention of Vargas was the proximate cause of plaintiff's injury.

[2, 3] The claim in regard to the negligent furnishing of an unsafe place in which to work was based upon the fact that the flat car upon which plaintiff was required to be was loaded on one side with iron beams as

already indicated. The only connection of the iron rails on this car with plaintiff's accident is that they served as a bulwark against which he was crushed by the load of wire when Vargas failed to follow the order given him, and directly contrary to such order moved the load in the direction of and against plaintiff. Of course there can be no recovery on account of defective machinery or appliances or unsafe place in which to work unless the same has directly caused or contributed to the injury, in other words, was a proximate cause of the injury. It may be assumed that, under the authorities cited by defendant, the sole proximate cause of the injury in this case was either the negligence or incompetency of Vargas, and that the condition of the car was not the proximate cause of the injury. See Luman v. Golden, etc., Co., 140 Cal. 700, 707, 74 Pac. 307; Vizelich v. Southern Pacific Co., 126 Cal. 587, 59 Pac. 129; Trewatha v. Buchanan, etc., Co., 96 Cal. 494, 500, 28 Pac. 571, 31 Pac. 561; Kevern v. Providence, etc., Co., 70 Cal. 392, 11 Pac. 740.

[4, 5] As we have said, in view of the fellow-servant rule, defendant would not be liable to plaintiff for these injuries if they were solely due to the mere negligence of Vargas, a fellow servant of plaintiff. But if Vargas was unfit, or, as it is generally put, incompetent to perform the duties of an amidships winch driver, by reason of any cause, and defendant knew of such unfitness or incompetency, or would have known it if it had exercised ordinary care in the matter of his employment or retention in that capacity, it being one of the obligations of an employer to use such care with a view to the safety of all his employés, and if such unfitness or incompetency upon the part of Vargas was the proximate cause of the injury to plaintiff, then admittedly defendant was liable to plaintiff for the damages caused by such injury. See Still v. San Francisco, etc., Ry. Co., 154 Cal. 559, 563, 98 Pac. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177. The special verdict of the jury found all these facts in favor of plaintiff, and the conclusions there expressed fully support the general verdict. The question is presented whether there was enough in the evidence from which the jury might find the existence of these facts essential to the liability of defendant. It should be unnecessary to suggest that these findings are conclusive upon us if there be substantial evidence in support thereof, no matter how strongly such evidence may be opposed to other evidence given on the trial.

[6] We are of the opinion that there was enough in the evidence to legally sustain the conclusion of the jury to the effect that Vargas was, in fact, unfit or incompetent to act as amidships winch driver.

Taking into consideration the duties of one in such a position, the dangers reasonably to be apprehended from there having one who is not able to at once understand and fully appreciate the nature of such orders as may be given him in the matter of running such a winch, and the fact that it was the custom to give such orders either by word of mouth or by motion of the hand, as the party giving the same might at the moment select, it cannot be held that it may not reasonably be concluded as matter of fact that one who, by reason of his lack of knowledge of the English language at a place where that language is the one ordinarily used by the workmen, is not able to at once appreciate the meaning of a direction given to him in that language, is not fit or competent for the discharge of the duties of such a position. Failure to comply promptly with an order in regard to the moving of the winch might very reasonably be anticipated to cause great personal injury to those engaged in the work of loading or unloading a vessel, as well as damage to property, and the ability to at once understand and appreciate the full meaning of the words used to convey such orders would seem to be a primary requisite for the position in question.

The case of Date v. New York, etc., Co., 114 App. Div. 789, 100 N. Y. Supp. 171, cited by appellant, is not in point. There the employés who did not understand the English language were engaged in the simple work of pushing a car, and pushed it against a ladder on which the plaintiff was standing, thereby throwing him to the ground. The court said that, in the employment of men to do such "simple work as pushing a car," it did not see how it could occur to any one that the fact that they could not understand the English language would make it dangerous to others for them to push a car along a track, and that "the defendant could not have anticipated such an accident from such a cause, and that is the test of its negligence or breach of duty in putting them at such work." A very different situation is presented in the case of such an employé as is here involved.

Consideration of the evidence has satisfied us that there is evidence enough to sufficiently support a conclusion that Vargas did not measure up to the requirements in this respect. It is true that there is evidence opposed to this theory, but we are bound in view of the verdict to take the evidence most favorable to plaintiff. And while defendant relies very strongly on evidence to the effect that Vargas had worked in this particular capacity on some five or six ships for three or four days on each ship, without complaint or accident, there was positive evidence to the effect that, when on the day of the accident he was directed by the captain in charge to take this place, he remonstrated and said in Spanish (a language understood by the captain) substantially that he did not understand the winch much, and that he (the captain) kicked against him too much every time he drove a winch, and that the captain simply ordered him to take that place or go home.

There was also sufficient evidence to support a conclusion that the accident was due to the inability or incompetency of Vargas in this respect—to his failure to at once understand and appreciate the order given him to "come back on the amidships"—by reason of his insufficient acquaintance with the English language and his consequent lack of comprehension of the meaning of the words used. His very meager knowledge of the English language was quite clearly shown. While, when orders were given by word of mouth instead of by the mere motion of the hand, it appears that the orders "come back," "go ahead," and "hold it" were quite common, the claim of respondent that the order to "come back on the amidships" is a somewhat unusual one because the situation seldom requires it does not appear to be unreasonable in the light of the record. There is nothing to show that Vargas had ever been called upon to respond to this particular order, or that he knew exactly what the words meant. His conduct, when the order was given to him, goes far, under all the circumstances, to show that he did not understand its meaning. While it may be, as claimed by defendant, that he did understand, and simply forgot or became confused, and thus was impelled to turn the lever the wrong way, we are not warranted in holding that the jury could not reasonably infer that his action was due to a misunderstanding of the order, caused by his ignorance of the English language. The fact that plaintiff also gave the proper signal with his hand at the time he called out his direction does not compel a contrary conclusion. Vargas may not have seen the signal, even if he was in a position where he could have done so, as to which the record leaves us in doubt.

[7] In view of what has already been said, we cannot doubt that the jury were authorized to conclude that defendant failed to use ordinary care in the matter of the employment of Vargas in the capacity of amidships winch driver. As was said in Still v. San Francisco, etc., Co., 154 Cal. 559, 567, 98 Pac. 672, 20 L. R. A. (N. S.) 322, 129 Am. St. Rep. 177, "under all the authorities the term 'ordinary care' as used in this connection means that degree of care that a man of ordinary prudence would use in view of the nature of the employment and the consequences of the employment of an incompetent person—a degree of care commensurate with the nature and danger of the business and the grade of service for which the servant is intended, and the hazards to which other servants are to be exposed from the employment of a careless or incompetent person." The evidence was clearly sufficient to support a conclusion that those who employed and assigned Vargas to the place in question had full knowledge of his ignorance of the English language. Whether they exercised ordinary care in assigning him to this work, in view of the nature of the employment and the consequences of the employment of one not sufficiently acquainted with the English language to at once fully appreciate and understand all orders that might be given to him in that language, was a question upon which reasonable minds might well differ, and therefore one for the jury.

[8, 9] The fact that the jury found by the special verdict that each of several things was "the proximate cause" of plaintiff's injuries, viz., the condition of the surface of the flat car, the failure of Vargas to obey the signal, the incompetency of Vargas, and the lack of ordinary care on the part of defendant in the selection of Vargas, does not render such verdict so inconsistent as to require that it and the general verdict in favor of plaintiff be set aside. The meaning of the answers to the questions submitted to the jury is obvious. They simply concluded that all these things contributed to the injury. If the conclusion that the condition on the surface of the flat car was a proximate cause of the injury be not sustained by the evidence, it still remains that the other findings are ample to sustain the general verdict. We are utterly at a loss to understand defendant's claim that plaintiff was not entitled to recover unless he proved "both an unsafe place to work and negligence in employing an incompetent servant." Negligence in either respect, proximately causing the injury, is a sufficient basis for the recovery.

[10] There was no error in allowing proof of a prior act of Vargas, while acting as winch driver for defendant, tending to show negligence or incompetency, which act was known to defendant's agents in charge. This evidence, which was simply that Vargas on a prior occasion, by his manner of handling the winch, had "smashed up some furniture or boxes," was not very important, and it is clear that, standing alone, it would not have been sufficient basis for a conclusion that Vargas was in fact unfit or incompetent. Holland v. Southern Pacific Co., 100 Cal. 240, 34 Pac. 666. But it was evidence tending in some degree to show unfitness or incompetency, which might properly be taken into consideration in connection with other evidence on that question. We understand it to be the general rule that evidence of individual acts tending to show negligence or incompetency is admissible for the purpose of showing that the employé was in fact unfit or incompetent. This was declared to be the rule in Gier v. Los Angeles, etc., Ry. Co., 108 Cal. 129, 134, 41 Pac. 22. If, as claimed, the statement there was obiter dictum, we nevertheless consider it correct, and the California cases cited decide nothing to the contrary.

[11, 12] One Joe Myers, who was a foreman and hatch tender at the time of the accident, was called as a witness by plaintiff. He testified on his direct examination that Vargas was a Mexican, and said: "I do not know whether he could speak the English language. He could understand a little, understand enough to do his work. I could not say whether he was a competent winch driver." Plaintiff's attorney was then permitted to elicit from the witness testimony to the effect that he (the witness) had told him (the attorney) that he had to keep after Vargas all the time, "hollering at him about going ahead too fast or too slow," and that he did not remember using the words, "There was always something wrong." He further testified that he had to "keep after" all winch drivers about going too fast or too slow. No other evidence was offered by plaintiff to show that Myers had ever said anything to the effect that there was always something wrong with Vargas. The theory upon which plaintiff was permitted to elicit this evidence was that, where a witness called by a party has given damaging testimony against him, the party calling him may show, where he is surprised by the adverse testimony given by his own witness, that such witness has previously made statements inconsistent with his testimony given on the trial. It is thoroughly settled, however, that the rule invoked in such cases has no application where such witness does not testify adversely to the party calling him, but merely fails to give certain testimony expected of him. See People v. Creeks, 141 Cal. 529, 75 Pac. 101, and cases there cited; Bollinger v. Bollinger, 154 Cal. 695, 705, 99 Pac. 196, and cases there cited. But, if we assume that the situation was not such as to make the rule relied on by plaintiff applicable, we are of the opinion that it should be held that defendant was not prejudiced by anything testified to by Myers in this regard. It was not shown thereby that Myers had ever said anything to the effect that there was always something wrong. He flatly said that he did not remember saying anything of that kind, and no testimony was subsequently introduced by plaintiff to show that he ever did make any such statement. The other statement, viz., about "going ahead too fast or too slow," was of no importance in view of the circumstances of the accident, and it may fairly be said thereof that evidence concerning it was not prejudicial.

[13, 14] Patrick Walsh was called as a witness for defendant, and testified on direct examination that he had worked in the capacity of foreman of the hatch or hatch tender on several occasions, and that Vargas had worked under him. He said: "So far as I know, when Vargas was working under me he never had any difficulty in understanding me when I gave him orders; I always spoke to him in English, and cannot speak anything else. During the time, about two years before July 20, 1909, I was nearly always present when a ship was being unloaded in some capacity; I never heard any complaint against Vargas as a winchman." On cross-examination he denied that on a previous occasion, the time and place being specified, he had said to plaintiff, "I don't want to be drawn into this case, but I would be G—— d—— if I would have a fellow like that drive a winch for me," and also, "I wouldn't hire a man like Vargas unless I had to." Plaintiff was allowed, in rebuttal, to testify that Walsh made such statements to him at such time and place. The action of the trial court in allowing this testimony is claimed to have constituted prejudicial error.

If such prior statements may properly be held to be inconsistent with the testimony given by Walsh on his direct examination, evidence of such statements (he denying them and the proper foundation having been laid) was admissible, of course, for the purpose of impeaching the witness, although such evidence was not admissible for any other purpose. See Keyes v. Geary St., etc., R. R. Co., 152 Cal. 437, 93 Pac. 88. But, to justify the admission of a prior statement under this rule, it is universally recognized that there must be an inconsistency between it and the testimony, and such inconsistency must appear prima facie before the alleged impeaching declaration can be introduced. But obviously, as is said in section 1040 of Wigmore on Evidence (volume 2): "Such is the possible variety of statement that it is often difficult to determine whether this inconsistency exists." It is further said in the same section: "As a general principle, it is to be understood that this inconsistency is to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said or done. On a comparison of the two utterances, are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?" Gauged by this test, which appears to us to be entirely fair, we think the evidence was admissible. The whole impression and effect of the testimony given by Walsh on his direct examination was that, in his opinion, Vargas had a sufficient understanding of the English language to properly enable him to perform the duties of a winchman, and that he was in every way competent to perform those duties. The natural impression or effect of the language used in the alleged prior statements was that, in his opinion, Vargas was not fit or competent for that place. We believe the alleged prior statements were of such a nature that plaintiff was entitled to have them go to the jury on the question of the credibility of the witness Walsh.

We are aware that there are some expressions in the opinion in People v. Collum, 122 Cal. 186, 54 Pac. 589, that may appear inconsistent with our ruling on this question. In so far as that opinion may be construed as holding that, notwithstanding the natural effect and impression of inconsistency, nevertheless, if both statements (the one on the trial and the prior statement) may be literally true on some conceivable hypothesis, the prior statement may not be shown, we think it goes too far and does not state the correct rule. It is claimed here that possibly Walsh had a personal dislike for Vargas because he was a Mexican or for some other reason entirely consistent with his competency, and that it may have been on this account alone that he would not have him run a winch for him unless he had to. If such were the case, it is said the two statements would be absolutely consistent. But we think it is sufficient to warrant the proof of the prior statement that the natural effect and impression of the two statements is that they are inconsistent. The prior statement is open to explanation as to its meaning by the impeached witness if he has any explanation to make, and its effect may be limited by instruction to the jury solely to the question of the credibility of the witness.

[15-17] Defendant having filed its answer on January 10, 1910, on February 10, 1910, without leave of court and without the consent of plaintiff, filed an amended answer, setting up an additional defense to those contained in the original answer. Plaintiff on February 24, 1910, moved, on notice, to strike the same from the files on the ground that it had been filed after issue joined, without leave of court or consent of plaintiff. The motion was granted on March 2, 1910, the day named in the notice of motion, which was the day of the commencement of the trial. No claim was apparently made in the lower court or is made here that the motion was not well grounded. The amended answer having been filed without leave of court, there was no error in ordering it stricken from the files. It does not appear from the bill of exceptions, which purports to contain the proceedings in relation to the matter of said amended answer, that any application for leave to file an amended answer was made to the court at any time. It is doubtful whether the purported minute entry of February 28, 1910, found in the judgment roll, which simply shows such an application "for leave to file an amendment to the answer," and the denial, an exception to the ruling, and leave to prepare and serve a bill of exceptions within 30 days, in so far as it shows such application, is any part of the judgment roll or of the record. But, if it can be considered on this appeal, there is nothing therein to show what was the nature of the amendment then desired to be presented. So that the question whether the court committed any error in refusing to allow an amended answer to be filed is really not presented on this appeal. But, assuming that the proposed new matter was the same as the new matter incorporated in the amended answer that was stricken out, we are satisfied that the proposed new defense did not state facts sufficient to constitute a defense to plaintiff's action. It was sought thereby to bring the case within the doctrine declared in Callan v. Bull, 113 Cal. 593, 598, 45 Pac. 1017, as follows: "The master's liability for the negligence of his servant rests upon his right to select the servant and to control his work, but, when this selection and control rests in another, he is freed from such liability. The same principles govern the liability of a contractor for an injury resulting from the use of defective materials in his work. He can be held liable only when he has the right of selecting the materials." Substantially it was alleged in the proposed new defense that plaintiff and Vargas were both members of the Longshoremen's Union, members of which defendant employed in the loading and unloading of vessels; that one of the rules of said union, to which both plaintiff and Vargas had subscribed, was that defendant should not be permitted to employ any person other than members of said union, so long as members of said union presented themselves for work; that plaintiff and Vargas both presented themselves to defendant for employment on July 19, 1909, as longshoremen and members of said union; that plaintiff and Vargas worked together on July 19th and a part of July 20th, and plaintiff made no complaint to the union, to any of its members, or to defendant, as to the competency of Vargas, but accepted him as winchman and worked with him without complaint until the time of the accident. There was nothing in all this to show either that defendant's right to select a competent winchman was in any degree impaired, or that plaintiff in any way guaranteed the fitness or competency of Vargas as a winchman. The difference between these allegations and the facts of the case of Farmer v. Kearney, 115 La. 722, 39 South. 967, 3 L. R. A. (N. S.) 1105, as the same are stated in appellant's brief, is obvious from a mere reading of such statement.

[18, 19] We find no prejudicial error in such instructions given to the jury as are complained of. The instruction to the effect that, as to any obligation which the law imposes upon the employer, all of which had been specified in prior instructions, the employer is liable, notwithstanding the neglect to perform it is that of an agent to whom he has delegated the performance, even though the employer exercised due care in the selection of such agent, correctly stated the law, and was pertinent to the facts of the case. The instruction in regard to the character of risks assumed by one accepting employment correctly stated the law. It also may be said of it that it cannot be held to have been prejudicial, in view of the special findings of the jury to the effect that Vargas was incompetent, that his incompe-

tency was a proximate cause of the accident, and that defendant neglected to use ordinary care in employing and retaining him in the position of winchman. Even if we assume that it may well have been omitted, we cannot see that the instruction relating to the duty of an employer in cases where the service in which an employé is employed is such as to endanger the lives and persons of coemployés, if the employé is not competent, which is correct as an abstract proposition of law, could possibly have prejudiced defendant, especially in view of the other instructions given. The instructions as a whole were very fair and complete, fully presenting the propositions of law applicable in a manner free from criticism.

[20-22] As to the refusal of the court to give certain instructions requested by defendant: The requested instruction to the effect that, if the proximate cause of the injury was the furnishing by defendant of an unsafe place in which to work, then plaintiff was guilty of contributory negligence, and the jury must find for the defendant, was properly refused. Whatever other objections there may be thereto, it was incorrect in view of the fact that the evidence was not such as to make the question of contributory negligence on the part of plaintiff one of law for the court. In view of the findings of the jury, the failure of the court to give a requested instruction declaring in terms that plaintiff and Vargas were fellow servants cannot be held prejudicial. The long proposed instruction in relation to the duty of the jury in regard to the question of the competency of Vargas at the time of the accident and the question whether the defendant exercised ordinary care in the matter of his employment as winch driver at the time of the accident was fairly covered, we think, in so far as it was correct, by other instructions. There is no other point made that requires notice here.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

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163 Cal. 31

OTIS ELEVATOR CO. v. FIRST NAT. BANK OF SAN FRANCISCO.
(S. F. 4,986.)

(Supreme Court of California. June 8, 1912. Rehearing Denied July 8, 1912.)

1. Banks and Banking (§ 154*)—Forged Checks—Actions—Pleading.

Where plaintiff sued to recover a balance in defendant's bank, the existence of which defendant denied because of the payment of forged checks, it was not necessary that any issue on the alteration of the checks should be made by the pleadings to entitle defendant to take advantage of plaintiff's negligence in providing for the preparation and execution of checks by its agents.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 502-512, 514-533; Dec. Dig. § 154.*]

2. Banks and Banking (§ 148*)—Payment of Forged Checks—Loss.

The rule that, as between a bank and its customers, payment of forged or altered checks by the bank is made at its peril applies stringently in cases of simple forgery which involve no other elements, but does not apply where the customer's negligence has contributed to the payment of the checks by the bank, or where the facts are such as to estop the customer to deny the correctness of the payment.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.*]

3. Principal and Agent (§ 159*)—Liability of Principal—Negligence.

A principal is liable to third persons not only for the negligence of its agent in the transaction of the business of the agency, but also for the frauds, torts, or other wrongful acts committed by such agent in and as a part of the transaction of such business.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 599-613; Dec. Dig. § 159.*]

4. Banks and Banking (§ 148*)—Checks—Forgery—Payment by Bank—Validity—Estoppel to Deny.

Plaintiff's agent, B., was required to write out checks and transmit them to the payees after they had been signed by plaintiff's general manager, and to fill out, present, and have cashed at defendant bank checks signed by plaintiff and payable to "cash" or "bearer," or to the order of the assistant manager. Defendant's paying teller had frequently cashed such checks for B. in the ordinary course of business. B., having written out and procured the manager's signature to a check to M. & Co. for $3.50, changed it by erasing the name of the payee and inserting the word "bearer," stamping a different date thereon, and by obliterating the original amount and inserting $5,500, further indicating the amount by a perforating device. He then indorsed the check, presented it to defendant's teller, and received payment. At about the same time he took a check which the manager had signed and left with him, payable to the assistant manager's order and filled out in B.'s own handwriting for $400, and raised it to $1,400. This he presented to the assistant manager and, after it was indorsed by him, B. punched the figures with the safety device, presented the check, and received payment. In neither check was there any visible alteration or indication that they had been raised. *Held*, that plaintiff was estopped to deny that B.'s demand for payment of the checks was within his apparent authority and was therefore not entitled to recover the amount thereof from the bank under the rule that, where one of two innocent parties must suffer from the tortious conduct of a third, he who puts it in the power of the third person to do the wrong must bear the loss.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-452; Dec. Dig. § 148.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by the Otis Elevator Company against the First National Bank of San Francisco. From a judgment denying defendant's motion for a new trial, it appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Lloyd & Wood, R. H. Lloyd, T. C. Van Ness, and Percy E. Towne (Cushing & Cushing, of counsel), for appellant. J. A. Stephens, Curtis Hillyer, and Charles W. Slack, for respondent.

LORIGAN, J. The complaint in this action alleged that on January 20, 1904, plaintiff had on deposit in the bank of defendant a sum in excess of $6,496.50; that on said day plaintiff drew its checks against this deposit for two amounts, $5,496.50 and $1,000 respectively; that both of said checks on presentation were dishonored; that two days later the check of plaintiff for $75.55 was paid by the bank; and that, when this last check was paid, there was a balance due plaintiff from defendant of $6,496.50 on said account, for which amount plaintiff asked a judgment. The defendant by answer admitted the dishonor of the two checks drawn on January 20, 1904, and the payment of the last check, but denied that on January 20, 1904, plaintiff's balance exceeded $75.55.

The facts in the case are not disputed. Plaintiff had for many years been a depositor with defendant. Samuel Burger was the general manager of the plaintiff, W. Noble Dickinson, Jr., was his assistant, and H. T. Bliss was cashier and accountant in San Francisco of plaintiff. It was, and had long been, the custom of the plaintiff to use its own forms in drawing checks against its account in the bank of defendant. These were printed on white ledger paper and not upon "safety paper" of the kind used by defendant in the blank check books ordinarily furnished to its customers. Plaintiff possessed a certain protective perforating device by which the figures corresponding to the amount to be drawn by a check could be cut in the paper. This device—termed a safety device—was sometimes, but not always, used in the preparation of its checks. Burger was the only person in San Francisco authorized to sign checks for the plaintiff. Bliss had custody of the check book of plaintiff and the protective device referred to. He had been in the employ of plaintiff for many years. The usual practice followed by the plaintiff in drawing checks was for Bliss to fill in the checks in his own handwriting and take them to Burger for signature, who upon signing them intrusted Bliss with the duty of punching the amount for which the checks were drawn by use of the safety device. Hooper, the paying teller of defendant, had been acquainted with Bliss in connection with the business of plaintiff for fully 10 years, and knew him to be the cashier and bookkeeper of plaintiff. It was customary for Bliss to go to the bank with checks of plaintiff signed by Burger, and drawn either to the order of W. Noble Dickinson, Jr., and indorsed by him, or payable to "cash" or "bearer," and cash such checks. This was a frequent and usual thing, and Hooper had been accustomed to honor such checks. He was thoroughly familiar with the handwriting of Bliss in the body of checks and with his signature, as likewise with the signature of Burger. In August, 1903, as Burger was about to leave the city to be absent for some days, Bliss, at the request of Burger, made out and Burger signed about 20 checks payable to W. Noble Dickinson, Jr. The purpose of leaving these blank checks was to enable Dickinson to pay the creditors of plaintiff and carry on the business during the absence of Burger. When signed, these checks were not dated, nor were any amounts written therein. At the same time that these blank checks payable to Dickinson were signed by Burger, Bliss also presented to him for his signature some 50 checks for various amounts and made payable to various persons. All these checks were in the check book, not having been separated therefrom; were all completely filled out as to the payees and amounts in the handwriting of Bliss, but the amounts of none of them had been punched in these checks, and their dates were stamped with a rubber stamp. In this condition these checks were signed by Burger. One of them, complete in form when presented to Burger and signed by him, was made payable to "A. Merle Co." and was for the sum of $3.50. This particular check, after its signature by Burger and while subsequently in the custody of Bliss, was "raised" by him. By means of a rubber eraser he erased a portion of the date on the check, and with a rubber stamp stamped a different date thereon. With chemicals he erased the name of the payee, 'A. Merle Co.," and in its place wrote the words "bearer" as the payee thereof. By the same process he obliterated the amount for which the check was originally drawn, and in lieu thereof wrote in and made it payable for $5,500. Then by means of the safety device he perforated the check to indicate that it was drawn for that amount. Having effected these changes, he indorsed the check and presented it to Hooper, the paying teller of the defendant, who paid it.

It does not appear when this forgery on the part of Bliss occurred, whether before or after Burger had left the city, but that fact is of no consequence. Subsequent to the departure of Burger, however, Bliss took one of the blank checks which Burger had signed and left with him and which was made payable to the order of Dickinson and filled it out in his own handwriting for the sum of $400. In the body of this check Bliss had placed the figures "400" after the dollar sign thereon, and also had written therein the words "four hundred." In doing so, however, he had left a sufficient space between the figure "4" and the dollar sign to permit the insertion of another figure therein. Likewise he had left a sufficient space between the written words "four" and "hundred" so as to permit the writing therein of other letters. In this condition Bliss presented the check to Dickinson who wrote his signature on the back and returned it to Bliss. The latter then inserted the figure "1" between the dollar sign and the figure "400." and wrote in the word "teen" after the word "four" and preceding "hundred" in the space which had been left between these latter words. When this check was presented to Dickinson and indorsed by him, it had not been punched with the safety device, but after its indorsement Bliss cut upon it therewith the figures "$1,400." This check was indorsed by Bliss and presented to Hooper, the paying teller of the defendant, who cashed it. No erasures whatever were made in this latter check, the alterations consisting solely of filling in the blank spaces which were in the check when it was indorsed by Dickinson. There was nothing about either of these checks to warrant an inference that there was any negligence on the part of Hooper in not discovering that the checks had been raised or otherwise altered, and nothing upon which to base an inference that the appellant was in any degree negligent in paying to Bliss the amounts apparently called for by these checks. Besides being in the familiar handwriting of Bliss, both checks were apparently genuine and valid for the full amounts called for thereby. It was not until Bliss failed to return from his vacation, and suspicion was aroused in the mind of Burger as to the reason for his disappearance, that an investigation disclosed the fact that he had thus tampered with both these checks and escaped with the proceeds of his crime.

The findings of the trial court were in accord with the allegations of the complaint, and judgment given the plaintiff for the full amount claimed thereunder. This is an appeal from an order denying defendant's motion for a new trial, and the point made is that the evidence was insufficient to justify the decision of the trial court.

The position of the appellant under the evidence is that it had paid out on the raised checks above referred to a sum equivalent to the amount of the two large checks mentioned in the complaint and which it dishonored, and that the payment of these amounts was made under such circumstances as to justify appellant in charging the same to the account of respondent.

The particular claim of the appellant in this respect is that the trial court should have found that the respondent, through its agent Burger, was guilty of negligence as to the check raised by Bliss to $5,500 on account of using for the preparation of its checks a kind of paper from which, by means of chemicals, the original writing thereon could be readily obliterated, and in signing the checks in question without the original amounts thereof having been stamped therein with the safety device; and, as to the check raised to $1,400, that Dickinson, the other agent of respondent, was likewise guilty of negligence in indorsing that check with spaces left unfilled and without the amount thereof having been cut therein with the safety device; and, further, that the acts of Bliss, the agent of respondent, in altering and presenting both checks must be imputed to the respondent.

[1] It is insisted preliminarily by the respondent that, as the appellant did not specially plead any negligence on the part of respondent with reference to the kind of paper used for its checks, or in failing to have them stamped with the safety device prior to their being signed or indorsed, or in leaving spaces in the $400 check when indorsed, nor any facts showing the relation of Bliss with respondent, his handling of the checks, and his dealings as agent of the respondent with the appellant, that these facts may not be considered on this appeal under the claim of the appellant that thereby respondent is estopped from claiming that appellant should sustain the loss resulting from the payment of the forged checks.

When this case was in Department 2, in the decision thereof, it was said in the opinion when considering this point: "As the answer contains no allegation that the Otis Elevator Company, by its negligence or because it is bound by the acts of its agents, is estopped from denying the genuineness of these two checks, respondent urges that such estoppel is not a proper subject for our consideration on this appeal. It must be remembered, however, that the purpose of the action was to determine whether or not plaintiff had a certain balance in defendant's bank. The payment of the two checks being pleaded by way of defense, issue was completely joined. The forgery of the checks and plaintiff's conduct with reference to their preparation and custody were matters arising in connection with the offered proof of the principal allegation in the answer and plaintiff's attempted refutation of it. It was not necessary that any issue upon the alteration of the checks should be made by the pleadings. This seems to have been the theory of both parties to the action at the trial, for there it was conceded that, if plaintiff were responsible for the alteration of the checks, the small balance in favor of the Otis Elevator Company, which defendant admitted to exist, would be the proper credit. The case was tried apparently upon the theory that the sole question before the court was whether or not plaintiff was estopped to deny its responsibility for the checks in the form in which they were presented for payment." We are satisfied of the correctness of this view.

Considering now the appeal on its merits and addressing our attention to the first check for $5,500. There, of course, is no question but that this check was forged in the manner as heretofore set forth and in that condition paid by the appellant to Bliss. In determining by whom the loss through this forgery should be borne, whether by appellant or respondent, we deem it of no importance to discuss the claim asserted by appellant of negligence on the part of respondent arising from the conceded failure of Burger to have the amount of this check punched upon it with the safety device before it was signed by him. Nor is the matter of asserted negligence in using ledger paper in drawing its checks instead of safety paper necessary for consideration. It appears in the evidence that respondent procured its own check books to be made out of what is called "ledger" paper; that this character of paper was used in the manufacture of bookkeeping sets, one of its qualities as represented by the manufacturers thereof respecting it being that, in making entries in the books, any error committed might be easily corrected and without apparent disclosure of the change by the use of a simple chemical preparation, thus permitting the bookkeeper to keep a neat set of books. The matter of the use of ledger paper we deem only important as bearing on the condition of the check in question when it was presented by Bliss to the paying teller of the respondent for payment.

[2] The claim made by the respondent and the view adopted by the trial court was that, as to this raised check for $5,500, the evidence presented the simple case of a forgery perpetrated by Bliss to which is to be applied the well-settled rule that, as between a bank and its customers, the payment of forged or altered checks by the bank is made at its peril and cannot be charged against the depositor's account. This, of course, is the general rule, and it is applied stringently in cases of simple forgery which involve no other elements than that the purported check of the depositor which was paid was a forged one. But this rule is not applied unqualifiedly. It has its limitations and exceptions, as general rules usually have, and is modified to the extent that, when some negligent act on the part of the customer has contributed to the payment by the bank, or the facts in a particular case surrounding the forgery of a check and its presentation and payment are of such character as call for the application thereto of some general principle of law or equity, they may be relied on by the bank as an estoppel against the customer precluding him from denying the correctness of the payment.

While negligence of the respondent with reference to this check now under consideration is asserted here by the appellant bank as one of the grounds estopping respondent from questioning the correctness of its payment, we do not find it necessary to discuss that matter, because we are satisfied that, under the facts in the case to which special reference will be made, the appellant is entitled to invoke a general principle of law with respect to agency which, in our opinion, fully sustains its defense that respondent is estopped from claiming that appellant was not justified in the payment of the check. Our attention has not been directed by counsel on either side to any case presenting a similarity of facts to those presented here. But there are principles of law which in their scope have been made applicable in cases which, while not identical as to facts, yet are sufficiently analogous to make the doctrine therein laid down applicable here.

[3] It is the general doctrine of the law, as it is our statutory rule, that a principal is liable to third parties, not only for the negligence of its agent in the transaction of the business of the agency, but likewise for the frauds, torts, or other wrongful acts committed by such agent in and as part of the transaction of such business. Story on Agency, § 452; Shearman & Redfield on Negligence, § 65; Civ. Code, § 2338. After declaring this to be the rule, Story says: "In all such cases the rule applies respondeat superior, and it is founded upon public policy and convenience, for in no other way could there be any safety to third parties in dealings either directly with the principal or indirectly through the instrumentality of agents. In every such case the principal holds out the agent as competent and fitted to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency." Within the rule thus laid down, we think this case, under the facts proven, is brought.

[4] In discussing the application of this rule under the facts here, it is conceded, of course, that the check in favor of "A. Merle Co.," when it was signed by Burger, as filled out by Bliss, was a completed check, and that the only duty then with respect to it devolving upon Bliss was to send it to the payee. It may be further conceded that, if the only relation which existed between respondent and Bliss was for the latter to write out checks and transmit them to the payees, and simply by reason of an opportunity to do so he "raised" one of them and made it payable to bearer and presented it to appellant who paid it, such a payment would be at the loss of the bank. But this was not the only relation of Bliss to the respondent. He was its agent, intrusted not only with the duty of filling out checks in his handwriting and presenting them to Burger for signature and transmitting them to the payees thereof, but was, in addition thereto, intrusted by the respondent with the duty of filling out and presenting and having cashed at the appellant

bank checks signed by the respondent and payable to "cash" or "bearer," or payable to the order of Dickinson. This duty had been performed by Bliss for years, and the cashing of such checks by Hooper, the paying teller of the appellant, when presented by Bliss, had been a frequent and usual thing. Of course the preparation and presentation to appellant for payment by Bliss of checks which were valid and unaltered checks of respondent, payable to "cash" or "bearer" or indorsed to Dickinson, were acts within the scope of and in the direct course of his employment. And, while it is true that, as to the presenting of forged or altered checks, Bliss was acting without the scope of his authority which authorized him to present only valid checks, still, as far as the appellant bank is concerned, Bliss, in the preparation and presentation of this altered check, was acting within the direct scope and course of his employment which consisted in preparing and presenting checks of respondent payable to "cash" or "bearer," or to the order of Dickinson for payment by it.

There was nothing about the check in question to awake any suspicion in the mind of the paying teller of the bank; there was no alteration apparent on the face of the check; there was nothing whereby any negligence on his part can be attributed to the bank. The signature of Burger to the check was genuine; the body of the check was in the familiar handwriting of Bliss who was accustomed to fill out the checks of respondent; he had been for years intrusted by the respondent with the duty of presenting just such checks for payment as was here innocently paid by the bank; and it was presented in the direct course of his employment under the implied guaranty of respondent that, as their agent for the purpose of presenting such checks and obtaining payment, Bliss was faithful and honest.

In the application of the rule we have been considering, it is of no consequence that the check here in question presented by Bliss was in fact a forgery on his part. The rule is based on the fact that, as to the particular transaction, the agent had exceeded his authority, actual or apparent. Whether in doing so the agent has been guilty of a breach of faith with his principal, or has committed a crime, is of no controlling moment as affecting the responsibility of the principal to third persons injured thereby. It is enough to fix the responsibility of the principal in behalf of an innocent third party if the agent, though acting criminally, was nevertheless in perpetrating a fraud thereby on said third party acting within the course of his employment.

So in the present case, while Bliss committed forgery in altering the check and made this forgery the means of perpetrating a fraud upon the bank, still as there was nothing on the face, or in the appearance, of the check to raise suspicion as to its validity, and it was the duty of Bliss, as the accredited agent of the respondent, to prepare and present for payment by the appellant bank checks filled out in his own handwriting signed by Burger and payable to "bearer," and the one in question was in all apparent respects such a check as in the direct course of his employment Bliss was authorized to present for payment, the loss for his fraud should fall upon the respondent and not upon the bank.

While, as we have said, there are no cases which have involved the precise facts presented here, there are cases quite analogous to it, and between which and this there can be no distinction in the application of the principle discussed.

In London Life Insurance Co. v. The Molsons Bank, 5 Ontario L. R., p. 407, plaintiff sued to recover from the defendant bank moneys which the latter had paid out and charged to the account of plaintiff; it being alleged that the indorsements thereon by the persons in whose favor plaintiff had drawn checks in favor of defendant were forged. It appears that one Niblock had been for several years agent of plaintiff in Ottawa, and had sent on to the home office of plaintiff in London a number of applications for life insurance, some genuine and some forged, and policies thereon were issued by the plaintiff. Niblock subsequently notified the plaintiff of the death of several beneficiaries named and forwarded to it proofs of loss; the signatures thereto being forged by him. Plaintiff sent checks to Niblock drawn on the defendant bank and payable to the claimants or supposed claimants or their order. With respect to the checks sent for such purpose, it was the duty of Niblock to deliver them to the persons in whose favor they were drawn and obtain a discharge of the claims under the policies. When the checks, payment of which was involved in this suit, were received by Niblock, he forged the indorsements of the payees' names, adding to these indorsements in some instances his own signature following the word "Witness," presented them to the defendant bank for payment, and they were paid. Numbers of checks for valid claims had been theretofore sent to Niblock, and he was in the habit of certifying to the bank the genuineness of the payees in payment of their claims of which, respecting a number of such checks, plaintiff had notice.

In the cited case, after a discussion in which it was pointed out that no distinction could be drawn between the checks involved in the suit upon which the name of Niblock was indorsed and those upon which it was not—all the indorsements of the payees being forged by him—it was said: "Assuming this view to be correct, are the plaintiffs affected by what was done by Niblock, so as to preclude them from disputing the right of the defendants to pay the checks and charge the amounts paid to the plaintiff's account? In my opinion they are. * * * It was not shown that the practice of Niblock so certifying was exceptional in these particular cases, and the fair inference is, I think, that he did this throughout the period of his agency. * * * It would, as it seems to me, be a startling thing, at all events to business men, if it were to be held that a banker paying the checks of his customer under circumstances such as existed in this case should be bound to suffer the loss occasioned by the fraud committed by the person whom the customer had intrusted with the powers and duties which were intrusted to Niblock. I am not, I think, required to so decide, but am warranted in holding that the loss must fall, where, in my opinion, in justice it ought to fall—upon the plaintiffs."

In Dougherty v. Wells Fargo & Co., 7 Nev. 368, the plaintiff delivered to the agent of the defendant an old certificate of deposit issued by the defendant for the purpose of having it sent to San Francisco for renewal. The agent, instead of getting it renewed, fraudulently procured it to be cashed and appropriated the proceeds. The defendant was held liable for the fraudulent act of its agent as it was done in the course of his employment. The court said: "The liability, however, in such case arises, not upon the rule that the agent acted for the principal in that particular transaction, but because he is employed by the principal in that character of business, and is so held out as the person authorized and fully to be trusted therein. When the agent in such case does an act which is apparently within the general scope of his authority, although not so in fact, if the principal were not held liable for the act, a third person, who had reason to believe that the agent was reliable and possessed authority in the particular matter from the general character of his employment, might suffer loss; hence the law holds the principal liable upon the ground that he, rather than a third person equally innocent, should suffer."

Champion Ice Mfg. Co., etc., v. American Bonding & Trust Co., 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356, discloses that defendant had executed an indemnity bond to plaintiff against loss from dishonesty or fraud on the part of its bookkeeper, Weitkamp by name, and plaintiff sued to recover for loss sustained on certain of its checks fraudulently raised by the bookkeeper and paid by its bank. Weitkamp's duties with respect to the plaintiff in that case corresponded to those of Bliss, and his scheme of dishonesty was similar. The weekly pay roll of the company was furnished to Weitkamp, and his duty was to make out the checks payable therefor to himself, have them signed by the proper officer of the company, and take them to the bank—the First National Bank of Covington—to be cashed. During the course of this employment, after the checks had been so drawn, signed, and returned to him, Weitkamp raised a number of them, cashed them at the bank, and left for parts unknown. One of the claims of the defendant Bonding Company was that the Covington bank was liable to the plaintiff for the sums obtained by Weitkamp on the altered checks, and hence the plaintiff had no cause of action against it, the defendant Bonding Company. In disposing of this claim the court said: "We do not so understand the law. * * * We may, for the purposes of this case, even admit the rule to be that a bank, in paying a fraudulent or altered check, does so at its peril, and at its own loss, but we think the facts of this case present an exception to this rule. It was known to the bank's officers that Weitkamp was the bookkeeper and trusted agent of appellant, and that he was required to fill up and cash its checks, though without authority to sign them in his own name or that of his employer. In the course of their business relations with the appellant, its officers, and agents, the bank officers must be presumed to have become acquainted with their handwriting and that of Weitkamp, and therefore any change of the amount of a check from appellant, appearing in the handwriting of Weitkamp, would have excited neither alarm nor suspicion in their mind, as such alteration or change would have been within the apparent scope of Weitkamp's authority; and the payment by the bank of any check altered by him, under such circumstances, would not impose any liability on the bank to reimburse appellant for the amount thereof. It is unnecessary, therefore, to determine what the liability of the bank to appellant would have been under other circumstances." It is claimed by respondent that this language of the Kentucky court is dictum. We are not prepared to agree with this claim. It was made a point in the case by the Bonding Company, and the court held squarely that, under the facts, no liability on the part of the bank attached as the preparation and presentation of such checks to it was within the apparent scope of Weitkamp's authority. The court, it is true, further holds that, even if the bank were liable for the reimbursement to the plaintiff on these checks, this would not affect its right of action against it on the bond. We think, however, that this is but an additional reason for holding it liable upon its bond. But, if it be conceded to be dictum, we are satisfied that a correct principle of law was declared.

There is class of cases where telegraph operators have used the wires intrusted to their care in sending fraudulent messages to third parties for the payment of money under which the operators or some one in league with them have obtained its payment.

In such cases the companies have been held liable for the fraudulent acts of their agents. We see no reason why the principle of these decisions is not applicable here. Among the cases are the Bank of California v. Western Union Tel. Co., 52 Cal. 282; Pac. Tel. & Cable Co. v. Bank of Palo Alto, 109 Fed. 369, 48 C. C. A. 413, 54 L. R. A. 711; McCord v. Telegraph Co., 39 Minn. 181, 39 N. W. 315, 1 L. R. A. 143, 12 Am. St. Rep. 636. In all these cases the messages were forged by the agents, and their acts constituted a crime. In the case cited from the Federal Reporter, Minkler, the operator of the telegraph company, conspired with one Barclay to cheat the defendant bank, and to that end Minkler sent a forged telegraphic order purporting to come from a bank in San Francisco to the defendant bank to pay one H. L. Cator $840. Barclay presented himself at the defendant bank, represented that he was Cator, and was paid the money. The court held the telegraph company liable, and, after citing several telegraph cases in which a like conclusion was reached, said: "If either the agent or the operator should manufacture telegrams and send them over the company's lines, of the character of the telegram sent in the present case, they would be acting outside of the scope of their authority. But both would be acting in direct course of their employment, viz., transmitting messages over the company's lines. The company is held liable because it has placed its agent and operator in charge of its appliances and instruments for the transmission of dispatches over its lines, and authorized them to use the same. * * * In holding the telegraph company for the wrongful, tortious, and criminal acts of Minkler, we are not called upon to make any departure from the established principles of law. No additional or independent reasoning is required to show that the rule as announced in the telegraph cases is sound and just. Its foundation is based on the principle, often applied by the courts in a great variety of cases, that, if one of two innocent persons must suffer loss by the act of a third, he who put it in the power of the third person to do such act should be compelled to sustain the loss occasioned by its commission."

While in these telegraph cases the courts have sustained the liability of the companies under the broad equitable principle that, where one of two innocent parties must suffer from the tortious conduct of a third party, he who put it in the power of the third party to do the wrong must bear the consequence of the act, the specific principle extracted, and upon which liability of the company is based, is that, though the act of the agent was criminal and necessarily outside the scope of his authority, still the sending of dispatches of a character similar to those forged was in the direct course of the employment of the agent; that intrusting him with the duty of sending messages was a guaranty to the receiver thereof that the agent was faithful and honest; that, whether an agent was unfaithful in the discharge of his duties, or there were circumstances making his action in sending a particular message unauthorized or criminal, the receiver of the message could not know and it would be an impracticable and unreasonable rule to require him to investigate the honesty or integrity of the agent or his fidelity in performing his duty before acting upon the message.

We perceive no reason why the principle applied in the telegraph cases is not equally applicable here. Repeating in connection with these cases what we have said elsewhere, Bliss had been intrusted by respondent with the duty of filling out its checks in his own handwriting and payable to bearer, and, after signature by Burger, presenting them to the paying teller of the appellant bank for payment. This was a usual thing for Bliss to do, and by permitting it the plaintiff guaranteed the integrity and honesty of Bliss, and that he would not present for payment to the appellant bank other than valid checks of the respondent. Plaintiff intrusted him with the particular check now under consideration for a special purpose, and while in his possession he altered it. But, when presented for payment by him to the bank, it was still in his handwriting, payable to bearer, as was frequently the case when checks were presented by him, and bore the genuine signature of Burger. There was nothing about the check to awake any suspicion on the part of the bank as to its genuineness. The alteration of it by Bliss while it was in his possession for the particular purpose for which it was intrusted to him was a crime, and its presentation and payment as altered a fraud upon defendant bank, still, as the preparation and presentation of checks such as this one purported to be was in the direct course of the employment of Bliss, under the principle of the telegraph cases we have discussed, as well as the others cited, the respondent, whose agent Bliss was, should bear the loss from his fraudulent conduct, and not the appellant bank.

There is no such particular relation existing between a bank and its customers that denies the application of the general rules of agency, which apply in other relations. The commercial business of to-day is largely done through the medium of banks and the free use of checks and other commercial paper. It is equally the fact that business in its wider sense is conducted principally by corporations necessarily acting through agents in relation to their depositary banks, as well as the rest of the business world, and we are unable to perceive why, when an agent of a customer of a bank, while acting in the course of the employment with which the customer has intrusted him, commits a fraud upon the bank, the same rule of responsibility for the fraudulent conduct of the agent under such circumstances should not apply, as it applies to other relations between parties where the acts of the agent in the course of his employment are involved. In support of their claim that, under the facts here, the loss for the fraud of Bliss respecting this check must be borne by the appellant bank, counsel for respondent rely on Hall v. Fuller, 5 Barn. & C. 750; Belknap et al. v. National Bank of North America, 100 Mass. 376, 97 Am. Dec. 105; Crawford v. West Side Bank, 100 N. Y. 50, 2 N. E. 881, 53 Am. Rep. 152; Chicago Savings Bank v. Block, 126 Ill. App. 128; and Walsh v. Hunt, 120 Cal. 46, 52 Pac. 115, 39 L. R. A. 697.

But these cases have no application to the point now under consideration. The point decided in them had relation to the asserted negligence of the principal, based on special facts surrounding the relation of principal and agent in the matter of the preparation or handling of checks and the duties of the agent respecting them. They presented no facts under which the rule of liability of the principal for the acts of the agent done in the direct course of his employment could arise, and no such rule was considered. As an illustration, taking the case of Belknap et al. v. National Bank of North America, supra, as approaching in its facts nearer the case at bar than any other: The plaintiffs, who were commission merchants, signed a number of blank checks on the defendant, their bank, and left them with their bookkeeper to be filled out and sent by mail to customers at a distance. The bookkeeper committed this task to a clerk in the office, who, having performed it, returned the checks to the bookkeeper. When returned, the checks were drawn as directed, payable to each customer by name "or order." The bookkeeper examined the checks and placed them in envelopes addressed to the various payees and delivered the letters to the same clerk who had filled in the checks. Subsequently the clerk abstracted some of the checks from the envelopes, drew a line through the words "or order," and wrote in the words "or bearer." These checks were presented to the bank and paid, but who presented them does not appear. The trial court left it to the jury to determine whether, under the evidence, it was negligence on the part of the plaintiff to issue the particular checks there in question with a blank space after the name of the payee and before "or order," which permitted the insertion of the words "or bearer" by the clerk, or whether it was negligence on the part of plaintiff to intrust the mailing of the letters to the clerk who had drawn the checks inclosed therein. It was held by the appellate court that there was nothing in the evidence warranting the instructions. No question was involved in that case of the responsibility of the principal for the fraudulent act of the clerk because committed in the course of his employment. On the contrary, it was stated in the opinion that "plaintiff frequently drew checks payable to 'notes payable or order,' and in all such cases some one of the plaintiffs personally or their bookkeeper received the money from the bank," which, of course, precluded the bank from asserting that the checks were paid by it in the course of the employment of the clerk in drawing and presenting for payment checks in all respects similarly drawn. Nor is our own case of Walsh v. Hunt, supra, at all in point on this matter. The facts in that case did not call for the application of the doctrine of agency we have been discussing. As an authority it may have some bearing on the question of asserted negligence of respondent in signing the other check in question for $400 with blank spaces left therein and subsequently filled in by Bliss. Aside from this it could have no application.

Now, as to this second check. The principle which we determine is applicable as to the larger check is equally applicable to this second check. While it is further claimed by appellant that the plaintiff was negligent in drawing it with spaces unfilled and thus making the matter of its alteration simple, and for that reason should sustain the loss of its payment, there is no occasion to consider that point. As with the larger check, this smaller one was filled out in the handwriting of Bliss, and bore the genuine signature of Burger and was payable to bearer. There was nothing on its face to indicate that it was in any respect different from checks which, as similarly drawn, Bliss was authorized by respondent to fill out, and, when signed by respondent, present for payment and have cashed at the bank. The drawing of this check and its presentation for payment were acts done by Bliss in the direct course of his employment as agent of respondent, and under such circumstances respondent is estopped from asserting that the loss thereof should be cast upon the bank. Such loss as to these two altered checks, on both principle and authority, must rest, where in fairness it should rest, upon the respondent.

The order appealed from is reversed.

We concur: SHAW, J; HENSHAW, J.; SLOSS, J.; MELVIN, J.

(163 Cal. 99)

MELOY v. IMPERIAL LAND CO.

(L. A. 2,911.)

(Supreme Court of California. June 13, 1912.)

1. ARBITRATION AND AWARD (§ 6*)—VALIDITY.

An agreement that arbitrators named should have the right and power to take evidence as to the question to be settled, and to render a statement of the amount of money due to the parties to the agreement from each other, while not in compliance with the arbitration agreements provided for by Code Civ. Proc. § 1283, is a valid stipulation for common-law arbitration.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 27; Dec. Dig. § 6.*]

2. ARBITRATION AND AWARD (§ 34*)—RIGHT TO OFFER EVIDENCE.

The parties to an arbitration agreement have the right to introduce evidence in support of their claims, and, if the arbitrators make an award before the evidence and the controversy has been submitted, it is invalid because a denial of such right.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 177-183; Dec. Dig. § 34.*]

3. APPEAL AND ERROR (§ 1011*)—REVIEW—VERDICTS.

In an action on an award made under an arbitration agreement, a finding of the trial court that the matter in controversy was never submitted to decision, based on conflicting evidence, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by H. T. Meloy against the Imperial Land Company. From a judgment for defendant, and an order denying a new trial, plaintiff appeals. Affirmed.

Watkins & Blodgett, for appellant. Valentine & Newby, for respondent.

SLOSS, J. A controversy having arisen between the copartnership of Miller and Meloy (under whom plaintiff claims as assignee) and the defendant Imperial Land Company, an agreement was entered into for the submission of such controversy to arbitration. This action was instituted to recover the sums of $767.50 and $2,667.50, alleged to have been found by the arbitrators to be due from the defendant. A second count, based on the same cause of action embodied in the arbitration, was dismissed upon motion of the plaintiff.

[1] The agreement for arbitration did not comply with the terms of section 1283 of the Code of Civil Procedure. It was valid, however, as a stipulation for a common-law arbitration. Kreiss v. Hotaling, 96 Cal. 617, 31 Pac. 740. It provided that E. A. Meserve, Ben S. Hunter, and W. H. Anderson should have the right and power "to take such evidence as they may deem necessary or advisable pertaining to the question herein involved, and to render a statement of the amount of money due to the parties to this agreement from each other." The parties agreed to pay "such sums of money as may be found to be due one from the other within thirty days from receipt of a statement signed by a majority of the above-named arbitrators showing said amount." It was further agreed "that the hearing of evidence under this agreement to arbitrate shall take place at 9:30 a. m. on March 23, 1909, at the office of W. H. Anderson." The complaint alleges that all the parties met at the stipulated time and place, that evidence was introduced on behalf of plaintiff and defendant, "and the matter was then submitted to the arbitrators for their consideration and decision." It is alleged that on May 3, 1909, a majority of the arbitrators, to wit, Hunter and Anderson, found to be due from defendant to plaintiff the sums demanded in the complaint; that a written statement, showing such amounts to be due, signed by said arbitrators, was delivered to defendant, but the latter, although more than 30 days have elapsed, refuses to pay any part of said sums. The defendant denied, among other things, that the matter referred to in the agreement was submitted to the arbirators for their consideration or decision on the 23d day of March, 1909, or at any other time. The findings of the court include one in favor of this denial, and judgment went for the defendant.

Plaintiff appeals from the judgment and from the order denying his motion for a new trial.

[2] The finding that the matter in controversy was never submitted to the arbitrators for decision in and of itself necessitated a judgment in favor of the defendant. This is, in effect, conceded by the appellant. The parties to an arbitration have a right to introduce evidence in support of their claims. 3 Cyc. 644. To decide a matter before the evidence thereon, and the matter itself, have been submitted to the arbitrators for decision, is a plain denial of this right. If, then, the finding under discussion is sustained by the evidence, it is unnecessary to consider whether other findings are fairly open to attack.

[3] On the issue of the submission of the matter to the arbitrators, the evidence is conflicting, and the finding of the court below cannot be set aside on appeal. No doubt Mr. Hunter and Mr. Anderson, in attempting to make an award, were acting in the bona fide belief that the question in dispute had been submitted to them and their associate. But Mr. Meserve, the third arbitrator, took a contrary view, and his testimony was such as to justify the court in finding that his understanding of the situation was the correct one. Mr. Hunter was the attorney for plaintiff, while Mr. Meserve represented the defendant. Mr. Meserve testified that a hearing before the three arbitrators

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

took place on March 23, 1909, as agreed. Each party offered testimony. Mr. Anderson, who was presiding, "asked if that was all." Mr. Hunter answered in the affirmative. Mr. Meserve also said "Yes," but immediately thereafter, upon the suggestion of an officer of the defendant, said to Mr. Anderson that the defendant desired an opportunity to offer in evidence certain letters material to its case. He asked if there would be any objection to getting this correspondence together. Mr. Anderson said that he could see no objection, and somebody (presumably on behalf of plaintiff) said: "If the defendant offers more evidence, we are going to offer more evidence." The meeting then broke up, and no time for reconvening was ever fixed, nor did the three arbitrators meet again, or give the defendant notice of a time at which it could offer any further evidence. This version was supported by another witness. While the recollection of other persons present did not agree with that of Mr. Meserve, we have the ordinary case of a conflict of testimony which we must, in accordance with long-established rules, regard as conclusively settled by the finding of the trial court.

The appellant's only points being those based on the alleged insufficiency of evidence, the conclusions above stated dispose of the appeal from the order denying a new trial. The appeal from the judgment cannot be considered, as it was taken more than seven months after the entry of the judgment.

The appeal from the judgment is dismissed. The order denying the motion for new trial is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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163 Cal. 76

SEWELL v. CHRISTIE et al. (L. A. 2,881.)

(Supreme Court of California. June 12, 1912.)

1. APPEAL AND ERROR (§ 770*)—FAILURE TO FILE BRIEF AND APPEAR FOR ORAL ARGUMENT.

An appeal by a party who does not file a brief and who does not appear at the calling of the case for oral argument will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3106, 3107; Dec. Dig. § 770.*]

2. FRAUD (§ 58*)—SALE OF CORPORATE STOCK — FRAUDULENT REPRESENTATIONS — EVIDENCE.

In an action for fraudulent representations inducing the purchase of corporate stock, evidence *held* not to support a finding that defendant joined or aided the codefendant in making the representations inducing the purchase, or that he knew that any statement made by him to codefendant was false, or that defendant made any statement to the purchaser or to codefendant to mislead the purchaser.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55–59; Dec. Dig. § 58.*]

3. FRAUD (§ 50*)—ISSUES, PROOF, AND VARIANCE.

Where a defendant's liability for false representations was based on his complicity with codefendant in making the representations for the purpose of deceiving another, it must be shown that defendant joined or aided and abetted in the making of the representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by J. M. Sewell against R. R. Christie and others. From a judgment for plaintiff, certain of the defendants appeal. Reversed.

Hatch & Lloyd and Davis, Demp & Post (H. M. Barstow, of counsel), for appellants. Hannon & McCormick, Wm. J. Variel, F. A. Knight, S. G. Barker, and Roland G. Swaffield, for respondent.

ANGELLOTTI, J. In an action to recover damages for fraudulent misrepresentations in the matter of the sale of 7,000 shares of stock of the National Gold Dredging Company, plaintiff had judgment against defendants Christie and Price for $7,000; a nonsuit having been granted as to defendant Marsh. Both defendants gave notice of intention to move for a new trial, but the bill of exceptions appears to be a bill on behalf of Price only.

[1] Christie appealed from the judgment, but has filed no brief in this court and did not appear at the calling of the case for oral argument. It will therefore be unnecessary to consider his appeal. Defendant Price appeals from the judgment and from an order denying his motion for a new trial.

Substantially the complaint alleged as follows: Plaintiff was a resident of the city of Independence, state of Missouri, and the defendants were residents of the city of Long Beach, Cal. Plaintiff was a cousin of Christie, and relied absolutely on the statements and representations made to him by Christie and Price. Early in April, 1908, plaintiff was at Long Beach, and Christie and Price stated to him that they, Marsh, and one Dubois were large holders of the National Gold Dredging Company, a corporation organized for the purpose of placer mining by extracting placer gold from the sands and gravels of beds of rivers by means of a suction dredger; that the company owned certain mining grounds for such purposes, viz., 11 miles in length of the American river, and had there one of said dredgers and appliances; that the work of mining there had been in operation for two weeks; that Price had had the gravels and sands of the river tested with drilling appliances, and had ascertained that said territory was rich in placer gold; and that they thought so well of it that they were endeavoring to purchase an additional block of stock. Plaintiff within a few days returned to his home in Missouri. The defendants, knowing of the reliance by plaintiff on said statements and that he specially relied on Christie, conspired to cheat and defraud him by persuading him to purchase a large block of stock upon which they jointly had an option to purchase, and in pursuance of such conspiracy sent to him certain letters and telegrams signed by Christie alone. In one of these letters, sent April 27, 1908, it was stated: "The dredger has commenced operations, and the stock jumped to $1.25, and the next day was taken off the market. I think it will be worth from $2.00 to perhaps $5.00 in 60 days. Mr. Dubois says he can sell our 11 miles of the river to Portland parties for one million but it is not for sale." A telegram was sent on May 1, 1908, saying: "Dredger grounds prove fabulously rich stock worth three dollars. I believe will be ten will save five to ten thousand shares for you if you wire have sent money in forty-eight hours." On May 5, 1908, a letter was sent saying: "As I told you three of us are now interested in the option of the 50,000 shares of the dredger stock. The first offer we had was $550,000 for our ground, the next was one million and Mr. Dubois wrote last week and said he had just returned from the dredger where he met some mining men that wanted to pay us two and one half million for the property." On May 5, 1908, a telegram was sent saying: "How much dredger stock do you want at $1.00 worth $5.00." On May 6, 1908, a telegram was sent, saying: "Must send money tomorrow. Option only good to you." Plaintiff believed all these representations, and relying on them purchased from the defendants 7,000 shares of said stock, paying $7,000 therefor on May 8, 1908. He received stock that was owned by Price therefor. The representations were each and all untrue, and were known by each of the defendants to be false, and were made by said defendants to plaintiff for the purpose of inducing him to purchase the stock. He would not have purchased but for such representations. He had no opportunity of knowing and did not know of the falsity of such representations until about January 20, 1909, and on February 3, 1909, rescinded such purchase, notifying defendants in writing that he rescinded and tendering them the stock, which they refused to accept, and demanding the return of his money. He has been damaged in the sum of $7,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Defendant Price by his answer denied the allegations of conspiracy in the making of the representations, or that he knew that said statements, if they had been made, were false or untrue or without any foundation whatever. He also set up the defense of failure on the part of plaintiff to rescind after he had full notice of all the facts, until the stock had become valueless by reason of the destruction of the dredger of the company by a great and unusual flood.

[2] The trial court found as follows: The company was engaged in an attempt at gold placer mining on the territory mentioned, and for such purpose held 10 mining locations under the mining laws applicable thereto, and an adjoining mining location known as the Cache Rock claim, under option to purchase for the sum of $5,000; said claims occupying about 11 miles in length of the American river. It had constructed on Cache Rock claim a suction dredger for the purpose of extracting gold, and had commenced operating the same on or about April, 1908, and continued this work until about February, 1909, when by reason of a heavy storm the dredger was carried away and destroyed. During all of said time, only about one-half ounce of gold was extracted from said claims. In all other respects the representations alleged were found to be untrue. It was found that the representations alleged were all made by Christie and Price in the manner alleged, i. e., by Christie and Price orally as to those so alleged, and that Christie and Price sent to plaintiff the letters and telegrams containing the other statements. There was no finding of any conspiracy or joint intent on the part of Christie and Price to cheat or defraud plaintiff. It was found that they made the representations and sent the letters and telegrams for the purpose of inducing and persuading plaintiff to purchase a portion of the stock which Price had an option to purchase. It was found that Price knew all of said false representations to be false and untrue. It was found that Christie had no intent to deceive plaintiff, but that the statements made by him were made in a positive manner not warranted by such information as he had. It was further found that Christie relied wholly upon information received by him from Price, and that Price gave such information to Christie, with the intent that the same should be by him communicated to plaintiff, and that such representations were made by Christie to plaintiff with the knowledge of Price and with the intent on his part that plaintiff should be misled thereby and induced to purchase the stock, and that plaintiff did not know that any of Christie's statements were based on information received by him from Price or any one else. The stock never had any market value in excess of $1 per share, and was valueless at the time of the attempted rescission. All the other allegations of the complaint were found to be true.

The findings establish it as a fact, for all the purposes of this appeal, that there was no conspiracy or joint intent on the part of Christie and Price to cheat or defraud plaintiff. It is substantially found that Christie fully believed not only at the time of the purchase of the stock by plaintiff, but for a long time thereafter, that the enterprise was all he represented it to be, and that the stock would measure up in value to the various standards he set for it. The evidence, as the same is set forth in the record, clearly shows this to have been the situation. He was held liable notwithstanding his belief in the truth of his representations to plaintiff, solely on the ground that his representations were made in a positive manner not warranted by the information he had. Civ. Code, § 1572, subd. 2.

It is demonstrated by the record that the only representations influencing plaintiff in the matter of the purchase of this stock were such as were contained in the letters and telegrams sent to him by his relative, Christie. It appears that plaintiff had become interested in the enterprise on his visit to California, by reason of the enthusiasm of his relative and his desire to invest to advantage, and had requested that Christie keep him informed as to any development in the matter. Both Christie and Price, with defendant Marsh, were anxious to acquire 50,000 shares of stock from Dubois in addition to the stock they already had, and as to these Price had an option in which Christie and Marsh were equally interested with him; the understanding being that each should have one-third. Both because he considered it a good thing and was anxious to obtain the money wherewith to pay his portion of the purchase price and thus be allowed to obtain a portion of the stock covered by the option, and because he was willing to have his relative Sewell share in the profits if he would take some of the stock, he sought his participation. There is absolutely nothing to indicate that Price was not just as great a believer as Christie in the enterprise. Coming to a consideration of the letters and telegrams containing the alleged representations: There is nothing to warrant a conclusion that Price was in any way a party to the sending of any of the letters, or counseled or advised in the matter of their being sent. The first one, that dated April 27th, was devoted principally to the matter of plaintiff taking some stock in an asbestos concern, and what was said as to dredging proposition was said after discussing the matter apparently prompting the letter. The important parts of this were: "Now, in regard to the dredging proposition, will say that it is getting exciting—the dredger has commenced operation and the stock jumped to 1.25 and the next day was taken off the market. I think it will be worth 2.00 and perhaps 5.00 in 60 days. Mr. Dubois says he can sell our 11 miles on the river to Portland parties, for 1,000,000, but it is not for sale." The statement as to the dredger was true. There is nothing to show that Price was responsible for any of the other statements of fact above set forth except that he told Christie that "Mr. Edwards had received word from the north not to sell any stock for less than 1.25, and the next day they notified him not to sell any more at any price," and also showed him a letter from Dubois in which the latter said that he had not the least doubt but that the property could be sold for $1,000,000. The Dubois letter was introduced in evidence. Mr. Edwards corroborated the statement as to the receipt of the letter from the north, either from Auburn or Forest Hill, saying: "Received wire from Guy Dubois this a. m. Stock jumped to 1.25 and taken off the market. Close deal with Redlands party and return balance of stock to me as soon as possible." This evidence was in no way contradicted. The remainder of the portion quoted above was simply an expression of Christie's personal opinion as to the probable value of the shares in the future. Certainly there is nothing in all this to render Price in any degree responsible to plaintiff. The only material statement in the letter of May 1st was as to offers for the property, and this was clearly based by Christie on the letter from Dubois already referred to, which he had read. The only material statement in the letter of May 5th is one that "the stock has gone out of sight," with the further statement that he (Christie) would not take $5 for his dredger stock, but that he would try to save plaintiff 5,000 shares if his money was sent in time. As to all these letters, no connection on the part of Price is shown, nor is there ground for any reasonable inference that they were induced by anything Price may have said to Christie, with the intent that he should communicate the same to plaintiff, or that Price did not fully believe that such statements as he did make to Christie were true. As to the telegrams, the only ones which may be claimed to contain representations of fact are those of May 1st and May 5th. The first of these contained the statement: "Dredger grounds prove fabulously rich. Stock worth three dollars." The second was a query as to how much dredger stock he wanted at $1, "worth five." This "worth five" was simply an expression of opinion by Christie, based on the Dubois letter which he had read. The statement that the dredger grounds prove fabulously rich and that the stock was worth $3 was also based by Christie on the same letter. The testimony fairly read is not sufficient to support a conclusion that Price had anything to do with the sending of either of these telegrams, or even that he showed the Dubois letter to Christie or talked over the matter referred to therein, with the intent that he should communicate the same to plaintiff. The testimony is absolutely wanting in foundation for a conclusion that Price did not fully believe that everything he said to Christie in regard to the matters referred to was true.

It should be said that it appears from the adjustment statement made August 5, 1908, between Christie, Price, and Marsh, introduced in evidence by plaintiff, that the 7,000 shares of stock sold to plaintiff were charged to Christie's one-third of the 50,000 shares subsequently acquired under the option, and he (Christie) was credited with the purchase price therefor, less $2,000 divided among the three as "profits" on the sale. According to the findings, the stock which the defendants were seeking to sell to plaintiff was a portion of this option stock, and the evidence shows that the only part played in the transaction by stock belonging to Price individually was that the same was delivered to plaintiff on the sale, as a loan from Price to Christie, pending the actual acquirement of the option stock.

From what we have said, it is apparent that our conclusion is that the findings of fact are not sufficiently supported in so far as they in effect state that Price joined or aided in the mailing or sending of any of the letters, or either of the two telegrams to which we have specially referred, viz., those of May 1st and May 5th, or in making any of the representations contained in said letters or telegrams; or that Price knew that any statement made by him to Christie in regard to any of such matters was false or untrue or without any foundation in fact; or that Price made any statement either to plaintiff or to Christie in such matters for the purpose of misleading or deceiving the plaintiff.

[3] We do not see how it can be claimed that these findings are not essential to the judgment against Price. Both by the complaint and by the findings Price's liability is based wholly on his alleged complicity in the making of false representations for the purpose of inducing the purchase of the stock. That in some way he should have joined in the making of the representations is, of course, essential to any liability on his part. The findings to the effect that he actually participated or aided and abetted in the sending of the letters and telegrams are not sustained by the evidence. This leaves the judgment against him to depend solely on the finding that he made the statements to Christie with the intent that the same should be by Christie communicated to plaintiff. Passing all other claims made by appellant in regard to this finding there is not sufficient evidence to support the further conclusion upon which he is in fact held liable, viz., that he made the statements to Christie, not believing them to be true, but believing them to be false, and with the intent to deceive. It is nowhere found as to him, as it is to Christie, that he made his statements in a positive manner not warranted by his information. One or the other of these conclusions is absolutely essential to his liability.

As to the defendant Price the judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

163 Cal. 105

TIDEWATER SOUTHERN RY. CO. v. JORDAN, Secretary of State. (S. F. 6,213.)

(Supreme Court of California. June 13, 1912.)

CORPORATIONS (§ 298*) — INDEBTEDNESS — BOARD OF DIRECTORS.

Where a corporation sought to incur a bonded indebtedness in accordance with Civ. Code, § 359, subd. 5, providing that it may create such indebtedness by resolution adopted by the unanimous vote of its board of directors or trustees at a regular meeting, and the corporate board consisted of thirteen directors, the unanimous vote of seven directors who were the only ones present at the meeting is sufficient to authorize the creation of the indebtedness; Civ. Code, § 308, providing that a majority of directors is a sufficient number to form a board for the transaction of business, and the former section referring to the board as such, and not to the individual directors or trustees.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1292–1317, 1319; Dec. Dig. § 298.*]

In Bank. Petition by the Tidewater Southern Railway Company for mandamus directed to Frank C. Jordan, as Secretary of State. Writ issued.

Arthur L. Levinsky, J. G. De Forest, and Heller, Powers & Ehrman, for petitioner. U. S. Webb, Atty. Gen., and Malcolm C. Glenn, Deputy Atty. Gen., for respondent.

SLOSS, J. Mandamus. The petitioner, a railroad corporation, institutes an original proceeding in this court to compel the Secretary of State to file in his office a certified copy of a certificate of creation of bonded indebtedness by petitioner. The facts are undisputed, the only return to the alternative writ heretofore issued being in the form of a demurrer for want of facts. The respondent urges but one ground in support of his refusal to file the certificate, and it is conceded that, unless this ground be well taken, the petitioner is entitled to the relief sought.

The proceedings for creating a bonded indebtedness were taken under subdivision 5 of section 359 of the Civil Code. That subdivision provides that any corporation desiring to create a bonded indebtedness may, in lieu of calling and holding a stockholders' meeting as provided in earlier subdivisions, create such indebtedness "by a resolution adopted by the unanimous vote of its board of directors or trustees at a regular meeting or at a special meeting called for that purpose, and approved by the written assent or assents of the stockholders holding two-thirds of the subscribed or issued capital stock. * * *" The certificate here involved shows that the petitioner has thirteen directors, and that at a regular meeting of the board of directors, attended by only seven directors, all of those present concurred in adopting a resolution for the creation of a bonded indebtedness. Seven constitutes a quorum of the board. The only question is whether this was a compliance with the Code provision above quoted; the respondent taking the position that the requirement that the resolution be adopted "by the unanimous vote of its board of directors" can be satisfied only by the affirmative votes of the thirteen directors, all of whom must be present at the meeting. We entertain no doubt of the soundness of petitioner's contention that the vote of the seven who attended the meeting was all that was required. The statute does not demand the "unanimous vote of all the directors," nor the "unanimous vote of all the members of the board." What is called for is the "unanimous vote of the board." The provision looks to the body constituting a board of directors, rather than to the individuals of whom that board is composed. Section 308 of the Civil Code provides that "a majority of the directors is a sufficient number to form a board for the transaction of business. * * *" Accordingly, the seven directors, duly assembled in regular meeting, constituted the board of directors, and a resolution adopted by the affirmative votes of all such directors was "adopted by the unanimous vote of the board of directors." This view does not lack the support of authority. The case of McLane v. P. & S. V. R. R. Co., 66 Cal. 606, 6 Pac. 748, relied on by petitioner, seems, on a careful reading, not to be precisely in point. But other decisions cited fully sustain the proposition. In Coxon v. Inhabitants of the City of Trenton, 78 N. J. Law, 26, 73 Atl. 253, the court, in dealing with an ordinance which, by virtue of a statute, was required to be "unanimously adopted by the said board of health," held that where the resolution was adopted by a board legally constituted, all present voting and none dissenting, the statute had been complied with. The opinion distinguishes the case presented (which is like the one at bar) from that of a statute requiring the "unanimous vote of all the members of the council." The language last quoted plainly requires the assent of every member of the board. Crickenberger v. Westfield, 71 N. J. Law, 467, 58 Atl. 1097.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The Code of Civil Procedure of New York (section 191) withholds the absolute right of appeal from the Appellate Division of the Supreme Court to the Court of Appeals "when the decision of the Appellate Division of the Supreme Court is unanimous." Five justices compose the Appellate Division, but four constitute a quorum. Where, in hearing an appeal, only four sat, and all four concurred in an affirmance, it was held that the decision was unanimous, within the meaning of the Code section. Harroun v. B. E. L. Co., 152 N. Y. 212, 46 N. E. 291, 38 L. R. A. 615. Similar in principle are the decisions holding that provisions requiring the vote of "two-thirds of each house," or the like, mean two-thirds of the members present and constituting a quorum. State v. McBride, 4 Mo. 303, 29 Am. Dec. 636; Green v. Weller, 32 Miss. 650; Southworth v. R. R. Co., 2 Mich. 287; Warnock v. Lafayette, 4 La. Ann. 419. The construction thus indicated gives the requirement of unanimity the effect of making it impossible for a majority of a mere quorum, which might be a minority of the entire membership, to adopt the resolution, as such minority might do in the absence of any restriction of this nature. St. A. O. A. v. Milwaukee County, 107 Wis. 80, 82 N. W. 701; Gumaer v. C. C. T. T. & M. Co., 40 Colo. 1, 90 Pac. 81, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781. Thus read, the provision is reasonable and in harmony with the apparent purposes of the statute. On the other hand, the interpretation urged by the respondent might block or delay the transaction of business of great importance to the stockholders if, on account of illness or for any other reason, it became impossible to secure the attendance of any one member of the board.

It is ordered that a peremptory writ of mandate issue as prayed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

163 Cal. 102

HAYNES AUTOMOBILE CO. v. WOODILL AUTO CO. (L. A. 2,878.)

(Supreme Court of California. June 13, 1912.)

1. Principal and Agent (§ 81*)—Compensation of Agent—Commission for Sale.

Under a contract by which plaintiff gave defendant the exclusive sale of its automobiles in Southern California, defendant, in the absence of the trade usage, could not recover commission on the sale of an automobile by plaintiff outside of the state to a resident in plaintiff's territory.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194-214, 219, 223; Dec. Dig. § 81.*]

2. Principal and Agent (§ 81*)—Compensation of Agent—Exclusive Agency.

One having the exclusive sales agency outside of California of products manufactured here cannot recover commissions on sales made in the state to persons known by the seller to intend to sell the merchandise out of the state.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 194-214, 219, 223; Dec. Dig. § 81.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the Haynes Automobile Company against the Woodill Auto Company. Judgment for plaintiff, and defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Schmidt & Riggins, for appellant. Wm. Fleet Palmer, for respondent.

MELVIN, J. Plaintiff sued for $3,092.59 alleged to be due from defendant for automobiles and attachments sold and delivered by plaintiff to defendant. The latter asserted that the plaintiff was indebted to it. Both litigants furnished bills of particulars of their respective claims, and by written stipulation it was agreed that defendant's bill of particulars should be considered as if pleaded by defendant as a counterclaim. The court found that the balance due plaintiff upon all of the accounts between the parties to the action was $871.16. Defendant appeals from the judgment and from an order denying its motion for vacation of judgment under section 663 of the Code of Civil Procedure.

[1] The sole controversy upon this appeal relates to defendant's claim of $600 as commission on the sale of a car to Ralph C. Otis. According to the findings, Otis, who was a resident of Pasadena, purchased from plaintiff for $3,000 one of the automobiles manufactured by the said Haynes Automobile Company. At the time of the purchase, Otis was in Chicago, Ill., and he ordered the car to be shipped to him at that city from plaintiff's factory in Kokomo, Ind. Afterwards he changed the order, and directed that the automobile should be sent to him at Los Angeles. It was forwarded as directed, with a provision in the waybill that it might be reshipped to Chicago at one-half rate. Payment for the vehicle was made at Kokomo. Defendant does not assert that it had anything to do with negotiating the sale, but bases a claim for compensation solely upon the contract between it and plaintiff by which the Woodill Auto Company was given the exclusive sale in Los Angeles and vicinity of the cars manufactured by plaintiff. The pertinent portion of the agreement, dated April 15, 1908, was as follows: "This agreement entered into on this date with the Haynes Automobile Company of Kokomo, Ind., and the Woodill Automobile Co. of Los Angeles, Cal., gives to the Woodill Automobile Co. the exclusive sale of Haynes cars in Los Angeles and Southern half of the state of California."

Appellant contends that, when a manufacturing corporation gives exclusive sale of its products within a given territory to another, the said manufacturer cannot deprive the agent of regular commissions by selling to one who resides within such territory, citing Garfield v. Peerless Motor Car Co., 189 Mass. 395, 75 N. E. 695; Thompson-Houston Electric Co. v. Berg, 10 Tex. Civ. App. 200, 30 S. W. 454. The cited cases do not sustain appellant's position. The former case was decided upon a contract which, interpreted in the light of trade usage, gave the agent a right to a commission on all automobiles sold to residents of his district. The appeal in this case is on the judgment roll alone, and the record does not show any finding with reference to trade usage. We must therefore look alone to the contract which gives to defendant the "exclusive sale" in its territory of cars manufactured by plaintiff. As the sale was made outside of the state of California, and as no trade usage appears to give defendant any right other than that expressed in the exact words of the agreement, we are compelled to conclude that defendant cannot recover a commission on the transaction. The Texas case cited by appellant is not in point. The contract there under consideration was quite different from the one before us in this case. The contract itself provided that, if sales were made in Texas by a special agent representing the selling company, the agent in that state should receive his commission. His claim was that he was entitled to commission "on the sales of all appellant's products to be used in the state of Texas," and commenting on this part of the contract the court said: "We think that it bears the construction contended for by the appellee, and that it reasonably appears from the dealings between the parties that appellant placed upon it the same construction, and there is no error in so much of the court's charge as gave it this construction." It will thus be seen that the meaning of the contract under discussion by the court in the Texas case was made apparent by the dealings between the parties—an element entirely absent from the case at bar.

[2] It has been held in this state that one having an exclusive agency for the sale outside of California of products manufactured here cannot recover commissions on sales made in this state to persons known by the seller as intending to sell the merchandise out of the state. That case is perfectly applicable to the matter before us here. Golden Gate Packing Co. v. Farmers' Union, 55 Cal. 606. See, also, Wyckoff v. Bishop, 115 Mich. 414, 73 N. W. 392.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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163 Cal. 54

PEOPLE v. AKEY. (Cr. 1,692.)

(Supreme Court of California. June, 11, 1912.)

1. CRIMINAL LAW (§§ 763, 764, 811*)—INSTRUCTIONS—PROVINCE OF JURY—INVASION —CHARGING ON PARTICULAR EVIDENCE.

In a prosecution for rape, the court charged that it was not essential to a conviction that the testimony of the prosecutrix should be corroborated by other evidence; it being sufficient if the jury believed beyond a reasonable doubt from all the evidence that the crime charged had in fact been committed as alleged.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Held, that such instruction was not objectionable as singling out and giving special importance to the prosecutrix's testimony and as misleading the jury to understand that they were to take her testimony as true, nor as invading the province of the jury in charging on matters of fact, in violation of Const. art. 6, § 19.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770, 1787, 1969-1972; Dec. Dig. §§ 763, 764, 811.*]

2. CRIMINAL LAW (§ 822*)—INSTRUCTIONS—REVIEW.

Instructions given must be considered as a whole, and, if as so considered, they state the law correctly so that the jury, as men of ordinary intelligence, can understand what is meant and apply it to the facts, the charge will be deemed correct.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

3. CRIMINAL LAW (§ 730*)—APPEAL—DISTRICT ATTORNEY—MISCONDUCT.

Alleged misconduct of the district attorney in asking improper questions will not be deemed prejudicial where the objections to the questions were promptly sustained and the court fully instructed the jury not to consider any matter which was not in evidence before them.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

4. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR—EVIDENCE.

Where, in a prosecution for rape, there was evidence that defendant had arranged to have prosecutrix examined by physicians, and also the purpose for which she was examined, the result of which was favorable to him, defendant was not prejudiced by evidence as to just what treatment prosecutrix underwent at the time she was examined at the hospital.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137-3143; Dec. Dig. § 1169.*]

In Bank. Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

D. H. Akey was convicted of rape, and he appeals. Affirmed.

Peyton H. Moore and Campbell & Moore, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones and George Beebe, Deputy Attys. Gen., for the People.

LORIGAN, J. Defendant was charged with and convicted of the crime of rape committed on one Lutie Valentine. Judgment of imprisonment followed, and this appeal is from the judgment. The judgment was reversed by the District Court of Appeal for the Second Appellate District, and a further hearing granted on application of the respondent by this court.

[1] The reversal by the District Court of Appeal was based on the conclusion that the trial court erred in giving the following instruction: "The court further instructs the jury that it is not essential to a conviction in this case that the testimony of the prosecutrix, Lutie Valentine, should be corroborated by other evidence. It is sufficient if you believe beyond a reasonable doubt from all the evidence in the case that the crime charged has in fact been committed as alleged." It was held by the District Court that by this instruction the trial court invaded the province of the jury in charging with respect to matters of fact, contrary to section 19, art. 6, of the Constitution of this state. In that respect the specific point relied upon by appellant and sustained by the District Court was that the trial court singled out and gave special importance in the instruction to the testimony of the prosecuting witness, and in effect the jury was instructed by the court, or at least the instruction was susceptible of being so understood by the jury, that they were to take the testimony of the prosecutrix, Lutie Valentine, as being true, and as sufficiently establishing the guilt of the defendant. We cannot agree with either this claim of appellant or the conclusion of the District Court with respect to this instruction.

Particular reliance for its support is based upon the first sentence of the instruction. While we perceive nothing in this sentence which in itself is open to any valid criticism, it is to be borne in mind that whether a jury has been correctly instructed is not to be determined from a consideration of parts of an instruction, or from particular instructions, but the entire charge of the court must be considered.

[2] This is the general rule, and if, when so considered as a whole, the charge correctly states the law so that the jury, as men of ordinary intelligence, can understand what is meant and apply it to the facts, no prejudice is suffered by defendant. People v. Weber, 149 Cal. 325, 86 Pac. 671; People v. Besold, 154 Cal. 363, 97 Pac. 871; People v. Argentos, 156 Cal. 720, 106 Pac. 65.

Now as to the entire instruction. It is a rule of evidence in this state that, in a prosecution for rape, the defendant may be convicted upon the uncorroborated testimony of the prosecuting witness. People v. Mayes, 66 Cal. 597, 6 Pac. 691, 56 Am. Rep. 126; People v. Stewart, 90 Cal. 212, 27 Pac. 200; People v. Gardner, 98 Cal. 127, 32 Pac. 880. It was proper, therefore, for the court to instruct the jury as to this rule and its application, and this was evidently all that the court did. There was no singling out of the testimony of the prosecuting witness with a view of giving it undue prominence before the jury. The rule to be declared is addressed solely to the testimony of the prosecuting witness, and necessarily the fact that she has testified must be stated when the rule is declared. Nor is there in the instruction anything from which the jury would be at all warranted in understanding that the court was stating to them that the prosecuting witness had testified in such a manner that the jury should accept her testimony as true and as sufficiently establishing the guilt of the defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

One of the controlling features in determining the character of an instruction is the purpose and object of the court in giving it. Here the sole purpose and object clearly was to inform the jury, as it is always proper in this class of cases to do, that there was no rule of evidence in this state which required that the testimony of the prosecuting witness should be corroborated. Accompanying this declaration of the rule, and as part of the same instruction embodying it, the jury were told that, in order to convict the defendant, it was necessary that they "believe beyond a reasonable doubt from *all* the evidence in the case that the crime charged had been committed as alleged." When a jury is told that they are to act upon a belief to be derived from a consideration of all the evidence in the case, they, as men of ordinary intelligence and good sense, understand that this necessarily involves a determination by them of the credence they are to give to the testimony of the various witnesses in the case and the weight they may attach to their testimony. There is nothing in the instruction trenching on the right and duty of the jury in this respect, nor any reasonable basis for a claim that they could have understood the court as telling them that they should accept the testimony of the prosecuting witness as true, or that, if they believed her testimony, they should find the defendant guilty. They were merely told that, if they believed from all the evidence, beyond a reasonable doubt, that the defendant was guilty as charged, they might return a verdict of conviction, although the evidence of the prosecuting witness was uncorroborated; that there is no rule of law in this state which makes it essential to a conviction that the testimony of the prosecutrix should be corroborated. The court simply declared the rule as to corroboration applicable to this class of prosecutions, leaving to the jury to determine from a consideration of all the evidence the question of guilt. Under the instruction was left to them exclusively the right to determine what credibility they should attach to the testimony of the witnesses, which embraced a consideration of the testimony of the prosecutrix, as well as the testimony of the other witnesses. If, upon such a consideration, they believed that the defendant was guilty beyond a reasonable doubt, they were told that they might convict, although the testimony of the prosecutrix was not corroborated. In the application of this rule the credibility of witnesses and weight of evidence was left entirely to the jury. In fact, prior to giving the instruction complained of, the court had expressly instructed the jury that they were the sole judges of the effect and value of the evidence, and sole judges also of the credibility of the witnesses, and, immediately following the instruction complained of, the court in the next instruction given declared that to them "exclusively belongs the duty of weighing the evidence and determining the credibility of the witnesses." In still further instructions they were repeatedly told that this was their exclusive province, and likewise repeatedly told that they must take into consideration all the evidence in the case in reaching a verdict. Many instructions were also given in varying phraseology on the doctrine of reasonable doubt and its application.

Certainly, under these circumstances, taking the entire charge of the court into consideration, it would be a reflection upon the intelligence and good sense of the jury to say that they could have understood the special instruction complained of as either a declaration by the court that they should accept the testimony of the prosecutrix as true, or as an expression of opinion by the court that it was sufficient as it stood to warrant a conviction.

The cases of People v. Johnson, 106 Cal. 289, 39 Pac. 622, and People v. Barker, 137 Cal. 557, 70 Pac. 617, cited by respondent to support their claim, are not in point. In both those cases the court instructed the jury that, if they believed the testimony of the prosecutrix, it was their duty to find the defendant guilty. They were told to determine the question of guilt from a consideration of the testimony of the prosecutrix alone—not from a consideration of all the evidence in the case. The instruction here was not of that character, for, as we have pointed out, the jury were told that they could only convict if they believed from all the evidence—not from that of the prosecutrix alone—beyond a reasonable doubt that the defendant was guilty.

[3, 4] Other grounds, aside from this instruction, are urged for a reversal of the judgment. These matters were considered and decided in the opinion of the District Court of Appeal. That court said: "The alleged misconduct of the district attorney in the asking of certain questions against the objection of counsel and the ruling of the trial judge, if improper, seems not to have been prejudicial to defendant. The objections to such of the questions as appear to have been improper were promptly sustained by the court, and the trial judge very emphatically and fully instructed the jury as to their duty not to consider any matter which was not in evidence before them. The complaint made of the ruling whereby the prosecutrix was permitted to show just what treatment the girl Lutie Valentine underwent at the time she was examined by physicians at a maternity hospital in the city of Los Angeles may be answered in the same way. There was competent evidence introduced tending to show, not only that the de-

fendant had arranged to have the child examined by the said physicians, but also the purpose for which she was to be examined. The result of that examination, as testified to by the physicians, was favorable to defendant, in so far as it did not disclose that the child was then pregnant, as it was claimed defendant feared she might be, and the mere fact that the physician and attendant were permitted to explain to the jury the method adopted in the making of that examination could not well have been prejudicial to the rights of the accused. The conduct of the district attorney in examining the physician and his assistant, the matron of the sanitorium, who were present and participated in the making of the examination to ascertain the condition of the child with respect to pregnancy, was not censurable."

We are satisfied with the determination of the District Court on these points and adopt its views respecting them as the conclusions of this court, and, as we are further satisfied that there was no error in the instruction we have heretofore considered, the judgment of the superior court is affirmed.

We concur: MELVIN, J.; SHAW, J.; SLOSS, J.; HENSHAW, J.; ANGELLOTTI, J.

(163 Cal. 95)

METZLER v. THYE. (L. A. 2,717.)

(Supreme Court of California. June 12, 1912.)

1. LANDLORD AND TENANT (§ 157*)—LEASE—CONSTRUCTION—"INSTALL."

Notwithstanding Civ. Code, §§ 1645, 1654, 1656, providing that technical words in contracts must be interpreted as understood by persons in the business to which they relate, and that in cases of uncertainty a contract must be interpreted most strongly against the party causing the uncertainty to exist, and that all things necessary to carry a contract into effect are implied therefrom, a lease, which required the lessee to "install a sidewalk elevator from the basement to the sidewalk" in front of the premises, does not require the lessor to prepare the premises for the installation of the elevator; but the lessee must provide a suitable lift with the usual accessories connecting the basement with the sidewalk; the word "install" meaning to set up or fix in position for use or service.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 574–582, 584–600, 602, 607; Dec. Dig. § 157.*]

2. LANDLORD AND TENANT (§ 157*)—CONTRACTS (§ 303*)—LEASE—FAILURE TO PERFORM—EXCUSE.

A lessee contracting to install a sidewalk elevator from the basement to the sidewalk in front of the premises cannot excuse the nonperformance, on the ground that performance will involve greater expense than he anticipated, since parties sui juris cannot escape performance because of unforeseen hardship.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572, 574–582, 584–600, 602, 607; Dec. Dig. § 157;* Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. § 303.*]

3. LANDLORD AND TENANT (§ 157*)—LEASE—CONSTRUCTION—OBLIGATION OF LESSEE.

A provision in a lease that no alteration in the premises may be made by the lessee without the permission of the lessor is modified by a special provision that the lessee shall install a sidewalk elevator from the basement to the sidewalk in front of the premises, so that the lessee may not excuse nonperformance on the ground that the lessor never gave permission to make alterations necessary for the work.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572, 574–582, 584–600, 602, 607; Dec. Dig. § 157.*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Joseph Metzler against M. P. Thye, doing business as M. P. Thye & Company. From a judgment for defendant, plaintiff appeals. Reversed.

Jones & Weller, for appellant. W. W. Wideman and Frank Herald, for respondent.

MELVIN, J. Defendant became the lessee of certain premises in the city of Los Angeles. During the term of his lease plaintiff bought the property and succeeded to all of the rights of the lessor. After the term of the lease and surrender of the premises by defendant, this suit was brought for damages alleged to be due for injuries to the property beyond reasonable wear and tear and for the failure of defendant to install a certain sidewalk elevator, as provided by the terms of the written lease. The superior court gave judgment in favor of defendant, and plaintiff appeals therefrom.

There is no attack upon the finding that the lessee had not injured the premises beyond reasonable wear and tear; the only point of controversy here being with reference to the interpretation given by the trial court to the covenant in the lease respecting the sidewalk elevator. The appeal is upon the judgment roll alone, and, as the court found that there was no agreement respecting the installation of the elevator except that expressed in the lease, we must construe that instrument in the light of this finding. In his answer defendant admitted that no elevator had been put in position, but pleaded as an excuse for his failure to comply with the requirement of the lease in that regard that, although he was ready at all times during the term of his tenancy to fulfill his obligation, plaintiff had prevented him from so doing by neglecting to prepare the premises for the reception of the elevator. The requirement of the contract of lease was that defendant within six months from the 1st of November, 1905, should "install a sidewalk elevator from the basement to the sidewalk in front of said premises." The court found that neither plaintiff nor his predecessor in interest prepared or offered to prepare the premises for the reception of an elevator, and that "before said elevator could be installed it would have been necessary to make certain changes in the building on said premises, to remove a part of the foundation wall under said building, to excavate under the sidewalk, and build a wall around such excavation and an arch over the portion of said foundation wall to be removed as aforesaid, in order to prepare a place for the installation of said elevator, and that it would have been further necessary to place trapdoors in said sidewalk."

[1] It will thus be seen that the whole controversy turns upon the meaning of the word "install." Appellant insists that since all things necessary to carry a contract into effect are implied therefrom (Civ. Code, § 1656), and since the contract is to be "interpreted most strongly against the promisor," in cases of uncertainty (Civ. Code, § 1654) therefore this court, as matter of construction, should give to the word "install" a force including all things necessary to the carrying out of defendant's promise. The words "install" and "installation," when applied to machinery, have a technical meaning and should be interpreted accordingly. Section 1645, Civ. Code. Webster's New Standard Dictionary gives these definitions: "Install—to set up or fix in position for use or service; as to install a heating or lighting system." "Installation—the whole of a system of machines, apparatus and accessories set up and arranged for working, as in electric lighting, transmission of power, etc." Other lexicons define these words quite similarly. When, therefore, defendant agreed to install an elevator "from the basement to the sidewalk in front of said premises," he meant that he would provide a suitable lift, with the usual accessories connecting the basement of the building which he occupied as tenant, with the sidewalk in front of it. We see no room for an interpretation imposing upon appellant the duty of preparation of the premises. If a tenant under a lease of a farm should agree to sow a crop, the contract would scarcely be interpreted to mean that the landlord should plow the land, and buy the seed, leaving the promisor only the duty of spreading it. The implication in the contract before us, though perhaps not quite as strong, is as clear as that which would arise in the one cited by way of illustration. Words expressing a promise to build an improvement do not, as a rule, indicate the intent of the parties to the contract that a mere structure should be erected, but that the improvement should be adapted to the use to which it is generally applied. For example, where a railroad company promised to "erect" a station, the covenant was held to be one imposing upon the corporation the duty of building and establishing a regular station. Port Huron & Northwestern Ry. Co. v. Richards, 90 Mich. 577, 51 N. W. 680. It is true that the context in the case just cited was somewhat more illuminating of the meaning of the word "erect" as used in the agreement there considered, than are the other portions of the contract before us, as indicating the exact meaning of the word "install" intended by the parties thereto. But we believe that the principle announced in the Michigan case is entirely applicable here.

[2] The fact that compliance with his contract would involve greater expense than he anticipated would not excuse defendant. Parties sui juris cannot escape performance of their undertakings because of unforeseen hardship. Johnson v. Bryant, 61 Ark. 315, 32 S. W. 1081. Where one contracts to furnish capital, a financial panic does not excuse performance. McCreery v. Green, 38 Mich. 172. See, also, 2 Parsons on Contracts (9th Ed.) 826; 3 Page on Contracts, par. 1378; 1 Beach on Contracts, par. 216.

[3] The lease here considered provided that no alterations in the premises might be made without permission of the lessor, and the court found that plaintiff never granted leave to defendant to make the changes which would be necessary and incidental to putting in an elevator; but the failure of plaintiff to grant such permission would not be a good defense. The general covenant in the lease with reference to alterations would, of course, be subject to and modified by the special agreement regarding the installation of the elevator.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.; SHAW, J.; ANGELLOTTI, J.; SLOSS, J.

163 Cal. 49

KROTZER v. DOUGLAS et al. (L. A. 2,888.)

(Supreme Court of California. June 10, 1912.)

1. TAXATION (§ 658*)—TAX SALES—NOTICE OF SALE—MAILING.

Mailing a copy of notice of sale of land for taxes to the party to whom the land was last assessed next before the sale at his last known post office address, as required by Pol. Code, § 3897, is essential to the authority of the tax collector to make the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1332–1335; Dec. Dig. § 658.*]

2. TAXATION (§ 788*)—TAX SALES—DEED FROM STATE—PRIMA FACIE EVIDENCE.

Under Pol. Code, § 3898, providing that a tax deed from the state shall be prima facie evidence of the facts recited therein, the making of a deed to land sold by the state for taxes to an individual is not conclusive evidence of the mailing of the notice of sale to the owner's last known post office address as required by Pol. Code, § 3897.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

3. TAXATION (§ 658*)—TAX SALES—NOTICE.

Pol. Code, § 3898, requires notice of a sale of land for taxes by mail to the party to whom the land was last assessed next before the sale, directed to his last known post office address.

A tax deed recited that the collector mailed a copy of the notice to the party to whom the land was last assessed, but did not recite that it was mailed to his last known post office address, and the deputy tax collector testified that he had sent a copy of the notice by registered mail to the owner, directed to 1747 New Hampshire street, Los Angeles, Cal., and that the notice had been returned uncalled for and undelivered. He also testified that he sent the notice to the person last assessed to his last known place of residence, but was unable to say how he obtained the address, whether from the assessment roll, a city directory, a telephone book, or by inquiring from friends, and it was shown that the owner's address did not appear except in the assessment roll for the year 1908, and was there given as "Rivera." *Held*, to show that the notice was not mailed to the owner's last known address, and, there being no attempt to excuse the want of mailing on the ground that the address was unknown, such mailing was insufficient to justify a sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1332–1335; Dec. Dig. § 658.*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Henry Krotzer against Irvin Douglas and others. From a judgment for defendants, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

C. A. Stice, for appellant. Carter, Kirby & Henderson, for respondents.

SLOSS, J. Action to quiet title. The plaintiff relied upon a tax deed. It was admitted that the defendant Douglas, except in so far as his title may have been divested by the proceedings culminating in such deed, was the owner of the land. The court gave judgment in favor of said defendant upon his paying to the clerk of the court, for the use of the plaintiff, the amount of taxes, penalties, interest, and costs against the property on the day of sale by the state to plaintiff. The plaintiff appeals from the judgment and from an order denying his motion for a new trial. The property was sold to the state for nonpayment of taxes assessed for the year 1903. The deed from the tax collector, as agent of the state to the plaintiff, bore date of the 7th day of June, 1910. The defendant made several objections to the validity of the proceedings culminating in this deed. The findings are to the effect that the defendant is the owner in fee of the property, and that plaintiff has no right, title, or interest therein. These findings and the consequent judgment must be upheld if any of the points made by defendant against the validity of the attempted sale to plaintiff be good.

[1] One of these points is that the sale by the state was void for failure on the part of the tax collector to mail a copy of the notice of sale "to the party to whom the land was last assessed next before the sale, at his last known post office address," as required by section 3897 of the Political Code. That compliance with this requirement is essential to the authority of the tax collector to make the sale is no longer open to question. Smith v. Furlong, 160 Cal. 522, 117 Pac. 527; Buck v. Canty, 121 Pac. 924; Johnson v. Canty, 123 Pac. 263.

[2] The making of the deed is not conclusive evidence of the regularity of antecedent steps. Smith v. Furlong, supra. In this respect the Code makes a distinction between deeds to the state (Pol. Code, § 3787) and deeds from the state (Pol. Code, § 3898). The provision regarding the latter is merely that the deed shall be prima facie evidence of the facts recited therein.

[3] The respondent's position here is that, while a notice was mailed to the party last assessed, it was not mailed to him "at his last known post office address." In Smith v. Furlong, supra, there was no mailing at all, although the address was known. But clearly a mailing to an address other than that designated by the statute is no better than a want of any mailing, at least where it appears, as it does here, that the notice did not in fact reach the person to whom it should have been sent.

The deed from the state recites merely that the tax collector did mail a copy of the notice to the party to whom the land was last assessed. There is no recital that it was mailed to his last known post office address, or that it was addressed in any manner. Since, as we have seen, the effect of the deed as prima facie evidence is limited to the facts recited, the question of compliance with the requirement of mailing to the correct address must be determined by the evidence outside of the deed, and the burden of proof, in the absence of a recital, is on the party claiming under the deeds. Buck v. Canty, 121 Pac. 924.

Thomas Watson, a deputy of the tax collector, testified that he had mailed by registered mail a copy of the notice to Peter Robinson, 1747 New Hampshire street, Los Angeles, Cal.; that said notice was returned to the tax collector uncalled for and undelivered. He further testified that he had "sent the notice to the person last assessed to his last known place of residence"; but the witness was unable to say how he obtained the address. He believed he obtained it from the assessment roll, but might have obtained it from a city directory or telephone book, or by inquiring from friends of the said Peter Robinson.

On the other hand, the defendant offered in evidence the assessment rolls for the years 1908 and 1909, together with the index to each. The name of Peter Robinson was shown on each of said four volumes, and the property herein involved stood on said assessment rolls in the name of said Peter Robinson; but no address of said Peter Robinson was found in any of the said volumes, in the place where his name appeared, except on the index to the assessment roll for the year 1908; and thereon the address of Peter Robinson was given as "Rivera." There was testimony given by the witness Watson that the indexes to the assessment rolls were in the tax collector's office, together with said rolls for each year, while the tax collector was collecting taxes; and that, in searching for the last known post office address of the person to whom the land was last assessed next before the sale by the state, he looked at the assessment rolls for the year for which the property was sold and all subsequent years, and also in the indexes to said rolls, which are in the county auditor's office.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We are satisfied that this evidence warranted the court in making the finding, which must be implied from the general finding in favor of the defendant's ownership, that the notice had not been mailed to Robinson "at his last known post office address." There was no attempt here to excuse the want of mailing on the ground that the address was not known. On the contrary, a notice having been mailed, the claim necessarily was that the address was known, and that the mailing was to such address. It is true that, where no notice has been mailed, and there is nothing in the tax records to show an address, the tax collector is not required to make search aliunde, and his deed, reciting that there was no known post office address, will not be overcome by evidence tending to show merely that the person assessed did in fact reside in a certain place. Campbell v. Shafer, 121 Pac. 737. So, too, it has been held that the tax collector is not bound to take notice of an address which appears only on assessment rolls of years prior to that for which the sale to the state was made. Kehlet v. Bergman, 121 Pac. 918.

Such of the cases above cited as deal with the question of notice imputed to the tax collector by the tax records go no further than to hold that he is bound to take notice of an address appearing on the assessment roll itself. Section 3650 of the Political Code requires that the address, if known, shall be entered on such roll. There is no provision of the kind with reference to the index. Section 3651. In this case the address "Rivera" appeared only on the index, and not on the assessment. If the tax collector had failed to mail a notice, and had made a deed reciting that the address was unknown, we should hardly be inclined to hold that the effect of the recital was overcome by the mere fact that the index, which is not required to contain an address, did in fact contain one. But that is not the case presented. Here the plaintiff, who, as we have seen, was required to show the existence of facts authorizing the execution of the deed, undertook to prove, not that the notice had not been sent because the address was unknown, but that the tax collector, knowing the address, had correctly mailed notice. Even though the officer was not bound to know the address entered in the index, we have the testimony of Watson that he did, in fact, examine the indexes, including the one which showed the address "Rivera." There was nothing in the records to indicate the address to which the notice was in fact sent. On this evidence, the court below was fully justified in concluding that Watson had, through an inspection of the index, ascertained that the delinquent taxpayer's address was "Rivera," but had, through some unexplained mistake or inadvertence, mailed the notice to "1747 New Hampshire street," which, so far as the evidence goes to show, was not the correct address. Judgment in favor of the defendant properly followed.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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163 Cal. 24

SHURTLEFF v. BRACKEN. (L. A. 2,777.)

(Supreme Court of California. June 7, 1912. Rehearing Denied July 6, 1912.)

1. QUIETING TITLE (§ 2*)—COMPLAINT—SUFFICIENCY.

A complaint alleging that plaintiff is the owner in fee of lands through which there is a stream; that he is seised and possessed of the right to divert the flow of the stream; that defendant claims a right to, and threatens to divert some of the water, and asking that plaintiff be adjudged to be the owner of the right to use the water, and that defendant be declared to have no right thereto, and be enjoined from diverting it, states facts sufficient to constitute a cause of action to quiet plaintiff's title to the water; water flowing in a stream being real property and part of the riparian land inseparably annexed thereto.

[Ed. Note.—For other cases, see Quieting Title, Dec. Dig. § 2.*]

2. WATERS AND WATER COURSES (§ 85*)—DIVERSION—INJUNCTION.

The diversion of water of a stream is an injury to the freehold, and may be enjoined by the riparian owner without proof of other damages.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 84-88; Dec. Dig. § 85.*]

3. VENDOR AND PURCHASER (§ 232*)—BONA FIDE PURCHASERS—NOTICE—"PURCHASER IN GOOD FAITH."

The occupant of lands to which a right to divert water from a stream was appurtenant agreed to sell such water rights to defendant, and the duly authorized officer of the occupant informed defendant that S. was the owner of the land, and that it would be necessary to take a conveyance from him, which defendant did. Although S. was the record owner, the occupant at the time held an unrecorded deed, which was recorded subsequent to defendant's deed, and of which defendant had no knowledge. *Held*, that defendant was a purchaser in good faith within Civ. Code, § 1214, providing that conveyances of real property are void as against subsequent purchasers in good faith whose conveyances are first recorded, since, although defendant knew of the occupant's possession, the officer's statement relieved him from making any further inquiry as to the nature of his rights.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 540–545, 548–562; Dec. Dig. § 232.*

For other definitions, see Words and Phrases, vol. 8, p. 7775.]

4. MORTGAGES (§ 497*)—FORECLOSURE — PERSONS CONCLUDED.

Where defendant's deed to water rights appurtenant to land covered by a mortgage was duly recorded when a suit to foreclose the mortgage was brought, and he was in visible and notorious possession and use of such water rights, but was not made a party to the suit, his rights were not affected by the foreclosure.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1469, 1471–1473; Dec. Dig. § 497.*]

5. QUIETING TITLE (§ 43*)—EVIDENCE ADMISSIBLE UNDER PLEADINGS.

In an action to quiet title to water rights, evidence that defendant purchased such rights from a former record owner of the lands to which they were appurtenant in reliance on the statements of the holder of an unrecorded deed that such record owner was the owner and could make such conveyance was admissible, although such facts were not pleaded as an estoppel, since, although they might have constituted an estoppel, they also showed that defendant was a purchaser in good faith.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 84–87; Dec. Dig. § 43.*]

Department 1. Appeals from Superior Court, Ventura County; Robert M. Clarke, Judge.

Action by Hyrum C. Shurtleff against James Bracken, in which George Kehrer, administrator, was substituted as defendant. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Murphey & Poplin, for appellant. B. F. Thomas, for respondent.

SHAW, J. Appeals are herein presented from the judgment and from an order denying a new trial. After the appeal from the judgment was taken, James Bracken died and George Kehrer, administrator of his estate, was substituted as defendant. The appeal from the order denying a new trial was taken by the administrator.

[1] The complaint alleges that the plaintiff is the owner in fee of certain lands, describing them; that within the boundaries thereof there is a stream of water called Hund's Canyon; that plaintiff is seised and possessed of the right to divert and use on said land all of the natural and usual flow of said stream; that the defendant claims a right to divert some of the water naturally flowing in said stream; that such claim is without right; and that the defendant threatens to divert some of said water and use it upon lands not riparian to the stream, which use, if permitted, would ripen into a right adverse to that of the plaintiff. The prayer is that the plaintiff be adjudged the owner of the right to use all of said water upon said land, and that defendant be declared to have no right thereto, and be enjoined from making the threatened diversion. No demurrer was filed to the complaint, but the defendant claims that it does not state facts sufficient to constitute a cause of action. While the allegations are somewhat general, we think they are sufficient as against a general demurrer. Water flowing in a stream is real property. Stanislaus W. Co. v. Bachman, 152 Cal. 726, 93 Pac. 858, 15 L. R. A. (N. S.) 359. It is parcel of the riparian land inseparably annexed to it. Lux v. Haggin, 69 Cal. 391, 4 Pac. 919, 10 Pac. 674; Heilbron v. Last Chance, etc., Co., 75 Cal. 122, 17 Pac. 65; Hargrave v. Cook, 108 Cal. 77, 41 Pac. 18, 30 L. R. A. 390.

[2] The diversion of water of the stream is an injury to the freehold of the riparian owner, and may be enjoined without a showing of other immediate monetary damages. Anaheim U. W. Co. v. Fuller, 150 Cal. 333, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, and cases there cited. The facts stated constitute a good cause of action to quiet the plaintiff's title to the water, as part of his real estate, and to enjoin the threatened diversion. The answer denies that the plaintiff was or is seised or possessed of the water rights in question, and alleges that the defendant, Bracken, is the owner thereof. It further alleges that the defendant is the owner of 80 acres of land in Hund's Canyon, situated three-fourths of a mile above the plaintiff's land; that upon said tract the water which the plaintiff claims was diverted by the plaintiff from the stream, and from thence carried to the plaintiff's land; that the defendant claimed the right to divert said water and carry it out of the watershed to another tract of land owned by defendant and there use it for domestic and irrigation purposes; that on October 3, 1903, he purchased from the predecessor in interest of the plaintiff all the right, title, and interest of said predecessor in and to the water of said canyon, with the dams, reservoirs, tanks, pipes, flumes, and appurtenances thereunto belonging, saving and excepting such part thereof as was situated within the boundaries of the plaintiff's lands; that said predecessor in interest, Coonrod Smith, thereupon conveyed the same to the defendant, whereupon defendant took possession thereof, changed the pipe lines as theretofore existing so as to take the said water to his own nonriparian land, and has ever since continued to take and use the said water on said land. The findings are that the plaintiff and his predecessors in interest acquired title to said water by adverse possession and use, that plaintiff is the owner thereof; that prior to the conveyance of Coonrod Smith to the defendant said Smith had conveyed

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said land and water rights to the Barr Realty Company; and that Bracken was not a purchaser from Smith in good faith of said water rights, but had knowledge of the title of the said company. The defendant claims that these findings are contrary to the evidence, and we are of the opinion that the claim must be sustained.

[3] The land claimed by plaintiff consists of about 136 acres known as Glencoe Ranch. From about the year 1889 down to February, 1902, it belonged to one Wilsie and his heirs. During this time the use of the water on the land by means of the diversion on Bracken's land above was begun, and controversies arose between Bracken and the Wilsies concerning the right to take the same. The defendant disputed the acquisition of said right by the Wilsies by adverse use, and claims that the evidence is insufficient to sustain the finding to that effect. While there is some conflict, there appears to be sufficient evidence to show an adverse use for more than five years during a part of this period, and it must be conceded for the purposes of the decision that the Wilsies had acquired that right. In February 1902, the Wilsies sold the said land to the Barr Realty Company. For the convenience of the company, the title was conveyed to Coonrod Smith by deed dated February 19, 1902. Smith paid no part of the purchase money, but held the land merely as naked trustee for the company subject to its direction and control. The company immediately took possession of the land, and continued in possession until after the transactions about to be mentioned. On April 16, 1903, Smith executed to the Barr Realty Company a deed conveying said Glencoe Ranch with the appurtenances and water rights belonging thereto to the Barr Realty Company. This deed, however, was not recorded until December 10, 1903. Controversies and disputes existed between the Barr Realty Company and Bracken concerning the right to take the water from the canyon, each claiming said right. Thereupon, in settlement of the controversy, it was agreed that the company should sell the water rights to Bracken, and that Bracken should pay $1,000 as the price thereof. Harvey Sparling, vice president of the company, was the officer who transacted all its business and was duly authorized to act for it in the sale, conveyance, and disposition of all of its property. The negotiations leading up to this agreement were made by Bracken with Sparling. They met in Ventura to carry out the agreement. Sparling then informed Bracken that the record title to the land and water rights was in Coonrod Smith, and that, in order to consummate the agreement, it would be necessary for Smith to make the conveyance of the water rights to Bracken. This was on October 5, 1903. Bracken had no knowledge of the execution of the deed of April 16, 1903, by Smith to the company, and never heard of said deed until about the time of the trial of this action. He believed the statement of Sparling that the title was in Smith, and that Smith would have to make a conveyance to him and consented to that method of carrying out the agreement. Thereupon he paid the $1,000 to Sparling for the company, and Sparling delivered to him a deed dated October 3, 1903, duly executed by Coonrod Smith, purporting to convey to him the aforesaid water rights as described in his answer. This deed was recorded at the request of Bracken on October 5, 1903. Bracken immediately took actual possession of the water rights, disconnected the pipe line leading to the Glencoe Ranch, and with the pipe previously used by the company and other pipe extended the pipe line to his nonriparian land at an expense of $2,500, and ever since has continued to divert the water to said land and use it thereon for irrigation and domestic purposes.

We are of the opinion that the effect of this transaction was to vest in Bracken the water rights conveyed to him by the deed from Smith. Section 1214 of the Civil Code provides that every conveyance of real property is void as against any subsequent purchaser of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded. Bracken comes precisely within this provision. The deed of Smith to the company made on April 16th was not recorded until December 10th. Bracken had no notice thereof, and on October 5, 1903, he obtained the deed from Smith which he caused to be duly recorded on that day. He paid a valuable consideration, and he took his conveyance without knowledge of the prior unrecorded deed. The plaintiff claims that Bracken had notice of the prior conveyance to the company. His argument on this point is that the company was in actual possession of the land and water rights; that Bracken was aware of this possession, and that this fact put him on inquiry as to the rights of the company; that, if he had pursued the inquiry by making proper inquiries he would have learned of the existence of the company's deed from Smith. This argument would be sound if Bracken had purchased the water rights from Smith, paying the purchase money to Smith, while the company was in possession of the property purchased. But this is not that case. Bracken purchased from the company itself. He knew of the company's possession, and made his bargain with its accredited representative. He inquired of that company concerning its title, and was informed by it that Smith held the title and would make the conveyance on its behalf. This was a complete explanation of the fact that the company was in possession while the title was vested in Smith, and it showed that the two facts were not inconsistent with each other, and that the claims of the company and Smith were not antagonistic. He was not bound to pursue the inquiry farther, and had the right to accept the statement as correct and take the conveyance from Smith accordingly. He was a purchaser for a valuable consideration and without notice of the deed previously executed to the company. The effect is that the title to the water previously vested in the company as appurtenant to the Glencoe Ranch became vested in Bracken.

[4] At the time this conveyance was made to Bracken the land was incumbered by two mortgages one to F. R. Foster and the other to John S. Collins. Plaintiff afterwards obtained title under sales made on foreclosures of said mortgages. Bracken was not made a party to either of the foreclosure suits. They were begun in 1905, and at that time he was in open and visible possession and use of the water rights conveyed to him by Smith. Except as provided in section 726 of the Code of Civil Procedure, this possession would be sufficient to charge all subsequent purchasers with notice of his rights, whether his deed was recorded or not. The deed to the purchaser under the foreclosure decree did not operate to divest the title of Bracken to these water rights. It is well settled that a conveyance under a foreclosure decree does not affect the title held by persons who are not made parties to the action of foreclosure if such title appears of record when the action is begun. Goodenow v. Ewer, 16 Cal. 469, 76 Am. Dec. 540; Boggs v. Fowler, 16 Cal. 563, 76 Am. Dec. 561; Burns v. Hiatt, 149 Cal. 620, 87 Pac. 196, 117 Am. St. Rep. 157. The case is not within the provision of section 726 of the Code of Civil Procedure, declaring that a decree of foreclosure is binding against the holder of a subsequent unrecorded deed who has not been made party to the action, even if the plaintiff in the action had knowledge of such deed at the time the action was begun. Bracken was not the holder of title under an unrecorded deed. He held title under deed duly recorded prior to the beginning of the action and the prior deed to the company, subsequently recorded, was void as against him. It follows from these considerations that the finding that plaintiff was the owner of these water rights, and that Bracken had no interest therein, is without support in the evidence, and is contrary thereto.

[5] It is contended by the plaintiff that the evidence of the transaction between Bracken and Sparling at the time of the sale by the company to Bracken was not admissible because the facts were not alleged in the answer. The theory of the plaintiff is that these facts constituted an estoppel against the Barr Realty Company and its successors, and that an estoppel must be pleaded in order to authorize the admission of evidence in proof of it. While the facts might have constituted an estoppel, they were also admissible for the purpose of proving the acquisition of title under the deed from Smith to Bracken and to show that Bracken was a purchaser in good faith. Hence there is nothing in this objection. There are no other points which require notice. The facts above related are not seriously disputed, and, as the case is presented, it appears that they should have controlled the decision.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

168 Cal. 108

HANFORD GAS & POWER CO. v. CITY OF HANFORD. (Sac. 1,917.)

(Supreme Court of California. June 14, 1912.)

1. Gas (§ 10*)—"Tax"—What Constitutes.

A provision in a municipal franchise to a gas company for the payment to the city of a percentage of the company's gross receipts is not a provision for the payment of a "tax," but merely a provision for the payment of a consideration for the privilege.

[Ed. Note.—For other cases, see Gas, Dec. Dig. § 10.*

For other definitions, see Words and Phrases, vol. 8, pp. 6867–6886; vol. 8, p. 7813.]

2. Payment (§ 82*)—Recovery Back — Voluntary Payments.

In the absence of a statute, a person paying an illegal demand with knowledge of its illegality cannot recover it unless the payment was necessary to protect his person or property.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254–266; Dec. Dig. § 82.*]

3. Payment (§ 89*) — Recovery Back — Actions—Pleading.

In an action by a gas company to recover back a percentage of its receipts paid to a city under the terms of its franchise, on the ground that the provision for such payment was illegal, allegations that the payment was made under menace, compulsion, or coercion are insufficient to show that the payments were involuntary.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 291–296; Dec. Dig. § 89.*]

4. Payment (§ 89*) — Recovery Back — Duress—Threat of Legal Proceedings.

In an action by a gas company to recover back payments to the city under the terms of its franchise on the ground that the provision for such payments was illegal, an allegation that the payments were made under threats that proceedings would be instituted for the forfeiture of the franchise are insufficient to show that the payment was involuntary, since the company could have contested the validity of the city's claim in the proceeding to forfeit the franchise.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 291–296; Dec. Dig. § 89.*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by the Hanford Gas & Power Company against the City of Hanford. From a judgment for plaintiff on demurrer, defendant appeals. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

H. Scott Jacobs, for appellant. M. L. Short, for respondent.

ANGELLOTTI, J. This is an action to recover from the city of Hanford $740.20, paid by plaintiff to said city under such circumstances as, it is claimed, entitles plaintiff to recover it with interest, and also to obtain a decree enjoining the city from doing certain things. A demurrer to the complaint for want of facts to state a cause of action was overruled, and, defendant failing to answer, judgment was given for the recovery of such money with interest, and restraining the city from the commission of any of the acts alleged to be threatened. Defendant appeals from such judgment.

The complaint is substantially as follows: Defendant is a municipal corporation of the sixth class. The plaintiff is a corporation organized for the purpose of constructing and maintaining gas plants in cities and towns and manufacturing and supplying gas to the inhabitants of said cities and towns to be used for heat, light, and power. On July 14, 1902, E. E. Bush and C. S. Young applied in writing to the board of trustees of defendant for a franchise and privilege for themselves, their successors and assigns, for a period of 50 years, to lay and maintain gas pipes for the purpose of conducting gas for heat, power, and light, over, upon, along, and under the public streets, alleys, etc., in the city of Hanford, and for selling and supplying the same to the inhabitants of said city. Notice of such application was given to the board of trustees by publication stating that it was intended to grant said privilege, and that sealed bids would be received therefor up to October 23, 1902, at 8 o'clock p. m. The notice stated that the principal bidder and his assigns must, during the life of said franchise, pay to the city 2 per cent. of the gross annual receipts arising from the use, operation, or possession of the franchise, except for the first five years. It stated that, "in the event said payment is not made, said franchise shall be forfeited." It further required a bond from the grantee in the sum of $2,500, conditioned for the observance by him of the stipulations on his part. On October 23, 1902, C. S. Young submitted a bid for such privilege in accordance with the conditions specified in the notice, offering to pay therefor $250. This bid was accepted. On October 28, 1902, Young gave the required bond, which was approved and accepted. On November 10, 1902, the board of trustees adopted an ordinance granting to Young and his assigns the privilege and franchise for the term of 50 years "to lay gas pipes for the purpose of carrying gas for heat, light, and power through the public highways, streets, and alleys in said city of Hanford" on the conditions specified in the notice for bids, one of which conditions was specified in the ordinance as follows: "First. The said C. S. Young, and his assigns, must, during the life of said franchise, pay to the said municipality two (2) per cent. of the gross annual receipts arising from its use, operation or possession; provided, that no percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually, and in the event said payment is not made, said franchise shall be forfeited." Thereafter Young assigned to plaintiff all his interest in and to said privilege, and plaintiff thereupon constructed a gas plant in said city, and laid gas pipes through the streets, highways, and alleys thereof, and ever since the completion of said work has operated said plant and has been engaged in the business of manufacturing gas and supplying the same to the inhabitants of the city. On March 25, 1909, plaintiff paid to the city $359.09; said sum being 2 per cent. of its gross earnings for the first year after the expiration of the first five years. On April 14, 1910, it paid to the city $385.11; the same being 2 per cent. of its gross earnings for the second year after the expiration of the first five years. Each of these payments was accompanied by a written notice to the effect that the same was paid "under protest," and under the claim that the ordinance in so far as it required the payment of said money was unconstitutional and void, and that the city has no power to exact such payment, and that the company does not waive any of its rights to object thereto.

It was alleged that "plaintiff was unlawfully required to pay" these sums, that the city "did, * * * unlawfully and without right, demand of said plaintiff" such payments; that "by reason of said demand" plaintiff made the payments; that "the collection and taking of said money * * * was unauthorized, unlawful, and without right, and without consideration of any kind whatever, and the payment thereof was made by plaintiff herein under menace, compulsion, and coercion and under a threat that, if the same were not paid, proceedings would be instituted for the forfeiture of said privilege granted by said ordinance No. 115." It was further alleged, as a basis for the injunction sought, that the defendant threatens to continue to collect said 2 per cent. of said gross annual receipts, and threatens that if the same is not paid it will take immediate steps for the forfeiture of said privilege, "and threatens to interfere with and obstruct the use and operation of said plant by the said plaintiff," all of which plaintiff verily believes it will do unless restrained, and that "great injury and damage will result therefrom to this plaintiff, not susceptible of computation or compensation in a suit at law, and plaintiff's right to the use of said plant and its works will be permanently interfered with and destroyed, and great damage and waste will be wrongfully inflicted on said plaintiff, and endless litigation will result therefrom."

[1] Plaintiffs claim that the ordinance purporting to grant the assignor the privilege of using the streets of the city for its gas pipes, which was sought and accepted by plaintiff's assignor, is void in so far as it attempts to impose upon the grantee the duty of paying to the city a certain percentage of its gross receipts, is based upon section 19, article 11, of the Constitution as it existed prior to the amendment of 1911. That section has several times been held to constitute a grant of the right to use the streets of a city for pipes, conduits, etc., "so far as may be necessary for introducing into and supplying such city and its inhabitants either with gas light or other illuminating light, or with fresh water for domestic and all other purposes," in any city where there are no public works owned and constructed by the municipality for such purposes, to any individual, or any company duly incorporated for such purpose under the laws of this state, leaving nothing for the city to grant so far as the use of such streets for such purposes is concerned. The charge of 2 per cent. of the annual gross receipts is styled an "annual tax" by plaintiff; but, of course, it is in no proper sense a "tax" at all, but is simply an amount that plaintiff's assignor agreed should be paid annually as a consideration for such privilege as was granted by the city. It is the amount fixed by the contract of the parties, and, unless it is paid, the agreement is that "said franchise (the franchise granted by the board of trustees) shall be forfeited." Plaintiff's real point is that inasmuch as it had everything purported to be granted by the city, under and by virtue of the grant contained in the Constitution, it has obtained nothing from the city, and that the undertaking to pay the city anything on account of this purported grant was entirely without consideration and unenforceable. The defendant claims that plaintiff has acquired by this contract something from the city in addition to the rights granted by the Constitution, and is therefore liable for the stipulated price. It is unnecessary on this appeal to determine the question, for we are satisfied that, however it be determined, plaintiff is not entitled to recover the money paid by it and for which it obtained judgment in the lower court.

[2] There is nothing in the complaint to warrant a conclusion that these payments made by plaintiff to defendant were not what are known in law as voluntary payments, free from duress. Unless otherwise provided by statute, as is the case in this state with relation to state and county taxes (Pol. Code, §§ 3804, 3819), one who pays an illegal demand with full knowledge of its illegality cannot recover it, unless the payment is necessary in order to protect his person or property. As said in Brumagin v. Tillinghast, 18 Cal. 271, 79 Am. Dec. 176, quoted approvingly in Maxwell v. San Luis Obispo Co., 71 Cal. 466, 12 Pac. 484: "The illegality of the demand paid constitutes, of itself, no ground for relief. There must be, in addition, some compulsion or coercion attending its assertion, which controls the conduct of the party making the payment." In Phelan v. San Francisco, 120 Cal. 5, 52 Pac. 38, where a written protest accompanied the payment, it was said: "If one pays an illegal demand, with full knowledge of its illegality, his protest does not take from the payment its voluntary character, unless the payment is necessary in order to protect his person or property." See, also, Rooney v. Snow, 131 Cal. 51, 63 Pac. 155. It is unnecessary to cite other authorities on this well-settled rule of law.

[3, 4] Plaintiff claims that it has alleged facts warranting a conclusion of the duress or coercion essential to make the payments involuntary. We have set forth the allegations relied on. There is nothing therein hinting of duress, menace, or coercion, except the general allegation that the payments were made "under menace, compulsion, and coercion and under a threat that, if the same was not paid, proceedings would be instituted for the forfeiture of said privilege, granted by said ordinance No. 115." The general allegation as to menace, compulsion, and coercion is not sufficient to show any of these characteristics. It was said in Lewis v. San Francisco, 2 Cal. App. 114, 82 Pac. 1106, of an allegation that a payment was involuntary, that, while this was an allegation of the ultimate fact upon which plaintiff's right of recovery depended, nevertheless, "as in the case of a cause of action depending upon fraud or negligence, the allegation of this ultimate fact would have been insufficient against a general demurrer unless supported by an averment of the probative facts, and the sufficiency of the complaint is therefore to be determined by a consideration of these probative facts." The same is true as to the general allegation of menace, compulsion, and coercion. We have here no averment of any probative fact, except the allegation that the payments were made under a threat of the institution of proceedings for the forfeiture of the privilege granted by the city. In view of the fact that the claim of plaintiff for the recovery of this money is really based on the further claim that it had no privilege granted by the city, its contention that this threat is sufficient to show the duress essential to an involuntary payment is, to say the least, somewhat inconsistent. However this may be, a mere threat to institute a legal proceeding against the plaintiff, "for the forfeiture of said privilege granted by said ordinance No. 115," in which proceeding the validity of the claim of the city could be contested by the plaintiff and its legality determined, is

not sufficient to render a payment made by reason thereof compulsory or other than voluntary. See Lewis v. San Francisco, 2 Cal. App. 115, 82 Pac. 1106. None of the cases cited by plaintiff on this question is in point here. The allegations made in support of the claim for relief by injunction are utterly insufficient to warrant the granting of such relief. So far as they attempt to state matters on account of which the equitable remedy by injunction may be invoked, they are entirely wanting in specific statement warranting the inference that an injunction was necessary to protect the plaintiff in so far as any of its rights is concerned.

The judgment is reversed..

We concur: SHAW, J.; SLOSS, J.

163 Cal. 114

DONOHOE et al. v. WOOSTER et al.

(Sac. 1,952.)

(Supreme Court of California. June 14, 1912. Rehearing Denied July 11, 1912.)

1. Venue (§ 41*) — Joint Defendants — County of Residence—Change of Venue.

Where there are several defendants in a personal action, a nonresident defendant moving alone is not entitled to have the venue changed to the county of his residence, in the absence of a showing that none of the other defendants are residents of the county in which the action was brought, under Code Civ. Proc. § 395, providing that actions not specifically provided for must be tried in the county in which the defendants or some of them reside at the commencement of the action, etc.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*]

2. Venue (§ 41*)—Adverse Parties—Classification of Parties—"Defendant."

Code Civ. Proc. § 382, provides that, if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, and section 395 provides that, in all cases not specially provided for, the action must be tried in the county in which the defendants or some of them reside, etc. *Held*, that where plaintiffs sued on a joint cause of action in favor of themselves and F., and F. refused to join as plaintiff and was therefore made a defendant, he was not "a defendant" within section 395 for the purpose of determining the venue of the action, which was properly changed notwithstanding his residence in the county where suit was brought to the county of the residence of the actual defendant.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 62, 63; Dec. Dig. § 41.*

For other definitions, see Words and Phrases, vol. 2, pp. 1936–1939.]

3. Venue (§ 72*)—Change of Venue—Right to Change.

A right to change the venue must be determined by the conditions existing at the time of the appearance of the party demanding the change.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 127; Dec. Dig. § 72.*]

Department 1. Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by Charles L. Donohoe and another against C. M. Wooster and another. From an order granting the motion of defendant Wooster to change the place of trial, plaintiffs appeal. Affirmed.

Arthur C. Huston, for appellants. Frank H. Gould, Vincent Surr, W. T. Belieu, and George Freeman, for respondents.

SLOSS, J. The plaintiffs appeal from an order granting the motion of the defendant Wooster for a change of place of trial. The action was commenced in Glenn county. The complaint alleges the making of a contract between Charles L. Donohoe and Frank Freeman of the one part, and C. M. Wooster of the other, whereby Wooster agreed to pay to Donohoe and Freeman certain sums in consideration of services to be performed by them in obtaining options for the purchase of lands. A one-third interest in the contract was transferred by Donohoe and Freeman to Barceloux. It is alleged that, pursuant to the terms of the contract, the plaintiffs and Freeman obtained certain options, and that thereby said three parties became and are entitled to receive from Wooster the sum of $15,737.24, of which amount Freeman is entitled to receive one-third. It is alleged that Freeman has refused to join Donohoe and Barceloux as a plaintiff in the action, and for that reason is joined as defendant. The prayer of the complaint is that the plaintiffs recover judgment against Wooster for $11,481.50. The complaint was filed in January, 1911. On the 31st day of January the defendant Freeman appeared by filing a demurrer. On the 25th day of February, 1911, the defendant Wooster appeared and filed a demurrer, together with a demand for a change of place of trial, notice of intention to move for such change, and an affidavit. The affidavit showed a meritorious defense, and alleged that said defendant Wooster is, and at all times since the commencement of the action has been, a resident of the city and county of San Francisco, state of California. There was no counter showing, and upon the hearing of the motion the court made its order changing the place of trial from the county of Glenn to the city and county of San Francisco.

[1] Where there are several defendants in a personal action, a nonresident defendant, moving alone, is not entitled to have the place of trial changed to the county of his residence in the absence of a showing that none of the other defendants are residents of the county in which the action was brought. Code Civ. Proc. § 395; Hearne v. De Young, 111 Cal. 371, 43 Pac. 1108; Quint v. Dimond, 135 Cal. 572, 67 Pac. 1034; County of Modoc v. Madden, 136 Cal. 134, 68 Pac. 491; Sullivan v. Lusk, 7 Cal. App. 186, 94 Pac. 91, 92. Inasmuch, therefore, as Freeman is named as a party defendant, and there is no showing that he is not a resident of the county of Glenn, it is argued by the appel-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lants that Wooster was not entitled to have the place of trial changed.

[2] On the other hand, the respondents contend that Freeman was not a "defendant" within the meaning of section 395 of the Code of Civil Procedure. The latter view was the one adopted by the trial court, and we think the action taken was correct. As was said in Smith v. Smith, 88 Cal. 572, 575, 26 Pac. 356, 357: "The general spirit and policy of the statute is to give to the defendant the right of having all personal actions against him tried in the county of his residence. * * * It is intended to protect the defendant in the expense and inconvenience of being compelled to go to a distant county to defend himself against an action that might be commenced against him there, and is in accordance with the principles that obtain wherever the common law prevails, that a plaintiff who would seek redress from a defendant must seek it in the county where he resides." In conformity with this theory, it is settled that the joining as party defendant of one against whom no cause of action is stated does not deprive the other defendant of the right to have the action tried in the county of his residence. Buell v. Dodge, 57 Cal. 645; Sayward v. Houghton, 82 Cal. 628, 23 Pac. 120.

The joinder of Freeman as a party defendant is justified by the provision of section 382 of the Code of Civil Procedure that, "if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant; the reason therefor being stated in the complaint." The fact, however, that Freeman's refusal to join in bringing the action made it necessary to designate him as a defendant, does not alter the essential relations of the parties to one another. The cause of action alleged is one in favor of Donohoe, Freeman, and Barceloux, jointly, against Wooster. The plaintiffs are seeking no relief against Freeman; the only purpose of joining him being to have before the court all of the parties necessary to an adjudication of their claim against Wooster. Freeman has no such interest as would entitle him to a voice in fixing the place of trial. He must take one of two positions—either that he wishes to participate with the plaintiffs in such recovery as may be had against Wooster, or that he does not desire any benefit from the action. In either view his attitude will be substantially that of a plaintiff. In the one case that of a plaintiff asserting his right to recover; in the other, that of a plaintiff who waives such right.

It is apparent, therefore, that it is only in a narrow and technical sense that it can be said that the complaint states a cause of action against Freeman. While he was properly made a party defendant by virtue of the provisions of section 382, the plaintiffs cannot on the facts alleged obtain any relief against him. Nor can his action in asserting or waiving a right to participate in the recovery affect the rights which the plaintiffs are here attempting to assert against Wooster.

It is suggested by the appellants that Freeman may by appropriate pleadings seek relief adverse to the plaintiffs. But in seeking any such relief it is clear that Freeman would, whether he asserted his claim by cross-complaint or counterclaim, in reality assume the position of a plaintiff setting up a new cause of action by a new complaint.

[3] Furthermore, the right to a change of place of trial must be determined by the conditions existing at the time of the appearance of the party demanding the change. Buell v. Dodge, supra; Remington S. M. Co. v. Cole, 62 Cal. 318.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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163 Cal. 124

OLIVER v. LOYDON. (L. A. 3,116.)

(Supreme Court of California. June 17, 1912.)

1. Landlord and Tenant (§ 202*)—Rent—When Due.

Rent is not payable until it falls due under the lease, though the tenant abandons the premises and notifies the landlord that he will repudiate the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 802–806; Dec. Dig. § 202.*]

2. Landlord and Tenant (§ 110*)—Lease—Repudiation.

A mere threat on the part of a tenant that he would not be bound further by the lease was not a repudiation of it authorizing the recovery of damages from him, where he continued to occupy the premises and did not actually default in the performance of any of the conditions of his contract.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 366–369, 371; Dec. Dig. § 110.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Byron L. Oliver, for whom after his death Gertrude Oliver, his executrix, was substituted, against Fred R. Loydon. From judgment for defendant, plaintiff appeals. Affirmed.

Grant Jackson, for appellant. M. K. Young, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment given by the trial court in favor of defendant on the pleadings; the motion for such judgment being based on the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action.

The action was instituted on April 10, 1909, to recover the sum of $455. The complaint showed substantially the following facts: On November 14, 1908, plaintiff's testator leased to defendant by an instrument in writing certain real property for the term of one year, commencing November 15, 1908, and ending November 14, 1909, in consideration of which defendant agreed to pay as rent $780 in monthly installments of $65, payable in advance on the 15th day of each month during said term, and also agreed that he would keep the premises in good order and repair and pay all water, gas, electric light, and telephone rates. On November 15, 1908, defendant entered into the sole and exclusive possession of said premises, "and has ever since remained therein, and has paid all rents thereon up to and including the month beginning the 15th day of March, 1909, together with" the expenses of repairs and other sums agreed by him to be paid. "On or about the 9th day of April, 1909, the defendant renounced and repudiated the said lease and notified the plaintiff that he would no longer be bound thereby, and that he did then and there refuse and would continually refuse to pay any further rental accruing under said lease" or the other expenses and charges provided therein. It was further alleged "that the premises of the kind and character described in said written lease are not rentable during the months of April, May, June, July, August, September, or October of any year; that plaintiff is and will be unable to rent said premises during said months; and that he will be compelled to permit said premises to remain unoccupied and unrented." It was also alleged "that there is now unpaid upon said lease the monthly installment of $65 per month for the months beginning April 15, 1909, and ending November 14, 1909, and amounting to the sum of" $455. Judgment was sought for that amount.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It will be observed from the foregoing that it is affirmatively shown by the complaint that, at the time of the commencement of this action, April 10, 1909, first, there was nothing due from defendant to plaintiff's testator on account of the rents agreed to be paid, and defendant had not committed any breach of any provision of the lease; and, second, that defendant had not abandoned or removed from the premises, but was still in possession thereof.

[1] It is settled by the recent decision in Bradbury v. Higginson (L. A. No. 2,885), 123 Pac. 797, that the repudiation of a lease by the lessee does not operate at once to mature all the rent reserved in the lease and to enable the lessor to recover, not only the installments already accrued, but those to accrue in the future. In that case it was said as to this proposition: "But the proposition cannot be successfully maintained. It finds no support in the authorities with the exception of a few cases decided in Louisiana, a jurisdiction which is largely governed by the doctrines of the civil law. The general common-law rule is that rent, as such, is not payable until it falls due under the lease, and this rule is not altered by the fact that the tenant has abandoned the premises and notified the landlord that he will repudiate the lease. Nicholes v. Swift, 118 Ga. 922, 45 S. E. 708. Viewing the action as one for rent, it is not distinguishable, in principle, from Tatum v. Ackerman, 148 Cal. 357 [83 Pac. 151, 3 L. R. A. (N. S.) 908, 113 Am. St. Rep. 276, 7 Ann. Cas. 541]." This statement is equally applicable here, even if we assume that a repudiation of the lease was shown by the complaint. According to the complaint, there was no rent due at the time of the commencement of the action.

[2] Viewing the action as one for damages caused plaintiff's testator by a repudiation of the lease, it was said in the opinion in Bradbury v. Higginson, supra: "When a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due; or he may take possession of the premises and recover damages, which damages will be the difference between what he may be able to rent the premises for and the price agreed to be paid under the lease." The complaint in the case at bar differs from that in Bradbury v. Higginson, supra, in that it does allege facts showing damage in the event that defendant does not perform his contract. But, notwithstanding the general allegation that defendant "renounced and repudiated the said lease," the complaint affirmatively shows that there had been no actual repudiation of the lease; nothing more, in fact, than a mere threat on the part of defendant that he would not be further bound thereby, notwithstanding which he continued to occupy the premises, and did not actually default in the performance of any of the conditions of his contract. As said by the District Court of Appeal in deciding this case, it thus appears that "there was no repudiation of the demised estate under the lease, but merely a repudiation of the obligation to pay the rent *not yet due*," and also, we may add, a repudiation of the obligation to pay other charges *not yet due*. In other words, whatever the defendant may have *said*, he had never surrendered or offered to surrender possession of the demised premises, and was still in possession thereof *under his lease*, without having actually defaulted in the performance of any covenant or condition thereof, and was entitled to continue in such possession as long as he actually performed, as they accrued, the various obligations imposed upon him by the lease. As said by Justice James in his concurring opinion filed in this case in the District Court of Appeal, the facts shown by the complaint "are inconsistent with the general allegation found in the complaint that * * * the defendant

renounced and repudiated the said lease." It follows from what we have said that no cause of action for damages was shown by the complaint. Therefore the action of the court in granting the motion for judgment on the pleadings was correct.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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18 Cal. App. 787

CONNER v. BLODGET. (Civ. 1,092.)

(District Court of Appeal, Second District, California. May 4, 1912. Rehearing Denied by Supreme Court July 3, 1912.)

1. Bills and Notes (§ 474*)—Attorney's Fees—Allowance—Pleadings.

An answer, in an action on a note, which merely denies that $500 is a reasonable attorney's fee in the collection of the note and prosecution of the suit as alleged in the complaint, setting forth the note stipulating for attorney's fees, admits that any sum less than $500 is a reasonable fee, and the court finding that $300 is a reasonable fee finds an amount within the admission in the answer.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1508–1513; Dec. Dig. § 474.*]

2. Bills and Notes (§ 534*)—Attorney's Fees—Allowance.

Where an action on a note was brought by an attorney who signed the complaint which set out the note stipulating for attorney's fees incurred in the collection thereof, and which alleged that a specified sum was a reasonable attorney's fee in the collection of the note and prosecution of the action, the court could, when the nature and extent of the services rendered by the attorney were shown, fix a reasonable compensation without hearing any expert evidence thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. § 534.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by C. L. Conner against H. A. Blodget. From a judgment for plaintiff, defendant appeals. Affirmed.

E. L. Foster, for appellant. George E. Whitaker, for respondent.

JAMES, J. This is an action brought upon a promissory note, executed by defendant, which contained the agreement of appellant to pay, in addition to the principal sum and interest, "all legal expenses and attorney's fees which may be incurred in the collection of this note." Plaintiff set out in his complaint the note in hæc verba, alleged the nonpayment of the balance due thereon, and with reference to the matter of attorney's fees alleged as follows: "That $500 is a reasonable fee to be allowed plaintiff as attorney's fees in the collection of said note and prosecution of this suit." To this complaint defendant filed an answer which contained only the following denial: "Denies that $500 is a reasonable fee to be allowed the plaintiff as attorney's fee in the collection of said note and prosecution of this suit in any manner, or otherwise, or at all." This being the state of the pleadings, a motion was made on behalf of plaintiff for judgment without trial, which motion was granted by the court, and judgment was thereupon entered for the amount of principal and interest due, together with $300 as attorney's fees and costs.

[1] Defendant on this appeal taken from that judgment makes the contention that, under the allegations of the complaint, it was not shown that any attorney's fees had been incurred, and that therefore there was no jurisdiction in the court to award to the plaintiff judgment for any amount on that account. By his answer defendant denied only that the amount of $500 was a reasonable attorney's fee to be allowed. The denial in that form admitted, of course, that any sum less than $500 was a reasonable fee, and the court by its judgment found the sum of $300 to be a reasonable fee, which was an amount within that admitted by appellant to be reasonable. In the case of Prescott v. Grady, 91 Cal. 518, 27 Pac. 755, the denial there made by the defendant to a like demand was "that $75, or any other sum, is a reasonable attorney's fee." In that case the court said: "We think, under this answer, defendant could have shown either that plaintiff was not entitled to any fee, as in Bank of Woodland v. Treadwell, 55 Cal. 379, or could have been heard as to what would have been a reasonable fee; and perhaps might have made some other defense." The denial made in that case by the defendant covered every amount asserted by the complaint to be a reasonable fee, which the denial here, as we have pointed out, did not do.

[2] Neither do we think that it was incumbent upon the plaintiff to allege and show by express proof that an attorney had been employed and an agreement had been made to pay him before the court was authorized to make an allowance for attorney's fees as having been "incurred" by the plaintiff. As affecting that question, the facts in this case are very similar to those disclosed by the opinion in the case of Alexander v. McDow, 108 Cal. 25, 41 Pac. 24. There the note provided that there should be paid "ten per cent. of total amount due for attorney's fees incurred in the collection of this note, when collection is made by attorney or other officer." In that case the complaint contained no allegation that attorney's fees had been incurred, and the court said: "We think, also, that there is sufficient in the complaint to support the allowance of attorney's fees. The note, which is set forth in full, provides for them, and the prayer of the complaint asks for them, and the action is brought by an attorney at law. The sum

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

asked as attorney's fees is susceptible of exact determination by simple mathematical calculation. It is fairly deducible from the complaint, therefore, that plaintiff asks an allowance of a specific sum as being reasonable and due for attorney's fees under the contract. It is true that this demand is in the nature of special damages, the allowance of which might have been contested by defendant. Prescott v. Grady, 91 Cal. 518, 27 Pac. 755. But his default admits the truth of the matters pleaded, and must therefore be construed to admit that the amount claimed is both reasonable and due. Thus no evidence was required to be taken for the purpose of fixing that amount." It appears from the record in this case that the action was brought by an attorney at law, who signed the complaint and also appeared in court and presented the motion for judgment on the pleadings. The court was authorized, when the nature and extent of the services rendered by the attorney were made to appear from the papers and proceedings had, or by other evidence, to fix such an amount as would be a reasonable compensation for such services without hearing any expert evidence thereon. Spencer v. Collins, 156 Cal. 298, 104 Pac. 320, 20 Ann. Cas. 49. For the reasons stated, we think that under the pleadings the judgment as entered by the court was fully authorized.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 1

WENDLING LUMBER CO. v. GLENWOOD LUMBER CO. (Civ. 947.)

(District Court of Appeal, Third District, California. May 4, 1912. Rehearing Denied by Supreme Court July 3, 1912.)

JURY (§ 25*)—RIGHT TO JURY TRIAL—DEMAND.

A rule of court provides that trial by jury is waived where a party does not demand the same either before or at the time a cause is set down upon the trial calendar, and does not deposit the jury fee within five days of the demand. After the first trial of an action, plaintiff demanded a jury and tendered the fee, and, though plaintiff's demand was refused, the cause was reset for a later date, and plaintiff, when the case was tried, excepted to the court's refusal of a jury trial, having again demanded a jury on the date of the trial. *Held*, that plaintiff's original demand, though not formally renewed after the court's refusal and the resetting of the case, entitled it to trial by jury; it being apparent that plaintiff still relied on that demand.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 154–173; Dec. Dig. § 25.*]

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by the Wendling Lumber Company against the Glenwood Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Louis, Brownstone, Stratton & Kaufman, and Nicholas Bowden, for appellant. Walter H. Linforth, for respondent.

BURNETT, J. The only question involved herein is whether the lower court erred in denying plaintiff's demand for a jury. The action, brought to recover the sum of $6,500 for the conversion of certain lumber, was begun on the 25th day of November, 1903, and on the 26th day of September, 1904, was tried before Hon. H. B. Tuttle and a jury, and a verdict was rendered in favor of plaintiff. Thereafter a motion for a new trial was granted by Hon. J. R. Welch on the ground of the insufficiency of the evidence to support the verdict. An appeal was taken and this order affirmed by the Supreme Court. 153 Cal. 411, 95 Pac. 1029. When the action was originally set for trial, a demand was made by plaintiff for a jury, and the proper entry was made in the minutes of the court. On the 24th day of September, 1909, the case was reset, and at that time no additional demand was made for a jury. The case was called for trial on the 29th day of November, 1909; there being no jury in attendance. Plaintiff then demanded a jury and deposited the requisite fee. The demand was opposed by defendant on the ground that, under a rule of the court, the plaintiff, by failure to make the demand at the time the case was set for trial, had waived the right to a jury. The said rule provides that "trial by jury is deemed waived by a party who does not demand the same, either before or at the time when the cause is set down upon the trial calendar, and also does not, within five days after such demand, deposit with the clerk the fees for twelve jurors for one day." The court sustained defendant's contention and denied plaintiff's demand. The case was then continued until February 7, 1910, for further hearing. In the meantime plaintiff moved the court to vacate its order of November 29, 1909, denying a jury. This motion was heard December 29, 1909, and was denied. Thereafter the action came on for trial April 10, 1910, and plaintiff renewed the demand for a jury with the same result as before. Plaintiff thereupon declined to introduce any evidence, and judgment went for defendant.

Much argument is devoted by counsel to the consideration whether such a rule can be given effect to deprive a party of his constitutional right to a jury trial, and also to the question whether the rule represents a reasonable exercise of whatever power of regulation in this respect may be committed to a trial court. Among the cases cited in this connection are the following decisions of the Supreme Court of this state: Biggs v. Lloyd, 70 Cal. 448, 11 Pac. 831; Conneau v. Geis, 73 Cal. 176, 14 Pac. 580, 2 Am. St. Rep. 785; Swasey v. Adair, 88 Cal. 179, 25

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Pac. 1119; Farwell v. Murray, 104 Cal. 467, 38 Pac. 199; Bank of Lassen v. Sherer, 108 Cal. 516, 41 Pac. 415; Adams v. Crawford, 116 Cal. 495, 48 Pac. 488; Platt v. Havens, 119 Cal. 247, 51 Pac. 342; Ferrea v. Chabot, 121 Cal. 233, 53 Pac. 689, 1092; Naphtaly v. Rovegno, 130 Cal. 639, 63 Pac. 66, 621.

We deem it unnecessary, however, to decide between these opposing contentions of the parties, or to review the authorities cited, as we are satisfied that, under a fair construction of said rule as applied to the peculiar circumstances of the case, plaintiff should have been accorded a jury trial as requested. Granting, for the sake of the argument, that the rule is within the power of the court to adopt, it could be justified as a reasonable regulation as to the demand for a jury only upon the ground, as stated by respondent, that "the orderly business of the court may proceed and causes tried at the times they are set," and as to the deposit, for the reason stated by the Supreme Court in Conneau v. Geis, supra, that it affords "a reasonable precaution to prevent the jurors from being defrauded by unscrupulous parties and to prevent the demand of a jury being used as a pretext to obtain continuances and thus trifle with justice."

But it is apparent that no purpose of the rule could have been thwarted or imperiled if plaintiff's demand, under the circumstances already narrated, had been allowed. After said demand was made, the cause was continued by consent for more than two months. As a matter of fact, indeed, by reason of subsequent events, the case is brought clearly within the requirement of said rule. As far as the demand and the deposit of the jury fee are concerned, when the case was reset for trial the situation was exactly the same as when the original order setting it was made. In fact, it can be said that, upon the very day that the cause was set for trial, plaintiff made its demand and deposit as required by the rule. When the case was called for trial, plaintiff made application for a continuance on the ground of the absence of certain witnesses. It was opposed by respondent; one of the reasons being stated by counsel as follows: "Under the rules and under the decisions they have waived a trial here by jury. I tell you frankly I don't want to try this case before a jury if I can avoid it." The trial judge, among other things, said: "Whatever disposition the court will make of this motion for a continuance, it will not place it upon a condition that the continuance will be granted provided one party or the other must waive a jury." The chief counsel for plaintiff, Mr. Brownstone, then stated to the court: "I had not the slightest idea that there would not be a jury here." Before that he had said: "Now it appears that there is no jury in attendance this morning, and we do desire a jury in this matter." Considerable discussion then ensued, during which the court called attention to the aforesaid rule, and Mr. Brownstone said: "I want to convince your honor that I had no idea there would not be a jury here this morning. I am not making the motion for a continuance, or did not let the thing wait, not to have a jury here so that we could ask a continuance. Mr. Linforth asked me if we expected a jury, and I says, yes, we wanted a jury, we would not waive a jury." Then Mr. Bowden, associate counsel for plaintiff, requested a continuance, stating, inter alia, that "it seems to me that under all the circumstances of the case it would not be unfair to say to your honor, and I ask at this time that, even if we are forced to go on with it, take until to-morrow morning, and then your honor in the meantime could have a jury drawn and have a jury here to-morrow morning." The court replied: "That is passed, Mr. Bowden. We have passed that milestone." Mr. Brownstone: "Before your honor makes that ruling, will it be deemed that I have offered the fees for the jury? I make the offer of $40, to deposit $40." And it was agreed that the money might be deemed deposited. The case was then set for February 7th; Mr. Linforth stating that "by my consent to the continuance to that time, without calling any witness on behalf of the plaintiff or the plaintiff offering any proof, no advantage of that fact will be taken between now and the 7th of February, and without making any demand for jury, or tendering any fees, will there?" Mr. Bowden: "Of course, if the judge has committed an error, it is preserved to us. Isn't that so, Mr. Brownstone?" Mr. Brownstone: "Yes, I think that is all right." Mr. Bowden: "We will take leave to have the record show a record of an exception to the denial of the jury."

There is thus exhibited a continuous transaction during which plaintiff makes the demand and deposit for a jury and the cause is reset for trial. There is no pretense that plaintiff waived its right to a jury, or that there was any rescission from its demand. Plaintiff was all the time insisting upon its claim, and it was so understood by all the parties.

If it should be conceded that the court was justified under the rule in denying the application before the case was reset, yet immediately thereafter it should have reconsidered the matter and granted the request. The demand and deposit were still operative and before the court. It was not necessary to formally renew them, since it appears that plaintiff was still relying upon them. The demand must be considered as a continuous refusal to waive the right to a jury. It was not necessary to repeat the demand. Swasey v. Adair, supra.

The understanding of defendant that no other demand and deposit would be made thereafter is, also, it may be said, beside the question. Why should plaintiff be required to repeat the performance in order to secure his constitutional right? At the time the cause was reset, the record of the court showed that the demand and the deposit for the jury had been made, and that is all that the rule requires. If it is to be given the exceedingly technical application contended for by respondent, it should be declared without hesitation unreasonable and invalid. The truth is it should be construed liberally in favor of the person demanding a jury in a case like this.

We think the judgment and order denying the motion for a new trial should be reversed, and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

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19 Cal. App. 6

HORNE v. HUGHES. (Civ. 872.)

(District Court of Appeal, Second District, California. May 7, 1912.)

1. Vendor and Purchaser (§ 334*)—Rescission—"Mistake of Fact."

Where plaintiff paid the consideration for a deed on the belief that defendant had title to the premises, and thereafter it appeared that she had no title because the conveyance to her was a forgery, plaintiff was entitled to recover the consideration as money paid under a mistake of fact under Civ. Code, § 1577, subd. 2, providing that mistake of fact is a mistake not caused by neglect of a legal duty, and consisting in the belief of the present existence of a thing material to the contract which does not exist or in the past existence of a thing which has not existed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959–980; Dec. Dig. § 334.*

For other definitions, see Words and Phrases, vol. 5, pp. 4542–4543; vol. 8, p. 7723.]

2. Vendor and Purchaser (§ 108*)—Failure of Title—Rescission.

Where a grantor had no title because her interest rested on a forged deed, her grantee was entitled to rescind under Civ. Code, § 1689, authorizing a rescission if the consent of the party rescinding has been given by mistake, or if the consideration becomes entirely void from any cause.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 108.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by W. J. Horne against Ida D. Hughes. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Hanson, Hackler & Heath, for appellant. Denio & Hart, for respondent.

ALLEN, J. The allegations of the complaint, in substance, are these: Plaintiff bought of defendant an undivided half interest in a tract of land at Wilmington, paying therefor the sum of $675, defendant executing to plaintiff a bargain and sale deed. At the time of the sale and conveyance the defendant represented to plaintiff that she had a good and perfect title to the land and authority to sell and convey the same. Plaintiff relied upon these representations, and believed them to be true, and upon the faith thereof paid the purchase price, and accepted the conveyance. As a matter of fact, defendant had no title to said premises, and owned no interest therein; that she believed at the time, as did plaintiff, that a certain conveyance theretofore made under which she claimed title was valid, but in truth the same was a forgery, and defendant by reason thereof derived no title on account of such conveyance; that plaintiff did not discover this fact until in the year 1908, when such deed so made to defendant was by a court of competent jurisdiction declared to be invalid and a forgery. The action was brought to recover the amount of the purchase price so paid, with interest. A general demurrer was interposed to the complaint, which was by the court below sustained, and the complaint not being amended, judgment was rendered in favor of defendant for costs. From this judgment plaintiff appeals.

[1] It clearly appears from the averments of the complaint that the money paid in consideration of the execution of the deed and the whole transaction was occasioned by a mutual mistake of fact and such an one as is contemplated by subdivision 2 of section 1577 of the Civil Code.

[2] Section 1689 of the Civil Code confers the right of rescission, if the consent of the party rescinding was given by mistake, or if the consideration becomes entirely void from any cause. This transaction clearly comes within the provisions of the above named sections. Hartwig v. Clark, 138 Cal. 671, 72 Pac. 149. Defendant having no interest in the premises, her deed conveying none to plaintiff, no necessity existed for a reconveyance or tender thereof before the action was brought. Plaintiff received nothing which he could tender back, and defendant parted with nothing that she was entitled to have tendered to her as a condition precedent to the bringing of the action. We are of the opinion that the complaint stated a good cause of action, and that the court erred in sustaining the demurrer thereto.

Judgment reversed and cause remanded.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 28

DEAN v. SEDAN MILLING CO. et al. (Civ. 939.)

(District Court of Appeal, Third District, California. May 7, 1912. Rehearing Denied by Supreme Court July 5, 1912.)

1. Guaranty (§ 56*)—Discharge of Guarantor.

To relieve a guarantor of a note from liability on the ground of an extension of the time of payment, there must be a binding extension of time for a definite period, and there must exist mutual promises by the payee to forbear the right to full payment during the extension, and by the maker to retain the money for the extended time, and such extension must be supported by a sufficient consideration.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 67; Dec. Dig. § 56.*]

2. Guaranty (§ 57*)—Discharge of Guarantor.

Under Civ. Code, §§ 2819, 2820, 2823, providing that a guarantor is exonerated where, by any act of the creditor, the original obligation is altered or the remedies of the creditor are impaired or suspended, and that a void promise by a creditor does not alter the obligation or suspend the remedy, a guarantor of the payment of a note at maturity, or at any time thereafter until paid, and waiving demand, notice of nonpayment, and protest, is not discharged from liability by an oral agreement by the payee made with the maker extending the time of payment, unsupported by any consideration, though the guarantor does not receive notice thereof.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 68; Dec. Dig. § 57.*]

3. Guaranty (§ 57*)—Discharge of Guarantor.

An agreement to forbear suit for a definite period, the obligation remaining unchanged, is not supported by a sufficient consideration and does not discharge the guarantor.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 68; Dec. Dig. § 57.*]

4. Guaranty (§ 57*)—Extension of Time of Payment—Validity—"Executed Contract."

Under Civ. Code, §§ 1661, 1698, defining an "executed contract" as one the object of which is performed, and providing that a contract in writing may be altered only by a contract in writing, or by an oral executed agreement, an oral extension of the payment of a note, made after maturity, but not supported by any consideration, is void, notwithstanding the forbearance to sue during the extension, since the oral extension is not an executed contract, and a guarantor of the payment of the note is not discharged from liability in the absence of estoppel; an "executed contract" being one in which both parties have fully performed the terms of the contract.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 68; Dec. Dig. § 57.*

For other definitions, see Words and Phrases, vol. 3, p. 2562.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by W. E. Dean against the Sedan Milling Company and another. From a judgment for plaintiff, defendant H. W. Postlethwaite appeals. Affirmed.

G. F. Hatton and Hartley F. Peart, for appellant. A. F. St. Sure and J. Leonard Rose, for respondent.

CHIPMAN, P. J. Plaintiff commenced the action to recover the principal and interest of a certain promissory note, executed by defendant, Sedan Milling Company, dated September 3, 1908, for $2,000, payable 90 days after date to the Central Bank or order, with interest at the rate of 8 per cent. per annum, payable monthly. The Central Bank assigned the note to plaintiff, who brings the action. Defendant Postlethwaite indorsed the note as follows: "For value received, I hereby guarantee the payment of the within note at maturity or at any time thereafter with interest at the rate of 8 per cent. per annum, until paid, waiving demand, notice of nonpayment and protest." Upon sufficient evidence the court made the following finding: "(6) That said note, together with the interest thereon, became due on the 2d day of December, 1908, and that the same was presented to the said Sedan Milling Company for payment thereof after said 2d day of December, 1908, and payment thereof demanded, but that the same was not paid except the sum of $40, which said sum was the interest on said note up to the said 2d day of December, 1908. That shortly after said 2d day of December, 1908, said Central Bank of Oakland entered into an oral agreement with the said Sedan Milling Company, without any notice to, and without the consent of, the said defendant H. W. Postlethwaite, whereby and wherein the said Central Bank of Oakland extended the time of payment of said promissory note as follows: $1,000 and the interest on said $2,000 at the same rate of interest as provided in said note, to wit, 8 per cent. per annum to be paid on the 2d day of January, 1909, and the balance of $1,000 with the same rate of interest as provided in said note, to wit, 8 per cent. per annum to be paid on the 2d day of February, 1909. That said Central Bank of Oakland and said Sedan Milling Company did not give said defendant, H. W. Postlethwaite, any notice of said oral extension of time, and that said defendant, H. W. Postlethwaite, did not at any time consent thereto. That said Sedan Milling Company did not pay said sum of $1,000 and interest on said $2,000, or any part thereof, on said 2d day of January, 1909, or at any other time. That on or about said 2d day of January, 1909, said Central Bank of Oakland demanded payment of said $1,000 together with the interest on the said $2,000 from said Sedan Milling Company, and that said Sedan Milling Company did not pay said sum and interest, or any part thereof. That on or about the 8th day of January, 1909, notice of nonpayment by said Sedan Milling Company of said note and interest was given to the said defendant, H. W. Postlethwaite, and payment of said note together with the interest thereon was demanded of said defendant, H. W. Postlethwaite, but the same was not paid." As conclusion of law the court found "that the oral extension of time of payment of principal and interest of said note mentioned in paragraph 6 of the findings of fact is void." Plaintiff had judgment from which and from the order denying his motion for a new trial defendant Postlethwaite appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The foregoing finding of fact and conclusion of law present the principal question in the case, namely, Was the oral extension of time of the payment of the note void?

[1] Appellant, correctly, we think, states the rule that, in order to relieve the guarantor from liability, there must be a valid extension of time for a definite period, and there must exist the mutual promises, first, by the lender to forbear his right to full payment during the period of extension; second, by the debtor to retain the money for the extended time, and such extension must be supported by a sufficient consideration.

Where the agreement makes no change in the terms of the contract, and no additional burden is put upon the debtor, the creditor merely extending the time of payment, the decisions are in conflict as to whether such an agreement is supported by a sufficient consideration. Appellant cites Nelson v. Flagg, 18 Wash. 39, 50 Pac. 571, as presenting his view of the question. The court there said: "The effect of the indorsement in this case, in the light of the finding that it was at the maker's request and with his consent, was to postpone the time of payment for one year. The consideration flowing to the holder was the implied promise of the maker to pay interest during the full period of the extension, at the rate expressed in the instrument; and the promise of the holder to forbear suit for a definite period constituted a good consideration for the agreement upon the part of the maker to pay interest for such full period. Here are all the elements of a valid contract, and, upon principle, we are unable to see why such an agreement should not be sustained." The court expresses its unwillingness to agree with what it says is "the reasoning so often advanced by courts holding a contrary doctrine—that the maker under such circumstances assumes no additional obligation, that the note by its terms binds him to pay interest until the note is paid." Mr. Brandt says: "It seems the better opinion that the surety is thereby discharged. The reasoning upon which this rule is founded has been thus well expressed: 'It is a valuable right to have the privilege at any time of getting rid of the payment of interest by discharging the principal. By this contract the right to interest is secured for a definite period, and the right to pay off the principal and get rid of paying the interest is also relinquished for such period. Here then are all the elements of a binding contract' "—citing cases in footnote. Continuing, the author says: "Notwithstanding this reasoning seems invincible, the contrary has been repeatedly held, the ground upon which these decisions is founded being that the promise of the principal to pay the interest for the extended period creates no additional obligation upon him, as he would have been obliged to pay the interest without any new agreement if the time had not been given"—citing cases. Brandt on Suretyship & Guaranty, vol. 1, § 388 (3d Ed.). It would be difficult to determine where the weight of the decisions lies, if it were to depend upon the number of cases decided on each side, for they are pretty equally divided. We have a statute which must be taken into account in dealing with the question. Section 2819 of the Civil Code provides as follows: "A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended." And section 2820 provides: "A promise by a creditor, which for any cause is void, or voidable by him at his option, does not alter the obligation or suspend or impair the remedy, within the meaning of the last section." Mere delay on the part of the creditor to proceed against the principal does not exonerate a guarantor. Section 2823.

[2] We are thus brought back to the question whether the promise of plaintiff was for any cause void. If it lacked consideration it was void, and the guarantor was not exonerated. The promise of forbearance leaves the obligation unchanged, and it remains the same as when guaranteed. By the terms of the guaranty the guarantor guaranteed "the payment of the within note at maturity *or at any time thereafter* with interest at 8 per cent. per annum until paid," contemplating, by the very terms of the guaranty, it seems to us, the contingency that the note might not be paid at maturity. The fact that the forbearance was without notice to or consent of the guarantor lends no weight to his claim to exoneration, for he waived "demand, notice of nonpayment, and protest." The promise to pay interest during the time of forbearance was held, in Reynolds v. Ward, 5 Wend. (N. Y.) 501, to be "no consideration" for the agreement to forbear when the debtor is already bound to pay interest; such an extension does not release the guarantor or surety. In Davis v. Stout, 126 Ind. 12, 25 N. E. 862, 22 Am. St. Rep. 565, where the time of payment was extended, the court said: "The contract is not valid, for the reason that it is without consideration. It does not belong to the class of contracts in which a consideration is implied, nor do the recitals show a consideration; neither is there any extrinsic averment showing a valid consideration for the agreement of forbearance. The principal and interest of the note were due when the payments were made and the agreement extending the time of payment entered into; hence it is plain that the payors of the note neither did anything they were not already under a binding obligation to do, nor undertook to do anything that they were not already bound to perform. * * * The sure-

ty is in no better situation than his principal, if it be true that the contract of forbearance was without consideration, * * * for, where there is no consideration for the contract, the surety will not be released." Many cases to like effect might be cited.

Turning to the California decisions, McCann v. Lewis, 9 Cal. 246, was a case where the time of payment of a promissory note was extended provided the interest was paid at the end of every twelve months. Said the court, by Field, J.: "The agreement for the extension of time for the payment of the principal of the note was without consideration. It conferred no rights which the holder did not possess." In Liening v. Gould, 13 Cal. 598, the maker of the promissory note set up as a defense that the holder had agreed to extend the time of payment on payment of part of the note then due. The court held that there was no consideration for the alleged agreement of extension. In Hughes v. Davis, 40 Cal. 117, the principle was declared that an agreement to extend the time of payment could not be enforced for want of consideration.

In Stroud v. Thomas, 139 Cal. 274, 72 Pac. 1008, 96 Am. St. Rep. 111, the surety on a promissory note sought exoneration on the ground, among others, that the principal extended the time of payment of the note for a valuable consideration. The consideration relied on was the payment of overdue interest. Said the court, speaking through Mr. Justice Shaw: "The money paid was due to the plaintiff by reason of the previous obligation. No additional benefit was received by the plaintiff and none could be conferred by the principal debtor by the payment of money on the obligation already existing and past due. * * * A promise made without a consideration is not binding. Consequently, the agreement for the extension of time was not a valid promise, and would not bind the plaintiff to forbear suit upon the note during the time specified in the agreement." Appellant contends that the facts were entirely different in the Stroud Case from the facts here. The only substantial difference that we can see is that a payment of interest already due was made which the court held was not a consideration. But it was also claimed, as showing a consideration, that there was an agreement to forbear suit, and on this point the court expressly said "the agreement for the extension of time was not a valid promise and could not bind the plaintiff to forbear suit during the time specified in the agreement."

[3] It may be that our Supreme Court has not had the precise question so clearly before it as is here presented, but we think the trend of its decisions is towards that class of cases in which it has been held that an agreement to forbear suit for a definite period, the obligation remaining unchanged, is not supported by sufficient consideration and does not discharge the guarantor.

[4] Another element is brought into the case. The contract (promissory note) is in writing, and section 1698 of the Civil Code provides: "A contract in writing may be altered by a contract in writing or by an oral executed agreement, and not otherwise." And section 1661 provides: "An executed contract is one, the object of which is fully performed. All others are executory." Appellant claims that, one year having elapsed before suit was brought, the agreement was executed, at least, in part, by the creditor, and this was sufficient although no payment was made as agreed. If, as we hold, there was no consideration for the agreement and it was void, it is not easy to see how it was made valid by mere forbearance to sue, for there was in law nothing to execute. There is no element of estoppel here. Appellant had no knowledge of the agreement, did nothing by reason of it, and was not prejudiced by it. However this may be, can it be said that the agreement was executed in part? An "executed contract" is one in which both parties have fully performed the terms of the contract; a contract performed on one side only is not an executed contract. 9 Cyc. 244; 7 Am. & Eng. Ency. of Law (2d Ed.) p. 95; 1 Page on Contracts, § 18. In Pearsall v. Henry, 153 Cal. 315, 325, 95 Pac. 154, 157, the court, through Mr. Justice Sloss, said: "According to section 1661 of the Civil Code, an executed agreement is one 'the object of which is fully performed. All others are executory.' * * * An oral agreement altering a written agreement is not executed unless its terms have been fully performed. Performance on the one side is not sufficient. There must be a complete execution of the obligation of both parties in order to bring the modification within the terms of the statute"—citing numerous cases. See, also, Henehan v. Hart, 127 Cal. 656, 60 Pac. 426.

It is contended that findings 9, 10, and 11 are not supported by the evidence. These findings are to the effect that certain averments of the answer were untrue. If the court had held the agreement to forbear suit, as set forth in finding 6, supra, to have been valid, appellant's contention would have some foundation. But having found the facts and that they did not constitute a valid agreement, the averments of the answer were untrue in the sense they were used. And for like reason there is no conflict between finding 6 and these other findings.

No other question is presented in appellant's opening brief.

The judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(163 Cal. 182)

DORE et al. v. SOUTHERN PACIFIC CO.

FOLGER v. SAME.

(S. F. 5,779 and 5,780.)

(Supreme Court of California. June 26, 1912. Rehearing Denied July 26, 1912.)

1. Arbitration and Award (§ 7*)—Statutory "Arbitration"—Common-Law Arbitration.

An agreement to submit to arbitration the value of real estate sought to be acquired by a railroad company is not an agreement for a statutory arbitration, within Code Civ. Proc. §§ 1281–1290, authorizing the submission to arbitration "of any controversy which might be the subject of an action" except a question of title to real property, but it is an agreement for a common-law arbitration to afford the parties a hearing and an opportunity to offer evidence to enable the arbitrators to adjudge the value on a consideration of the evidence as well as their own opinion.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 1, pp. 487–489.]

2. Arbitration and Award (§ 7*)—Statutory Arbitration—Common-Law Arbitration.

An agreement to submit to arbitration a matter arbitrable only at common law, providing that the agreement shall be taken to be a submission within Code Civ. Proc. § 1283, and may be entered as an order of the court, gives the parties the right to arbitrate the controversy pursuant to the statutory mode, but it does not give the clerk of the court power to enter judgment as provided in section 1286 or give the court jurisdiction of such a matter, but the agreement is binding as a common-law arbitration agreement.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. § 7.*]

3. Arbitration and Award (§ 7*) — Common-Law Arbitration—Waiver of Stipulations.

A stipulation in an agreement to submit to arbitration a matter arbitrable at common law only, that the agreement shall be taken to be a submission within Code Civ. Proc. § 1283, providing for statutory arbitration, and the matter be entered as an order of court, may be waived, since it derives its force from the agreement and not from the statute as such, and where the parties proceeded with the arbitration, introduced evidence before the arbitrators, and proceeded to an award without objection on the ground that the submission had not been entered as an order of court, the parties, knowing the facts, waived any right to cause a submission to be so entered, and the award must be deemed binding.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. § 28; Dec. Dig. § 7.*]

4. Arbitration and Award (§§ 68, 46*)—Common-Law Arbitration — Failure of Arbitrators to be Sworn—Waiver.

The failure of arbitrators in a common-law arbitration to be sworn and to serve a signed copy of the award, as required by the statute, providing for a statutory arbitration, may be waived by the parties, and, where they appeared before the arbitrators and several days were occupied in the hearings, and neither party objected on the ground that the arbitrators had not been sworn, and the parties entered into negotiations for the payment of the award, the parties waived the fact that the arbitrators were not sworn and did not serve a signed copy of the award.

[Ed. Note.—For other cases, see Arbitration and Award, Cent. Dig. §§ 343–351, 230–243; Dec. Dig. §§ 68, 46.*]

5. Specific Performance (§ 121*)—Title of Vendor—Evidence.

An agreement to arbitrate the value of real estate sought to be taken by a railroad company, and to purchase at the value found, recited that plaintiffs were the owners of the land. Plaintiffs, suing for specific performance, introduced in evidence judgments under St. 1906, p. 78, adjudging them to be the owners. The company did not show affirmatively any defect in the title of plaintiffs, and there was nothing to show that any appeal had been taken from the judgments. *Held*, to show that the plaintiffs were the owners at the time of the agreement to arbitrate, and at the time of the trial, authorizing judgment in favor of plaintiffs.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 191–198; Dec. Dig. § 121.*]

6. Specific Performance (§ 95*)—Title of Vendor—Sufficiency—Effect.

An objection that a party who agreed to sell real estate at a value to be determined by arbitrators did not have title of record cannot be sustained where the parties, at the time of the agreement, knew that the records of the title had been destroyed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 191–198; Dec. Dig. § 95.*]

7. Records (§ 22*)—Real Property—Title—Record Title.

The destruction of the record title to real estate does not destroy the vested title nor deprive the owner of his title.

[Ed. Note.—For other cases, see Records, Cent. Dig. §§ 45–47; Dec. Dig. § 22.*]

8. Vendor and Purchaser (§ 129*)—Contracts—Rights of Parties.

Where time is not of the essence of a contract, and there is a positive agreement by a party thereto to purchase land, and not a mere option depending on the sufficiency of the showing of title, it is enough if the vendor is in fact the owner in fee, unincumbered at the time of performance or at the time of decree compelling performance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 238–244, 249; Dec. Dig. § 129.*]

9. Specific Performance (§ 49*) — Contracts for Sale of Real Estate—Valuable Consideration.

One seeking specific performance of an executory agreement for the sale of real estate must allege and prove, as required by Civ. Code, § 3391, that the consideration is adequate and that the agreement is just and reasonable, but where a party, with knowledge of the facts, freely enters into a contract without any unfair advantage being taken of him, the contract is not inequitable as to him, but is subject to specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140–151; Dec. Dig. § 49.*]

10. Specific Performance (§ 59*) — Contracts—Performance.

An agreement to buy land at a price to be fixed by arbitration is not complete until an award has been made, and it may then be enforced in the same manner as if the parties had agreed on the price and inserted it in the agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. § 59.*]

11. SPECIFIC PERFORMANCE (§ 59*) — CONTRACTS FOR SALE OF REAL ESTATE—VALUABLE CONSIDERATION.

Where an agreement to purchase land bound the purchaser to pay a price to be fixed by arbitration, and arbitrators on a hearing fixed the value and their award was not impeached in any particular, the contract could be specifically enforced because the award was prima facie evidence of adequate consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 181; Dec. Dig. § 59.*]

12. APPEAL AND ERROR (§ 837*)—QUESTIONS REVIEWABLE — STATEMENTS OF FACTS IN BRIEFS OF COUNSEL.

The court on appeal cannot take notice of facts which rest merely on the assertion of counsel in the briefs.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.*]

13. SPECIFIC PERFORMANCE (§ 121*) — CONTRACTS ENFORCEABLE—AGREEMENT TO SUBMIT TO ARBITRATION—TITLE.

An agreement was made to submit to common-law arbitration the value of real estate sought to be taken by a railroad company, and when the arbitration was concluded the company authorized its attorneys to examine the title of the alleged owner and determine its sufficiency. The attorneys determined that the title offered was satisfactory as based on a judgment under St. 1906, p. 81, providing that a judgment establishing title shall be binding on all existing claimants of any interest in the property, and persons claiming through them. No change occurred in the condition of the titles between the dates when the deeds to the company were tendered, and the time of the institution of the suits resulting in such judgment. There was no evidence to impeach the title of the alleged owner. *Held* to justify a finding that the alleged owner owned the premises, entitling him to compel specific performance of the agreement.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

14. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in admitting evidence of a fact conclusively proved by other evidence is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

15. CORPORATIONS (§ 425*) — EXISTENCE OF RELATION.

Where a railroad company held out to the world persons as its agents authorized to do the business necessary for the acquisition of land, the company was bound by the acts of the agents, and a party seeking to hold the company liable need not show a resolution of the board of directors specifically authorizing every detail of the business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; F. J. Murasky, Judge.

Actions by Ellen Dore and by Clara E. Folger against the Southern Pacific Company. From judgments for plaintiffs in each action, defendant appeals. Affirmed.

Wm. F. Herrin and J. E. Foulds (Peter F. Dunne, of counsel), for appellant. Charles S. Wheeler, J. W. Dorsey, and Stratton & Kaufman (J. F. Bowie, of counsel), for respondents.

SHAW, J. In each of these actions the defendant has appealed from the judgment and from an order denying defendant's motion for a new trial. The cases depend mainly upon the same facts. They were tried together upon stipulations that the evidence taken should be considered in both cases so far as applicable.

The plaintiffs, respectively, sue to enforce an agreement for the sale of real estate, made by all of the plaintiffs as vendors, and by the defendant as vendee. The agreement and the circumstances under which it was made are peculiar. Two actions for the condemnation of said lands and other lands for railroad purposes were, and still are, pending in the superior court of the city and county of San Francisco. The Southern Pacific Railroad Company was the plaintiff in each of said actions, and the plaintiffs above named, together with other persons, were the defendants therein, except that the plaintiff Sharp was a party to only one of the actions. The Southern Pacific Railroad Company, it must be noted, is not the same company as the Southern Pacific Company, the defendant appealing herein. The Southern Pacific Company, however, owns a majority of the capital stock of the Southern Pacific Railroad Company, and it controls the latter company. The condemnation suits were carried on by the Southern Pacific Railroad Company at the direction and for the benefit of the Southern Pacific Company. The agreement aforesaid was made on December 17, 1906, and is as follows: It was first recited that Ellen Dore, Charlotte E. Dore Horrigan, Maurice Dore, and William B. Sharp, who are the plaintiffs in the first case above entitled, owned, or claim to own, interests in certain tracts of land described, and that Clara E. Folger owned a certain other tract in fee and an interest in one of the tracts in which the first-named parties also had interests. It appointed Frank S. Johnson, William Hale, and William Thomas as a board of arbitration, and empowered them to ascertain and determine the value of each separate tract of said land and of each separate interest therein belonging to said parties. The judgment of a majority of said board was to be conclusive. It further provided that, when the awards should be made, the Southern Pacific Company would, within 60 days thereafter, pay to the other parties, respectively, the sums so awarded to said parties, and that the said parties immediately thereupon would each, respectively, convey said parcels of land to said Southern Pacific Company by good and sufficient deeds. It was further provided, with respect to the lands owned or claimed by the plaintiffs in the Dore Case, that the sums fixed as the price thereof by the board of arbitration should be paid into the superior court in one of the condemnation suits above mentioned, being the case No. 1,675, in the superior court, entitled Southern Pacific Railroad Company v. Griffith J. Kinsey et al., and that such payment in the court should discharge said Southern Pacific Company from liability to said parties. Before the award was made, a supplementary agreement was made by the defendant, and the plaintiffs in the Dore Case, reciting that the said plaintiffs did not own the reversionary interest in one of the tracts, and providing that 5 per cent. of the value fixed for said tract by the arbitrators should be deducted and the remainder taken as the value thereof for the purposes of the contract of sale. The board of arbitration made an award fixing the value of the respective parcels of land in question. The respective parties, plaintiffs herein, thereupon tendered to said defendant good and sufficient deeds, duly executed, conveying the several parcels of land in question, and demanded payment of said sums so awarded and agreed on as the price thereof, but the defendant refused and still refuses to pay the same.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

These facts are alleged, and the court found that they are true. Judgment was given in each case in favor of the respective plaintiffs enforcing the agreement of sale. As grounds for the reversal of the judgment and orders, the defendant contends that certain of the facts are contrary to the evidence, and that the court below erred in certain rulings at the trial.

[1] The agreement did not provide for a statutory arbitration under the provisions of title 10, pt. 3, of the Code of Civil Procedure. Sections 1281–1290. The matters which fall within the scope of these provisions are those described in section 1281. It reads as follows: "Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property." This section does not authorize the submission of any matter to arbitration except a "controversy which might be the subject of a civil action" between the parties concerned. The only thing submitted was the question of the value of the land. There might be a controversy over such value, of course, but that controversy could not be the subject of an action, and the value when fixed, either by an award, so called, or by an agreement, would, of itself, impose no obligation on either party, or determine anything that could be enforced as a judgment or entered on the judgment book as such, as provided in sections 1283 and 1286. An action will not lie for the mere purpose of fixing the value of property.

At common law it is competent for persons to submit any question or matter of difference between them to the decision of third persons, whether it could be the subject of an action or not, and, when they have done so, the decision will be binding upon them. 5 Am. & Eng. Ency. of Law & Prac. 33. "To furnish a sufficient basis for entering into a submission, no legal cause of action in favor of either party need exist. That there is a dispute, controversy, or honest difference of opinion between them concerning any subject in which they are both interested is enough. Nor, indeed, is it necessary that they should have come to the actual point of a dispute, for a matter simply in doubt may be submitted." Morse on Arbitration, p. 36. Where the thing to be done is merely ministerial, as the casting up of an account, the measurement of timber, or the estimate of the quantity of work done under a contract, the decisions are somewhat at variance on the question whether such a submission is properly an arbitration in which the award, in the absence of fraud, will be conclusive on the parties, or a mere computation for the information of the parties. Ibid. Submissions to determine values are of two kinds: First, where the valuers are to examine the property and fix the value in accordance with their own opinion or judgment; second, where they are to afford the parties a hearing and an opportunity to offer evidence, and are to adjudge the value upon a consideration of the evidence, as well as their own opinion. In cases of the first class, it is usually held that the agreement is not properly a submission to arbitration, and is not subject to the rules which govern arbitrators, and that notice of the meetings of the valuers is not required. Church v. Seitz, 74 Cal. 287, 15 Pac. 839, was a case of this class, and it may be considered as establishing this doctrine in this state. See, also, Stockton, etc., Works v. Glen Falls Ins. Co., 98 Cal. 570, 33 Pac. 633; Foster v. Carr, 135 Cal. 86, 67 Pac. 43.

The agreement for submission in the case at bar was of the second class above mentioned. It expressly provides that the arbitrators should fix a day to begin the taking of testimony and hear the respective parties. Cases of this class are usually held to be common-law arbitrations and subject to the common-law rules on the subject. The distinction is not important, for notice was duly given, the parties appeared, and days were spent in the investigation. The above cases hold that, in the absence of fraud, the decision of persons appointed as mere appraisers or valuers, although not properly or technically an arbitration and award, is binding on the parties. It cannot be disputed that, where an award as to values is to be made after a hearing and upon a judicial investigation and consideration of evidence, as in the case at bar, such award, if regularly made, is final and conclusive upon the parties with respect to the matter submitted. Morse on Arbitration, 487.

[2] The defendant claims that, if the thing submitted does not come within the terms of the statute, then there was no agreement at all, and that the entire proceeding was unauthorized and the award void. This proposition is founded on the following stipulation in the agreement: "This agreement shall be held and taken to be a submission within the meaning of section 1283 of the Code of Civil Procedure of the state of California, and may be entered as an order of the superior court of the state of California in and for the city and county of San Francisco."

The argument is that this stipulation shows that both parties intended that the controversy should be submitted under the statute, that the statute gives the right to have the award vacated for gross error, and to have it modified or corrected for miscalculation or imperfection by a motion made in the proceeding, which remedies are not available against a common-law award, and that, as it cannot be taken as a statutory submission, it cannot be said that the parties did agree, or ever would have agreed, to a common-law submission, that there was no meeting of minds in a valid agreement for any arbitration, and that, to hold the agreement good as a common-law arbitration, would require the court to make a new contract for the parties.

There are a number of cases which hold that where the parties agree to a statutory submission and follow it up by proceeding, or attempting to proceed, in the statutory mode, but because of fatal defects in the procedure the award is invalid, the reasons above stated will prevent it from enforcement by action as an award at common law. Williams v. Walton, 9 Cal. 142; Hepburn v. Jones, 4 Colo. 98; Estep v. Larsh, 16 Ind. 82; Francis v. Ames, 14 Ind. 251; Sargent v. Hampden, 32 Me. 78; Deerfield v. Arms, 20 Pick. (Mass.) 483, 32 Am. Dec. 228; Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259; Benjamin v. Benjamin, 5 Watts & S. (Pa.) 562. In Williams v. Walton the proceedings were in all respects regular and within the scope of the statute, but the submission and award were declared void because the jurisdiction of the county court, to which it was made, did not extend to awards. The statute giving that court such jurisdiction was itself invalid, being contrary to the Constitution. In all these cases the matter submitted was one which was subject to arbitration under the terms of the statute. There are other cases to the effect that, where upon a submission, avowedly under the statute, the award, or the judgment thereon, is void as a statutory award or judgment, because of a fatal defect in the proceedings, the award will nevertheless be good as a common-law award, and may be enforced by an ordinary action. Galloway v. Gibson, 51 Mich. 135, 16 N. W. 310; Gibson v. Burrows, 41 Mich. 713, 3 N. W. 200; Burnside v. Whitney, 21 N. Y. 148; Darling v. Darling, 16 Wis. 644. We do not find it necessary to attempt to reconcile these cases or to follow strictly the doctrine of either class. The matter to be submitted in this case, as we have seen, was not arbitrable under the statute, but was arbitrable at common law. If the statutory regulations apply at all, it is not because of their force as statutes, but solely because of the agreement of the parties, which, it may be said, makes the statutory provisions a part of the agreement. Such agreement could not give the clerk power to enter judgment, as provided in section 1286, or give the court jurisdiction of such a matter, as of an arbitration proceeding. At most, it could only give the parties the right to have the proceedings before the arbitrators and by them conducted in the statutory mode. As the parties are presumed to know the law, and it is not alleged that they were mistaken concerning it, we may presume that this was the extent of their purpose in declaring that the submission "may be entered as an order of the superior court."

[3] As this stipulation derives all its force from the agreement of the parties, and none from the statute as such, it follows that this part of the agreement could be waived. What the parties may do, by executory agreement, they may undo, or disregard, or waive by mutual consent duly carried into execution. The court below found that, notwithstanding the said stipulation, neither of the parties at any time caused the submission to be entered as an order of court, but that each of them, well knowing that it had not been so entered, proceeded with the arbitration, introduced evidence before the arbitrators, and proceeded to an award without objection on that score; that each waived any right to cause the submission to be so entered; and that the form and manner of the arbitration and of the proceedings therein, and the making of the award without such entry as an order of court, was with the knowledge and consent of each and all of the parties and was agreed to by them. These findings are not challenged by the defendant. We must accept them as true. Indeed, the evidence in the record tends strongly to support them. The facts found show that there was a complete waiver of the stipulation for the entry of the submission as an order of court and of the right to have it considered as a statutory

submission, and a practical agreement to proceed in the manner actually followed.

The statute requires that before acting the arbitrators must be sworn and that the award must be signed and delivered to the parties. Sections 1285, 1286. The specifications of insufficiency of the evidence point out that there was no evidence that either of these things was done. The court found that the arbitrators were not sworn, and that on the day the award was signed an unsigned copy thereof was served on defendant, and that defendant waived all objections on account of the failure of the arbitrators to be sworn and the lack of a better service of the award.

[4] What we have said heretofore is a sufficient answer to the point that the failure of the arbitrators to be sworn, and the failure to serve a signed copy of the award, makes it invalid as a statutory award. It is not a statutory award, and we need not decide whether or not these defects would avoid such an award. We may concede, for the purposes of the case, that the stipulation above quoted was, in effect, an agreement that the arbitrators should be sworn and that the award should be delivered. As before stated, these requirements, if agreed to, could be waived. We think the finding that they were waived is supported by the evidence. The original agreement was made on December 17, 1906. The evidence does not show how soon thereafter the hearings before the arbitrators were begun, but it appears that many days were occupied in the hearings, and that defendant appeared and presented evidence and conducted the proceeding on its part without ever demanding or suggesting that the arbitrators be sworn, or objecting because they had not been sworn. The agreement for a 5 per cent. deduction from the amount awarded for a certain parcel was made on March 11, 1907. On April 30, 1907, the failure to make the award within the 90 days fixed in the original agreement was waived and the time was extended to May 15, 1907. The award was made on May 10, 1907, and on the same day the unsigned copy was delivered to defendant, and it was informed that the arbitrators had not been sworn. No objection was then or ever made on either ground. Negotiations to obtain payment before the expiration of the 60 days by allowing a discount, and for an approval of the title, were begun at once. Defendant agreed to make such payment if the title was good. Defendant's attorneys examined the evidences of title offered by plaintiffs and approved the same, except that there was an outstanding tax sale, and that one Kearney owned an equitable interest in a part of the Dore lands. The clause providing that the value awarded to the Dore lands should be paid into court in the condemnation suit was inserted in the original agreement to enable the defendant to secure the Kearney interest by a judgment in condemnation, if necessary, using said money to pay him. In order to obtain payment without delay, it was agreed by defendant and plaintiffs that the Dores should procure title to the Kearney interest. In pursuance of this agreement they obtained a deed from Kearney to the defendant for his interest and paid him $11,500 on account. They also redeemed the land from the tax sale. The defendant examined the award and pointed out an error in the calculations of the area of some of the parcels. On this account it was agreed that $5,371.86 should be deducted from the values of the Dore lands, as awarded. The defendant's attorneys then approved the title, and the defendant promised to pay the values as thus fixed. The plaintiff on July 9, 1907, appeared at defendant's offices, tendered to the defendant duly executed deeds, including that of Kearney, conveying the lands to defendant, and asked payment. It was late in the afternoon, too late to conclude the transaction on that day, and for that cause defendant asked plaintiffs to call again the next morning, at which time defendant promised to pay the money and take the deeds. Plaintiffs called the next morning with the deeds and were informed that the price was considered too high, and that defendant would not pay the price or take the land. No other objection was made. It is clear, from all these proceedings, that all objections to the arbitration proceedings and to the award were waived.

The finding that defendant, after the award was made and with full knowledge that the arbitrators were not sworn, treated the award as valid and promised to pay the amount allowed, is challenged. There was some conflict in the evidence on this point, but, as the facts already recited show, there was sufficient evidence to sustain it. The other findings attacked are (1) the finding that the respective plaintiffs were the owners of the property at the time the deeds were tendered and payment demanded; (2) the finding that the value of the property was fairly and properly determined by the arbitrators and that the value so fixed was the reasonable value of the property.

[5] The facts already stated in the discussion of the subject of waiver shows that the evidences of title exhibited by plaintiffs were satisfactory to the defendant, and that the refusal to pay was on other grounds. The agreement itself recites that the plaintiff Folger is the owner of the land which she agreed to convey. This is an admission by the defendant and is sufficient prima facie evidence of title to those lands. In addition to this, the plaintiffs introduced in evidence judgments in certain suits by the respective plaintiffs against "all persons," etc., under the so-called McEnerney act of 1906 (Stats. 1906, p. 78), adjudging and de-

termining that the respective plaintiffs were the owners in fee of the said properties. These judgments were entered in 1909, after the present action was begun and before the trial. The said judgments would have become final, by expiration of time for appeal, before the findings were signed, and, as no showing was made to the contrary, we must presume that there was no appeal and that they were competent evidence of title during the continuance of the trial, which, in legal contemplation, continued until the decision of the court below was made. There was no attempt whatever, by the defendant, on the trial to show affirmatively any defect in plaintiffs' title. From all these facts and circumstances, the court could reasonably infer that the plaintiffs were the owners of the land at the time the contract was made, and thereafter until the time of trial. We think the evidence was sufficient to sustain the finding as to title. The ruling admitting in evidence the aforesaid judgments before they became final seems to be in accord with Cook v. Rice, 91 Cal. 668, 27 Pac. 1081, and contrary to Naftzger v. Gregg, 99 Cal. 88, 33 Pac. 757, 37 Am. St. Rep. 23. The error, if any, was harmless, since they became final before the trial was closed. Harris v. Barnhart, 97 Cal. 552, 32 Pac. 589.

[6] The objection that the evidence shows that, at the time performance was due under the agreement and at the time tender was made by the plaintiffs, they did not have title of record to the lands is without any force. It is based on the fact that this tender occurred after the great fire of April, 1906, in which practically all of the records of titles in San Francisco were burned. Upon this the defendant asserts that there was no record title in existence. The destruction by the fire mentioned occurred before the agreement was made. The parties must be presumed to have contracted with reference to the existing condition. It was well known to them at the time of the contract.

[7] Moreover, it cannot be said that the destruction of the record of title to real estate destroys vested titles thereto, or deprives persons of the title or ownership thereof. The title and the record of title are two distinct things.

[8] Under such circumstances, where, as here, time is not of the essence of the contract, and it is a positive agreement to buy and not a mere option depending on the sufficiency of the showing of title, it is enough if the vendor is in fact the owner in fee, unincumbered, at the time of performance or at the time of the decree. Alvarez v. Brannan, 7 Cal. 509, 68 Am. Dec. 274; Allstead v. Nicol, 123 Cal. 597, 56 Pac. 452; 36 Cyc. 719; 4 Pom. Eq. Jur. § 1408; 26 Am. & Eng. Ency. of Law, 114. The doctrine of Crim v. Umbsen, 155 Cal. 697, 103 Pac. 178, 132 Am. St. Rep. 127, is not applicable to such a case. That the plaintiffs were then the owners in fee was substantially admitted at the time by the defendant, and it was not seriously controverted at the trial.

[9] It is a well-established rule of equity that, in an action to enforce specific performance of an executory agreement for the sale of land, the plaintiff must allege and prove that the consideration received by the other party was adequate, and that the agreement is, as to him, just and reasonable; in other words, that it is not, as to the other party, an unconscionable, inequitable, or hard bargain that the value of the land and the price to be paid are in reasonable approximation to equality. Civ. Code, § 3391; White v. Sage, 149 Cal. 615, 87 Pac. 193; Kaiser v. Barron, 153 Cal. 790, 96 Pac. 806; Stiles v. Cain, 134 Cal. 171, 66 Pac. 231; Bruck v. Tucker, 42 Cal. 353. There are many other cases. If the other party, with knowledge of such inequality as there may be, nevertheless desired to and freely did enter into the contract without any unfair advantage being taken of him, it will not be deemed inequitable as to him. The demands of this rule will be considered as sufficiently met by these circumstances. 2 Pom. Eq. Jur. § 926; 6 Ibid. § 790.

[10] An agreement to buy land at a price to be fixed by arbitration is not complete until the award has been made. It may then be enforced in the same manner as if the parties had agreed upon the price and inserted it in the agreement themselves. The defendant contends that, where the price is fixed by arbitration, the equitable rule above stated applies to the same extent as where the parties agree on the price, and that the vendor must prove that the price is reasonably adequate and just. For the purposes of this case, this may be conceded. In the present case, the award was introduced in evidence. It was, in effect, decided, in the cases heretofore cited, that an award as to value, whether technically a common-law arbitration or a mere appraisal, is nevertheless binding on the parties, and, in the absence of fraud or mistake, conclusive. Church v. Seitz, supra. On principle, it would appear to be at least competent evidence of value. It was the judgment of the arbitrators duly given upon a consideration of the evidence and arguments offered by both parties bearing upon the question to be decided by them. They were selected by both parties to make the decision, and were the authorized agents of both to declare it. It is a declaration by agents as to a matter within the scope of their authority and made in the performance of their delegated duty. Such declarations, on familiar principles, are evidence against the principals. The agreement in this case declares that "the judgment of a majority of said board of arbitrators shall be conclusive as to such values." The following authorities are to the effect that such an award is conclusive as to the value

of the property. Collier v. Mason, 25 Beav. 204; Smith v. Boston, etc., Co., 36 N. H. 490; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 361; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 408; Hartford Fire I. Co. v. Bonner M. Co., 56 Fed. 382, 5 C. C. A. 524; Baltimore, etc., Co. v. Canton Co., 70 Md. 408, 17 Atl. 394; Atkinson v. Whitney, 67 Miss. 662, 7 South. 644; Montgomery v. American I. Co., 108 Wis. 158, 84 N. W. 175; Chandos v. Insurance Co., 84 Wis. 184, 54 N. W. 390, 19 L. R. A. 321; Water Power Co. v. Gray, 6 Metc. (Mass.) 173; Brigham v. Evans, 113 Mass. 538. Some of these cases were actions to set aside an award. The defendant claims that such cases are not in point. It is unnecessary to discuss the question, for many of the other cases were actions to enforce an award, or a contract in which the award was an essential term, and several of them were actions in equity to compel specific performance of agreements for the sale of land, in no way distinguishable from the case at bar.

The defendant cites the case of Parken v. Whitby, Turn. & Russ. 367, 37 Eng. Rep. 1142, to the point that a court of equity is not bound by such an award of value. It was there decided that, notwithstanding such award, the court could require other evidence of value in order to satisfy its conscience, if there were circumstances raising a suspicion that the valuation was unfair. In support of this statement the court cited Emery v. Wase, 5 Ves. Jr. 846; Emery v. Wase, 8 Ves. Jr. 517; s. c. on appeal; and Hall v. Warren, 9 Ves. Jr. 605. Emery v. Wase was a suit for specific performance similar to the case at bar. The court, both at the trial and on appeal, declared that the award of value was conclusive in the action unless it was shown that it was procured by fraud or was made under gross mistake, and that the burden to show these matters was upon the party who sought to impeach the award. Hill v. Warren strongly intimates that the award is conclusive unless it is impeached for fraud. It was also a suit for specific performance.

[11] Upon the authority of these cases we hold that the award was evidence of value and was sufficient to support the finding. There was no evidence offered by the defendant to impeach the award in any particular, or to show that the value fixed thereon was too high, and the only error disclosed was corrected by agreement of the parties before the award became due. It is perhaps inaccurate to say that the error was shown. The evidence was that, during the negotiations for settlement at a discount, the defendant asserted that there was an error in the computation of the area, and that the plaintiffs thereupon agreed to the deduction mentioned. They did not admit that there was in fact such an error, but they acceded to the defendant's claim in regard to it, and it is allowed in the complaint.

[12] In the defendant's brief some objections are made to the proceedings of the arbitrators and to the accuracy of the facts recited in the award. No evidence was introduced to show that the facts therein stated were untrue, and with the single exception already referred to, which was corrected by agreement of the parties after the award was made, there was no evidence to show any inaccuracy or defect whatever in the award. This answers the objections. We cannot take notice of facts which rest upon the mere assertion of counsel in the briefs.

It is claimed that the court erred in admitting in evidence four volumes of so-called abstracts of title from the plant of the California Title Insurance and Trust Company a corporation, which, ever since the year 1886, has been engaged in the business of preparing and issuing abstracts of title to lands in San Francisco. These volumes comprised an abstract of title, as shown by the public records, to the lands in question belonging to the Dores. They were prepared and made up prior to the great fire of April, 1906. Objection was made to them on the grounds that they had not been "issued and certified to as correct" by the company which made them in the manner provided by section 1855a of the Code of Civil Procedure. They purported to show the contents of the public records affecting said lands prior to the destruction of said records by the great fire in San Francisco in April, 1906. We do not deem it necessary to decide whether they were admissible or not.

[13] The evidence shows that, when the arbitration was concluded, the defendant authorized and directed its attorneys to examine the title of the plaintiffs to these lands and determine as to its sufficiency, and that said attorneys did make such examination and determined for the defendant that the title offered was satisfactory. Section 11 of the so-called McEnerney act of 1906 provides that a judgment procured under that act, establishing the title of the petitioner thereunder, is "binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed any estate, right, title, or interest in or to said property, or any part thereof, and upon every person claiming under him by title subsequent to the commencement of the action." Stats. 1906, p. 81. The aforesaid judgment under that act establishing the respective titles of the plaintiffs in the lands in controversy were made in suits begun in May, 1909, and July, 1909, respectively, and they are conclusive. It is not claimed that any change occurred in the condition of the titles between the 9th of July, 1907, when the deeds were tendered, and the time of the beginning of these McEnerney suits, nor after they were begun and up to the time of the decision of the court in the case at bar. The defendant offered no evidence to impeach the

plaintiff's title. It does not now point out any defect therein.

[14] It is apparent, therefore, that the evidence, without the aid of these abstracts, was conclusive of the fact that the title is in the plaintiffs, and that the ruling admitting the abstracts could not have prejudiced the defendant. The finding on that point must of necessity have been against defendant, even if they had been excluded. It is proper to add that section 1855a has been amended (Stats. Extra Sess. 1911, p. 64), so that the precise question is not likely to again arise in the trial court.

[15] Twelve pages of appellant's brief are occupied in enumerating some 28 alleged errors in the admission of evidence. None of them affect the substantial merits of the case. Many of them are covered by what we have already said in this opinion. We do not deem it necessary to discuss them. Indeed, with one exception, appellant does not discuss them, but merely states the objection. Such discussion deserves scant notice. Duncan v. Ramish, 142 Cal. 690, 76 Pac. 661; People v. Glaze, 139 Cal. 163, 72 Pac. 965. There was objection to testimony as to the negotiations between the defendant and the plaintiffs concerning the title, the proposed discount, and the agreement, on the ground that the persons who represented defendant in these negotiations had no authority from defendant to act in that behalf. Defendant has put itself in the position of employing persons to act as its agents, and its only agents, to carry on its business, and then denying that these persons have any authority to act in every instance in which such action does not redound to its advantage. It does not deny the execution of the agreement in question, nor that the officers and agents in question were the persons to whom this business was intrusted. The agreement was made by the persons whose authority it now disputes. The objection appears to be that the plaintiffs did not offer some resolution of the board of directors specifically authorizing every detail of the business. There was ample proof that defendant held out these persons to the world as its agents authorized to do this business. It is unnecessary to state it. The objection was well overruled. We find no prejudicial error in the record.

The judgments and orders are affirmed.

We concur: SLOSS, J.; LORIGAN, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

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163 Cal. 223

CALIFORNIA FRUIT EXCHANGE v. BUCK. (Sac. 1,908.)

(Supreme Court of California. June 28, 1912.)

CORPORATIONS (§ 34*) — EXISTENCE — ESTOPPEL.

One who deals with a corporation as such in executing notes and a chattel mortgage is estopped to deny its corporate capacity in suit to foreclose the mortgage.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.*]

Department 2. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by the California Fruit Exchange against Fred M. Buck. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Reversed.

A. L. Shinn, C. G. Shinn, C. L. Shinn, C. F. Stewart, and Frank R. Devlin, for appellant. T. T. C. Gregory, for respondent.

LORIGAN, J. This appeal presents the same essential facts, and calls for the application of the same legal principles as in the case of Frank H. Buck Co. v. F. M. Buck et al. and the California Fruit Exchange, 122 Pac. 466, where the present plaintiff was defendant and appellant.

That action was brought by the Buck Company against the present defendant Buck to foreclose a crop mortgage given to it by him on May 19, 1909, and against the present plaintiff, the California Fruit Exchange, which, it was alleged, asserted some right or lien under a prior crop mortgage executed in its favor by Buck.

The California Fruit Exchange set up by answer in that suit a priority of right and lien over the crop mortgage to the Buck Company by virtue of a similar mortgage to it made in December, 1905, by the defendant, Buck, covering the same farm and orchard premises, and which mortgage provided that it was security for a present indebtedness of $2,500 and to secure future advances. The trial court in that action held that while the mortgage of Buck from the California Fruit Exchange had been executed prior to his mortgage to the Buck Company, and on October 27, 1908, there was a balance of indebtedness due to said California Fruit Exchange from Buck for advances to the amount of $5,447.70, that this indebtedness was not secured by that mortgage. This conclusion of the court was derived from the fact that as the books of account between the California Fruit Exchange and Buck, kept by the former, show that on September 15, 1907, there was a credit balance in favor of Buck of $442.32, the mortgage had thereby been paid, and in effect canceled, and that subsequent advances made by the California Fruit Exchange to Buck which aggregated the $5,447.70 found due it was not secured by that mortgage, and judgment was entered accordingly.

On the appeal from that judgment taken by the California Fruit Exchange this court, on a consideration of the conceded facts and the terms of the mortgage, held that this conclusion of the trial court was erroneous; that as the mortgage provided for future advances which were represented by the indebtedness which the court found due from Buck to the California Fruit Exchange the "mere accidental circumstance that the books of one or another of the parties show a balance in favor of the mortgagor on a given date" did not extinguish the mortgage as a security for such future advances. A reversal of the judgment was ordered. This present action was brought by the California Fruit Exchange to foreclose this same mortgage, and the action was tried and a judgment rendered in favor of the respondent, Buck, before the appeal in the case just referred to was determined. In the court below the same claim of extinguishment of the mortgage and on the same ground as was asserted by the Buck Company in the other case was made by the defendant Buck (who in the previous action had suffered default), and the court sustained it. Plaintiff appeals from this judgment, and the order denying its motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The evidence in this case was exactly the same as in the other case and calls for the application of the same principle of law. It is unnecessary to detail that evidence or to again discuss these principles. It is sufficient to refer to the opinion of this court in the former case where they are fully set forth and considered, and, under the views which are expressed there and are applicable here, the present judgment and order appealed from must be reversed. The court found in this case that the plaintiff was not a corporation, the defendant attempting by its answer to raise an issue in that respect. But as the evidence conclusively shows that the defendant dealt with the corporation as such in the execution of his mortgage, and the making of his notes to it, he is estopped from denying its corporate capacity in an action to foreclose the mortgage. Bank of Shasta v. Boyd, 99 Cal. 604, 34 Pac. 337; Weill v. Crittenden, 139 Cal. 488, 73 Pac. 238.

The judgment and order appealed from are reversed.

We concur: MELVIN, J.; HENSHAW, J.

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168 Cal. 178

LEAHY v. WARDEN et al. (L. A. 2,780.)

(Supreme Court of California. June 26, 1912.)

1. Mortgages (§ 415*)—Foreclosure—Condition Precedent.

Where a mortgagee agreeing to advance $3,000 to the mortgagor to pay a buiding contractor advanced only $2,290, but there was no demand on him to advance the balance, or any necessity for the advancement of the balance, the mortgagee could foreclose.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1210–1224; Dec. Dig. § 415.*]

2. Payment (§ 82*)—Voluntary Payment.

In the absence of an express finding as to the character of a payment made with knowledge of the facts, and in the absence of any showing of duress, it must be deemed voluntary.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254–266; Dec. Dig. § 82.*]

3. Payment (§ 82*)—Voluntary Payment.

Payments of interest in excess of the amount due made to avoid a foreclosure of the mortgage securing the debt are voluntary, and cannot be recovered back.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254–266; Dec. Dig. § 82.*]

4. Mortgages (§ 581*) — Foreclosure — Examination of Title—Attorney's Fees.

Where a mortgage stipulates for compensation for examination of title and attorney's fees in the event of a foreclosure, the amounts due therefor are properly included in the foreclosure decree.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 211½, 1669–1679; Dec. Dig. § 581.*]

5. Payment (§ 82*)—Voluntary Payments.

Where interest on a mortgage debt was not paid at maturity, and the mortgagee sued to foreclose for the default, and thereafter the installment of interest calculated on a sum in excess of that advanced by the mortgagee was paid, and the suit dismissed, the payment was made with opportunity to know the facts and the legal rights arising therefrom, and was voluntary, and could not be recovered back.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 254–266; Dec. Dig. § 82.*]

In Bank. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by John R. Leahy against Julia P. Warden and another. From a judgment for plaintiff, defendants appeal. Affirmed.

John F. Poole, Julia P. Warden, and C. D. Warden, for appellants. Andrew H. Rose, for respondent.

SHAW, J. This cause was transferred to the District Court of Appeal for the Second District for decision. In that court the judgment was affirmed upon the following opinion prepared by Justice Allen:

"The action was one to foreclose a mortgage executed to plaintiff's assignor by one Jackson, defendants' grantor. The note and mortgage were dated August 15, 1908, note due three years after date, bearing interest at the rate of 11 per cent. per annum, with a condition that, if default be made in the payment of any installment of interest, the principal should become due, at the option of the holder.

"The findings of the court are to the effect that, notwithstanding the rate of interest specified, a contemporaneous written agreement was entered into whereby 3 per cent. of the interest was to be rebated upon payment of taxes, which taxes had been paid up to September 27, 1909, by the makers of the note; that defendants' grantor had paid interest at the rate of 8 per cent. per annum each and every quarter up to and including August 15, 1909; that no payments of interest were made thereafter; that these payments of interest were made voluntarily and in accordance with the terms of the note. The court further finds that the note and mortgage were made in consideration of a promise of the payee to pay a building contractor, then engaged in the construction of a house for the maker of the note, $2,750 and an additional sum of $250 to cover incidental and extra expenses in connection with the construction of such house; that the payee advanced only the sum of $2,290, together with $65 incidental expenses, which was the entire amount of the advances made; that the sum of $710, the difference between the sum so advanced and the $3,000, remained unadvanced; that, after such advances were made, the maker of the note and mortgage conveyed the premises so mortgaged, subject to said mortgage, to appellants, and, in addition thereto, assigned and transferred whatever claim the grantor had against the payee of the note as to the sum of $710, the unadvanced amount evidenced by the note. The court found that there was due and owing upon said note and mortgage the sum of $2,290, with interest at the rate of 8 per cent. per annum, from August 15, 1909, compounded quarterly, to the date of judgment, and, further, that defendants had expended $7.50 in searching title to the mortgaged premises, and that $200 was a reasonable attorney's fee for the foreclosure proceedings, and directed a sale of the mortgaged premises in satisfaction thereof. From the judgment alone, upon the roll, defendants appeal.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] "Two errors are assigned and claimed: First, that under the findings the action of foreclosure could not be maintained so long as plaintiff was in default in advancing any portion of the sum so agreed to be advanced; and, second, that the interest paid upon the $3,000 at the rate of 8 per cent., being in excess of the amount actually due, should be credited upon the interest account generally, which, if done, would extinguish all of the interest due, up until the commencement of the action, upon the sum actually advanced. The first contention is maintained upon the authority of Savings Bank of Southern California v. Asbury, 117 Cal. 96, 48 Pac. 1081. That case, however, only determines that a mortgagee cannot maintain an action for foreclosure so long as he has not complied with a condition to be performed by him as a part of the consideration of the mortgage, as where he retains in his hands a part of the money which he was to loan and advance to the mortgagor, and refuses to pay it over. In the case at bar there is no allegation nor finding with reference to any demand upon the part of appellants or of their grantor, for the payment or advancement of any portion of the $710. That a mortgagee should be barred of the right to foreclose on account of partial advancements made, it must be made to appear that he has refused to comply with the terms of the contract. For aught that appears in this record, there was no necessity or occasion for the advancement of the full amount, or that the entire sum was required for the construction of the house, or the payment of any incidental expenses. It would be a harsh rule to say that the maker of a note and mortgage, under the circumstances of this case, should be compelled to take and receive the full stipulated amount agreed to be advanced, without reference to necessity or desire, or that one advancing in good faith all of the sums required by the other should be barred of a right to recover the amount so advanced where no demand or refusal for the advancement of the additional sum is made to appear.

[2-4] "As to the second point, the court finds that the payment of 8 per cent. interest upon the $3,000 was voluntarily made. It must be assumed upon this appeal from the judgment that there was evidence before the court warranting such finding. In addition to this, in the absence of an express finding as to the character of the payment, the payment being made with knowledge of the facts is to be regarded as voluntary, in the absence of any showing of duress. Assuming that these payments of interest in excess of the amount due were necessary in order to avoid a foreclosure of the mortgage, this would not be sufficient to render such payments other than voluntary. Burke v. Gould, 105 Cal. 282, 38 Pac. 733. Payments voluntarily made cannot be recovered. The amounts found due on account of the examination of title and attorney's fees for foreclosure were stipulated in the mortgage, and were properly included in the decree."

A rehearing in the Supreme Court was granted for the purpose of examining the question of the right of the defendants to have the amount paid as interest credited upon the principal, in so far as it exceeded the interest that would have been due at 8 per cent. upon the amount actually loaned to the mortgagor, the question whether or not, as to such excess, the payments were voluntary.

[5] Upon further consideration, we can see no escape from the conclusion of the District Court of Appeal upon this point. The findings, not only state that they were voluntary, but they further state that the interest maturing on August 15, 1909, was not paid at that time, that a suit to foreclose for that default was begun, that thereafter, on September 28, 1909, said installment of interest, calculated at 8 per cent. per annum upon a principal sum of $3,000, was paid, by the mortgagor, the former owner, and thereupon that suit was dismissed. It is therefore evident that the payments were made after the mortgagor had full opportunity to know the facts and his legal rights. Harralson v. Barrett, 99 Cal. 611, 34 Pac. 342, is a direct authority for the proposition that such payments of interest cannot be after-

ward credited upon the principal against the will of the creditor. See, also, London Bank v. Bandmann, 120 Cal. 224, 52 Pac. 583, 65 Am. St. Rep. 179; Matthews v. Ormerd, 140 Cal. 581, 74 Pac. 136.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

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163 Cal. 200

AHLERS et al. v. SMILEY et al. (L. A. 2,890.)

(Supreme Court of California. June 27, 1912. Rehearing Denied July 26, 1912.)

1. PLEADING (§ 248*)—STATEMENT OF CAUSE OF ACTION—PARTIES.

Where the cause of action for damages was the same in both, an amended complaint does not state a different cause of action from the original, because in one the parties are described as partners and in the other as individuals, both complaints showing that the cause of action accrued during the existence of the partnership.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 709; Dec. Dig. § 248.*]

2. LIMITATION OF ACTIONS (§ 24*) — CONTRACTS IN WRITING.

The four years' limitation fixed by Code Civ. Proc. § 337, subd. 1, for the bringing of an action upon any contract, obligation, or liability founded upon an instrument in writing, applies wherever the instrument itself contains the contract to do the thing for the nonperformance of which the action is brought.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 112–117; Dec. Dig. § 24.*]

3. CONTRACTS (§ 303*) — BREACH — PERFORMANCE.

Where defendants contracted with plaintiff to purchase all ice necessary for their customers from plaintiff, and before the expiration of the contract abandoned the ice business, after having refused to purchase from plaintiff, plaintiff's sale of their ice plant after defendants' abandonment did not deprive them of their action for damages which had accrued up to that time.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. § 303.*]

4. SALES (§ 384*)—BREACH BY PURCHASER—MEASURE OF DAMAGES.

In view of Civ. Code, § 1512, providing that, if the performance of an obligation be prevented by the creditor, the debtor is entitled to all benefits which he would have obtained, if it had been performed, the measure of damages for buyer's breach of a contract to purchase ice is the loss of profits which the seller would have made had the contract been fully performed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098–1107; Dec. Dig. § 384.*]

5. JUDGMENT (§ 721*) — CONCLUSIVENESS — MATTERS CONCLUDED.

Where plaintiffs first sought an injunction to prevent the defendants from violating their contract to buy all their ice from plaintiff, and in that proceeding it was found that plaintiffs daily furnished four to six tons of ice to defendants at a profit to plaintiffs of at least $1 per ton, and that plaintiffs' damages for defendants' breach was at least $16 a day, was not conclusive of plaintiffs' damages, so as to fix the amount of such damages in a later action for damages.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1238, 1252; Dec. Dig. § 721.*]

6. JUDGMENT (§ 724*) — DETERMINATION — FORMER ADJUDICATION.

Where the judgment in an action for an injunction to restrain breach of contract expressly excepted plaintiff's right of action for damages, defendants cannot in a subsequent action for damages set up the proceeding for an injunction as a bar.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1254; Dec. Dig. § 724.*]

Department 2. Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by J. L. Ahlers and S. S. East, partners as Ahlers & East, against A. J. Smiley and R. R. Smith, partners as Smiley & Smith. From a judgment for plaintiffs and an order denying a new trial, defendants appeal. Affirmed.

F. O. Daniel, for appellants. E. E. Keech, for respondents.

MELVIN, J. Defendants appeal from a judgment against them, and from an order denying their motion for a new trial. The action was one for damages for the violation of a certain contract. Ahlers & East were copartners engaged in the business, among other things, of manufacturing ice. Defendants, also copartners, were retailers of ice. By the terms of the contract, the firm of Ahlers & East agreed to furnish to defendants at the price of $4 per ton all of the ice necessary for defendants to supply their customers. Under this agreement, the plaintiff copartnership continued to furnish and the defendants to receive large quantities of ice until July 24, 1905, when the latter refused longer to abide by the terms of the contract, and thereafter furnished their customers with ice purchased from the Union Ice Company and other manufacturers. On July 28, 1905, an action was brought to restrain defendants from purchasing ice from any other manufactory than that of Ahlers & East. Judgment enjoining them from the violation of their contract was entered March 15, 1906. From this judgment defendants appealed, but, as they had abandoned the business of selling ice, they failed to file a transcript in this court, and their appeal was dismissed.

On September 6, 1907, the plaintiffs sued for damages, and after trial were awarded the sum of $480. This judgment and an order denying a motion for a new trial were reversed on appeal, but leave was granted to file amended pleadings. Ahlers v. Smiley, 11 Cal. App. 343, 104 Pac. 997. On December 14, 1909, a "second amended complaint" was filed, but, a demurrer to it having been sustained with leave to amend, a "third amended complaint" was filed. After a demurrer and a motion to strike out had been denied, defendants answered. Upon the issues then joined a trial was had, and judgment was given in favor of plaintiffs for the sum of $2,250.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Defendants take the position that the demurrer to the "third amended complaint" should have been sustained or the motion to strike it out should have been granted, because it states a different cause of action from that originally alleged. In their initial complaint for damages plaintiffs were described in the caption as "formerly copartners doing business under the firm name of Ahlers & East." In the body of the pleading they alleged the dissolution of the copartnership in June, 1906. There is also the averment that "on and after July 24, 1905, and until the entry of said judgment on March 15, 1906, these plaintiffs as such copartners were able, willing, and ready to perform all the conditions and covenants on their part contained in said contract." The caption of the third amended complaint describes them as "copartners doing business under the firm name of Ahlers & East." There are averments that on or about April 1, 1906, the copartners Ahlers & East sold their business and divided the assets of the partnership "except said ice contract and the damages which had accrued to them," and that as to these matters the partnership continued. Defendants conclude, therefore, that in the original complaint plaintiffs sued as individuals while in the final purported amendment thereto they appeared as copartners. We do not see, however, that a cause of action different from that originally stated is set forth in the third amended complaint. The same contract, the same parties defendant, the same breach, and the same sort of damages are alleged in both pleadings. The same parties plaintiff appear in both except in one they are described as formerly copartners and in the latter as continuing to be copartners in the subject-matter of the cause of action. In both pleadings the injury wrought by defendants is described as occurring during the time that the plaintiffs were copartners. In Stewart v. Spaulding, 72 Cal. 265, 13 Pac. 661, the plaintiffs in their original pleading described themselves as "late partners." The suit was on a foreign judgment rendered while they were copartners. Demurrer to this complaint was sustained for nonjoinder of parties defendant, and in their amended complaint the plaintiffs omitted the designation of themselves as "late partners." A motion was made to strike the amended complaint from the files on the ground that plaintiffs had alleged a different cause of action from that originally set up. This court held that the motion was properly denied, saying: "In one sense it was a different cause of action, but plainly the same judgment was attempted to be set up in each complaint, and the same relief demanded upon the same facts, which were only stated in a different legal aspect." Appellant cites McCord v. Seale, 56 Cal. 262, Harrison v. McCormick, 69 Cal. 617, 11 Pac. 456, and Weinreich v. Johnston, 78 Cal. 255, 20 Pac. 556; but those cases merely hold that a variance arises when persons are described as individuals in the caption and as partners in the body of a pleading, and that proof of partnership liability or credit will not sustain a personal judgment or vice versa. It is to be noticed that the doctrine announced in these cases has been somewhat modified by the later cases of Williams v. Southern Pacific R. R. Co., 110 Cal. 461, 42 Pac. 974, and Grangers' Union v. Ashe, 12 Cal. App. 757, 108 Pac. 533. In the case at bar a demurrer to one of the complaints was sustained because the plaintiffs described themselves as "formerly copartners," while the pleading stated a cause of action in favor of a partnership of which they were the members. This ambiguity was corrected, but the cause of action set forth in their last pleading was essentially the same as that which was formerly alleged. The ambiguity which was called to the court's attention and because of which the demurrer was sustained was a mere defect of parties, capable of correction by a new pleading.

[2] Defendants pleaded the bar of the statute of limitation, and assigned as error the finding of the court against them. They insist that, while the obligation of the contract between the parties was founded upon a written instrument, the breach of the agreement is not subject to the provisions of section 337, subd. 1, but to those of section 339, subd. 1, of the Code of Civil Procedure. This contention is fully answered by the opinion of this court in the case of McCarthy v. Mt. Tecarte Land & Water Co., 111 Cal. 340, 43 Pac. 959 (one of the cases cited by appellants themselves), where it is said: "In order to be founded upon an instrument in writing, the instrument must itself contain a contract to do the thing for the nonperformance of which the action is brought."

[3] A number of the findings are attacked by appellants upon the theory that they were not sustained by the evidence. The court found the making and delivery of the contract and the breach thereof, but appellants assert that the plaintiffs put themselves beyond the power of fulfilling their part of the agreement by selling their ice manufacturing plant on April 1, 1906. But the damages alleged and recovered all accrued prior to March 15, 1906, and defendant Smiley testified that defendants ceased to sell ice on that date. There was, therefore, no reason why plaintiffs should have been prepared to deliver ice after March 15, 1906.

[4] Appellants question the measure of damages applied by the court, and insist, also, that the damages awarded were excessive, and assert that the evidence was insufficient to support the amount found to be

due by way of damages. These contentions are all without merit. There was no denial of the execution by the parties of the contract which required that defendants buy all ice for the supplying of their customers from plaintiffs. It was admitted that defendants had received from sources other than plaintiffs' factory 600 tons of ice, and that they sold 480 tons thereof. What they did with the difference between 480 tons and 600 tons does not appear. Whether a surplus was kept on hand for sale and melted or the difference was used in some other way is not disclosed. Since defendants joined in the stipulation without any qualification to explain this matter, we must assume that the entire 600 tons was purchased in the course of the business of supplying their customers. It was shown that the capacity of the ice plant was sufficient to supply all of defendants' wants, and that the ice for their use could be produced at an added cost to plaintiffs of 25 cents per ton, and therefore at a profit of $3.75. The loss of this sum per ton on 600 tons made the aggregate amount of damages $2,250. Section 1512 of the Civil Code is as follows: "If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties." The judgment is in accord with this rule. The rule of damages in such cases is the difference between the cost of manufacture and the contract price. Hale v. Trout, 35 Cal. 229; Winans v. Sierra Lumber Co., 66 Cal. 61, 4 Pac. 952. Loss of profits which are the natural result of a contract and which the law implies from a breach may be recovered without allegations of special damage. Tahoe Ice Co. v. Union Ice Co., 109 Cal. 249, 41 Pac. 1020.

[5] Appellants call our attention to a finding in the former action between these parties which they say limits the possible recovery in this action to $1 per ton. That case was one in which an injunction was sought. The finding in question was in part as follows: "That since the execution of said contract, and until the 24th day of July, 1905, the defendants have duly performed all the conditions on their part; and during said time, in accordance with said provisions, have advanced the sale of ice manufactured by the plaintiffs, until the said defendants were so receiving and selling from four to six tons of ice per day from the plaintiffs, at a profit to the plaintiffs of at least $1 per ton. That on the said 24th day of July, 1905, without the consent of the plaintiffs, and contrary to the provisions of said contract, the defendants ceased and refused to receive any more ice from the plaintiffs, and began to receive from the Union Ice Company and from ice companies other than the plaintiffs all the ice required by the defendants, * * * to the daily loss and damage of the plaintiffs of at least $16 per day." It will be seen at a glance that the above-quoted finding established only a minimum amount of damage as showing a reason for the issuance of an injunction. There is nothing in that finding inconsistent with the subsequent adjudication that the loss to plaintiffs was greater than $1 a ton.

[6] There is also a claim on the part of appellants that respondents were estopped by the previous decision and by their election of a remedy by injunction. This same point was made in the former appeal herein and was by the district court of appeal determined adversely to appellants, as follows: "For the purpose of determining whether the issues involved in a former suit constitute a bar to a second action reference will ordinarily be had to a comparison of the record in the two cases. Here, however, the judgment in the former action which defendants attempt to plead as a bar solemnly adjudges and decrees 'that on account of the insufficiency of the pleadings * * * in this action to warrant or sustain a judgment for damages which may have accrued to the plaintiffs, the matter of damages is hereby reversed and excepted from the operation of this judgment, to be determined by a separate action to be brought by the plaintiffs for that purpose if necessary.' Without regard to the rule, this judgment, so long as it stands, presents an insurmountable obstacle to defendants' contention on the grounds stated. There is no merit in defendants' contention that electing to sue for an injunction was a waiver of plaintiffs' right to assert a claim for damages in a subsequent action." This correctly disposes of the matter.

Other alleged errors are called to our attention, but we do not think it necessary to treat of them in detail. Suffice it to say that they are without merit.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

162 Cal. 726

SOUTHERN PAC. R. CO v. ARNOLD.

(L. A. 2,255.)

(Supreme Court of California. May 28, 1912.)

1. Trial (§ 404*)—Findings—Construction.

A finding that complainant railroad under certain specified decisions of the United States Supreme Court had no right in certain land described by virtue of its selections on a specified date was not a finding of fact but a conclusion of law resulting from the court's interpretation of the decisions of the Supreme Court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957–962; Dec. Dig. § 404.*]

2. Public Lands (§ 81*)—Railroad Grants—Indemnity Lands.

Under Act Cong. March 3, 1871, c. 122, 16 Stat. 573, making a branch line land grant to the Southern Pacific Railroad Company, such company was not entitled to select as indemnity lands under that grant lands lying within the granted or indemnity limits of the Atlantic and Pacific grant of 1866.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250–252; Dec. Dig. § 81.*]

3. PUBLIC LANDS (§ 81*)—RAILROAD GRANT—BRANCH LINE GRANT.

The fact that public lands had been adjudicated not to be subject to selection as indemnity lands under the Southern Pacific branch line grant of 1871 did not deprive that company of its right to make a separate and independent selection of the same lands under its main line grant of 1866; the adjudication against the validity of the branch line selection not being conclusive against the company except on the title actually adjudicated.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250–252; Dec. Dig. § 81.*]

4. PUBLIC LANDS (§ 81*)—RAILROAD LANDS—INDEMNITY SELECTION.

The right of the Southern Pacific Railroad Company to make an indemnity selection of public lands under its land grant depends on the status of the land at the date of the selection, irrespective of its status at any earlier period.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250–252; Dec. Dig. § 81.*]

5. PUBLIC LANDS (§ 81*)—RAILROAD LANDS—PRIMARY INDEMNITY GRANTS.

Primary and indemnity grants of public lands to a railroad company differ in that the primary grant, on the filing and approval of maps of definite location, take effect in præsenti by relation as of the date of the passage of the granting act, while indemnity grants do not transfer title until (1) a right to select has arisen by virtue of the performance of the railroad construction contemplated by the granting act; (2) after appropriate filing of the selected indemnity lands; and (3) after approval of the Secretary of the Interior of such selections, on which approval by relation the grant takes effect, not as of the date of the granting act, but as of the date of selection.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 250–252; Dec. Dig. § 81.*]

6. PUBLIC LANDS (§ 88*)—RAILROAD GRANT—INDEMNITY LANDS.

The Southern Pacific Railroad Company has a general right to select indemnity lands under its main line grant within the place limits of the Atlantic and Pacific primary grant forfeited by Act Cong. July 6, 1886, c. 637, 24 Stat. 123.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 235, 266–269; Dec. Dig. § 88.*]

7. PUBLIC LANDS (§ 82*)—RAILROAD GRANT—REJECTION.

Restoration by the Secretary of the Interior to the public domain of indemnity land selected by the Southern Pacific Railroad Company under its main line grant, rendering such land subject to entry, constituted a rejection or disapproval of the selection by the railroad company.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253–256; Dec. Dig. § 82.*]

8. PUBLIC LANDS (§ 82*)—RAILROAD LANDS—SELECTED INDEMNITY LANDS—REJECTION—ACTS OF SECRETARY OF INTERIOR.

The duty of the Secretary of the Interior to approve or reject selected indemnity land claimed by a railroad company under a land grant is not merely a formal or ministerial act, but one involving judgment and discretion, first in determining whether the selection has been properly made, and second in protecting the interests of the United States and persons who may have claims on any portion of the land in accordance with the land laws of the United States, and hence his power, while not unlimited or subject to arbitrary exercise, is not subject to review by judicial mandate.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253–256; Dec. Dig. § 82.*]

9. PUBLIC LANDS (§ 128*)—RAILROAD LANDS—INDEMNITY SELECTION—REJECTION—REMEDY OF RAILROAD COMPANY.

Where the Secretary of the Interior improperly rejected an indemnity land selection by the Southern Pacific Railroad Company, either through fraud or mistake of law or fact, and the mistake was not corrected by the Secretary of his own initiative, the railroad company, not being authorized to enforce a reversal of the ruling by mandamus, was bound to await the time when the United States had parted with the title and then institute proceedings to have the patentee declared a trustee of the land for its benefit.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec. Dig. § 128.*]

10. PUBLIC LANDS (§ 125*)—PATENT—ERRONEOUS AWARD—TRUSTS.

Where the Interior Department has fallen into error in awarding a patent to public land to one not entitled thereto as against the selector under a railroad indemnity grant, the railroad company, in order to recover the land from the patentee, must not only show that the department was in error in granting the patent, but that the error was one injurious to complainant's vested rights in that, by the law properly administered, the title should have been awarded to him.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 341; Dec. Dig. § 125.*]

11. PUBLIC LANDS (§ 82*)—RAILROAD GRANT—INDEMNITY LIMITS—SELECTION.

A due selection by a railroad company of public lands, free from other claims and within the indemnity limits of its grant, vests in the railroad company a right to the land against all third persons attempting thereafter to initiate a claim to the selected land under any of the general land laws.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 236, 253–256; Dec. Dig. § 82.*]

12. PUBLIC LANDS (§ 128*)—RAILROAD GRANT — SELECTION — ERRONEOUS REJECTION — RIGHTS OF ENTRYMEN.

Complainant railroad company having made a due selection of certain public lands free from other claims and within the indemnity limits of its grant, such selection was erroneously rejected by the Secretary of the Interior, whereupon the railroad company contracted to sell the land to defendant by a contract binding complainant to use ordinary diligence to procure a patent to the land, defendant agreeing to make payment on account of the purchase price, and never to deny that any part of the land was a part of the railroad's grant, and not to do any act to hinder, delay, or impede the obtaining of a patent by complainant. Defendant thereafter repudiated the contract, failed to make the payments required, and secured a patent to himself by representing that he was a bona fide purchaser from complainant. *Held*, that complainant was entitled to have defendant declared a constructive trustee of the title for it.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 344; Dec. Dig. § 128.*]

In Bank. Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by the Southern Pacific Railroad Company against George L. Arnold. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wm. Singer, Jr., and D. V. Cowden, for appellant. Anderson & Anderson, for respondent.

HENSHAW, J. Plaintiff brought this action to compel the defendant to convey unto it a quarter section of land for which defendant had received patent from the United States, or pay the amount due under an executory contract by which defendant agreed to purchase the land from the plaintiff. The form of this contract and many facts and much law bearing upon this case will be found set forth in Wilson v. Southern Pacific Railroad Company, 135 Cal. 421, 67 Pac. 688, Southern Pacific Railroad Co. v. Lippman, 148 Cal. 480, 83 Pac. 445, and Southern Pacific Co. v. Bovard, 4 Cal. App. 76, 87 Pac. 203. In brief, plaintiff agreed to use ordinary diligence to procure a patent for the land, and defendant agreed to make payment on account of the purchase price of the land at stated periods, and bound himself "never to deny that the tracts herein described, or any part of them, are a part of said grant, and will do no act to hinder, delay, or impede the obtaining of patent for them by the party of the first part." "In case it be finally determined that patent shall not issue to said party of the first part (plaintiff) for all or any of the tracts herein described," the purchase money paid was to be refunded. The land in controversy is within the indemnity limits common to the Atlantic and Pacific grant made by the act of Congress of July 27, 1866 [Act July 27, 1866, c. 278, 14 Stat. 292], the Southern Pacific main line grant made by the same act, and the Southern Pacific branch line grant made by act of Congress of March 3, 1871 [Act March 3, 1871, c. 122, 16 Stat. 573]. It was selected by the Southern Pacific Railroad Company on October 3, 1887, as branch line indemnity land, and on March 3, 1898, as main line indemnity land. The court finds that these selections were duly made, and that, in their making, all the requirements of law and the rules and regulations of the Secretary of the Interior and the Commissioner of the General Land Office were complied with, and that at the date of such selection the land in suit was public land to which the United States then had full title, was not reserved, sold, granted, or otherwise appropriated, and was free from pre-emption or other claims or rights.

[1] The court found: "That by the decisions of the United States Supreme Court in United States v. Southern Pacific Railroad Company, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091, and Southern Pacific Railroad Company v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, decided on the 18th day of October, 1897, it was finally determined that the plaintiff had no right in the land described in the first finding hereof, by virtue of its selections on October 3, 1887." This, of course, is not a finding of fact, but a conclusion of law resulting from the interpretation which the trial court placed upon the decisions of the Supreme Court of the United States.

[2] Its conclusion is sound. It may be considered as having been definitely settled by the Supreme Court of the United States in cases decided since this appeal was taken, that, by reason of the peculiar wording of the Southern Pacific grant of 1871 (its branch line grant,) that company was not entitled to select as indemnity lands, under its branch line grant, lands lying within the granted or within the indemnity limits of the Atlantic and Pacific grant of 1866. Southern Pacific R. R. Co. et al. v. United States, 223 U. S. 560, 32 Sup. Ct. 325, 56 L. Ed. ——. We may therefore turn this consideration to the main line indemnity selection of March 3, 1898. The finding as to this selection, as above set forth, is that it conformed in all respects to law, was of lands within the indemnity limits of the Southern Pacific grant of 1866, and was of lands which, at the time of the selection, were owned by the United States, free from any private claim of right.

[3] By United States v. S. P. R. R. Co., 223 U. S. 565, 32 Sup. Ct. 326, 56 L. Ed. ——, it is declared that the fact that the lands had been adjudicated not to be liable to selection as indemnity lands under the branch line grant to the Southern Pacific did not deprive the Southern Pacific of its right to make another separate and independent selection of the same lands under its main line grant of 1866, and that the adjudication against the validity of the branch line selections did not conclude the Southern Pacific, excepting upon the title actually adjudicated in such cases as United States v. Southern Pacific R. R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Southern Pacific R. R. Co. v. United States, 189 U. S. 447, 23 Sup. Ct. 567, 47 L. Ed. 896.

[4] The doctrine of Ryan v. Central Pacific Ry. Co., 99 U. S. 382, 25 L. Ed. 305, to the effect that the right to make an indemnity selection depends upon the status of the land at the date of such selection, irrespective of its status at any earlier period, is reaffirmed, and it is declared that this decision should be taken to express an "established and general principle." Such is the import and effect of the latests utterance of the Supreme Court of the United States.

[5] The most important consideration which differentiates the primary grants from the indemnity grants is that the primary grants, upon the filing and approval of maps of definite location, took effect in præsenti by relation as of the date of the passage of the respective acts of grant. The indemnity grants, being designed merely to make up deficiencies in the primary grants, did not transfer title until, first, a right to make se-

lection had arisen by virtue of the performance of the railroad construction contemplated by the granting act; second, after the appropriate filing of the selected indemnity lands; and, third, after the approval of the Secretary of the Interior of such selections, upon which approval, by relation, the grant took effect, not as of the date of the granting act, but as the date of selection. Oregon & California R. R. Co. v. United States, 189 U. S. 112, 23 Sup. Ct. 615, 47 L. Ed. 726. Therefore, as the Atlantic and Pacific had never performed its work so as to entitle it to make selection of indemnities, and so, of course, had never made such selections, there is here a freedom from any embarrassment which might have arisen under those conditions. It may be added that the Atlantic and Pacific grant was forfeited by act of Congress of July 6, 1886 (Act July 6, 1886, c. 637, 24 U. S. Stats. 123); that the indemnity selection was made after this forfeiture and restoration of title to the United States; and that it is well settled that the right to make an indemnity selection depends upon the status of the land at the date of such selection, irrespective of its status at any earlier period. Ryan v. Railroad Co., 99 U. S. 382, 25 L. Ed. 305.

[6] And, finally, upon this point it should be remembered that the question of the general right of the Southern Pacific Railroad Company to select indemnity lands under its main line grant within the place limits of the Atlantic and Pacific primary grant has been resolved in favor of the railroad company since this appeal was taken, and such selections have been upheld as to all lands, including those directly adjudicated upon by the Supreme Court of the United States in Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, where the selection was under the branch line grant of 1871. S. P. R. R. Co. v. United States, 223 U. S. 565, 32 Sup. Ct. 326, 56 L. Ed. ——. Since it is thus placed beyond peradventure that the indemnity selection may be made of lands affected by the primary grant to the Atlantic and Pacific, no doubt can be entertained of the right of selection of the land here in question which is within the indemnity limits of both grants.

Notwithstanding the facts above found and shown to be correctly found, that the indemnity selection was in all respects proper, the Secretary of the Interior restored the land so covered by the selection to the public domain. This action of the Interior Department followed the decision of the Supreme Court in the case of Southern Pacific Railroad Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355, and was manifestly taken under a mistaken view of the effect of that decision and of the rights of the appellant under its main line indemnity selection, rights which have above been briefly touched upon, and which will require later consideration. The order of restoration declared the lands to be subject to entry with preferential right to purchase from the United States in favor of bona fide purchasers from the railroad company as contemplated by the act of Congress of March 3, 1887 (Act March 1887, c. 376, 24 Stat. 556). Under this provision, defendant, representing himself to be a bona fide purchaser from the plaintiff, applied for and secured patent from the United States; the title derived under which patent, as has been said, plaintiff seeks to have decreed to be held in trust for it.

The order of the Secretary of the Interior restoring all these lands to the public domain was based upon a mistake of law—a misconstruction of the decision of the Supreme Court of the United States in 168 U. S., a misconstruction which led the department to believe that plaintiff was not entitled to select indemnity lands under its main line grant lying within the limits of the forfeited Atlantic and Pacific grant. That such an interpretation of the decision is erroneous in point of law is made plain by the later decisions of the Supreme Court of the United States which we have just considered (S. P. R. R. Co. v. United States, 183 U. S. 519, 22 Sup. Ct. 154, 46 L. Ed. 307, and S. P. R. R. Co. v. United States, 223 U. S. 565, 32 Sup. Ct. 326, 56 L. Ed. ——).

[7] The restoration by the Secretary of the Interior to the public domain of the selected indemnity land with the right of entry thereon may be considered as a rejection or disapproval by him of such selection. We are brought to consider the correlated rights and duties of the Secretary and of the selector under such circumstances.

[8] The duty of the Secretary in approving or rejecting such selection is not merely formal or ministerial. He has to exercise judgment and discretion, first, in determining whether the selection was or was not properly made, and, second, in protecting the interests of the United States and such entrymen or others as may have claims upon any portion of the land in accordance with the laws of the United States. His action, then, in approving or rejecting, is judicial. Northern Pacific v. Soderberg (C. C.) 86 Fed. 49; Kirwan v. Murphy, 189 U. S. 35, 23 Sup. Ct. 599, 47 L. Ed. 698; Riverside Oil Co. v. Secretary Hitchcock, 190 U. S. 317, 23 Sup. Ct. 698, 47 L. Ed. 1074. The determination and action of the Secretary thus being judicial, mandate will not lie to compel him to reverse his ruling or order, either of approval or rejection. But upon the other hand, as said in Cornelius v. Kessel, 128 U. S. 461, 9 Sup. Ct. 122, 32 L. Ed. 482, his "power of supervision and correction is not an unlimited or arbitrary power." If it were, it would vest the Secretary with an extraordinary power beyond the reach of the courts arbitrarily to destroy this and like grants; for, if the Secretary could thus arbitrarily re-

ject one indemnity selection, he could reject all indemnity selections, and the grantees would never be able to take that which the United States, through its Congress, had granted to them.

[9] It follows therefore, that, in case such a rejection is made through fraud or mistake of law or fact, if the wrong be not corrected by the Secretary of his own initiative by a revocation of the order, since mandamus will not lie to enforce a reversal of his ruling, the aggrieved party can only await the time when the United States shall have parted with title and then, under well-recognized and well-settled principles of equity, begin his action to have the patentee declared his trustee; for, as said in Lytle v. Arkansas, 9 How. 332, 13 L. Ed. 153, "it is a well-established principle that, where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." See, also, Yosemite Valley Case, 15 Wall. 91, 21 L. Ed. 82; Duluth, etc., R. R. Co. v. Roy, 173 U. S. 587, 19 Sup. Ct. 549, 43 L. Ed. 820; United States v. Winona, etc., R. R. Co., 67 Fed. 959, 15 C. C. A. 96; 26 Am. & Eng. Ency. of Law, 397; 10 Ency. U. S. Sup. Ct. Repts. p. 261.

[10] Coming thus to the correlative rights of the selector, all that has been said, of course, presupposes not only that the department has fallen into error, but that it is an error injurious to his vested rights, for, "to enable one to attack a patent from the government, it is not sufficient for him to show that there may have been error in adjudging the patent to the patentee; he must show that by the law properly administered, the title should have been awarded to him. This does not mean that, at the moment of time the patent issued, it should have been awarded to him. The acts performed by him may or may not have reached that completeness; but the claimant against the patent must so far bring himself within the laws as to entitle him, if not obstructed or prevented, to complete his claim." 10 Ency. of U. S. Sup. Ct. Repts. p. 261.

What, if any, then, were the rights which this appellant acquired by virtue of its main line grant selection of indemnity lands subject to selection? The trial court held that the selector acquired no rights by virtue of these facts. It is proper to say that the last utterances of the Supreme Court of the United States upon the subject at the time of the trial of this case were those reported in Sjoli v. Dreschel, 199 U. S. 564, 26 Sup. Ct. 154, 50 L. Ed. 311, and the learned judge of the trial court based his decision upon statements to be found in that case like the following: "Mere filing of lists of selections of indemnity lands did not have the effect to exclude them from occupancy under the pre-emption or homestead laws. * * * They remained open, as before, to settlement or occupancy under the laws until the selections were formally approved by the Secretary of the Interior.

[11] Subsequently, however, and since the submission of this cause, the Supreme Court of the United States has declared this and like expressions in the Sjoli Case to be dicta, has denied them any persuasive force, and has declared that a due selection by a railroad company of public lands, free from other claims and within the indemnity limits of its grant (such a selection as it is here found was made), vests in the selector a right to the land against all third persons attempting thereafter to initiate a claim to the selected lands under any of the general land laws. Weyerhaeuser v. Hoyt, 219 U. S. 380, 31 Sup. Ct. 300, 55 L. Ed. 258; Campbell v. Weyerhaeuser, 219 U. S. 425, 31 Sup. Ct. 321, 55 L. Ed. 279. In the course of its opinion, the court quotes from its own earlier opinion in St. Paul Railroad v. Winona Railroad, 112 U. S. 720, 5 Sup. Ct. 334, 28 L. Ed. 872: "'It is no answer to this to say that the Secretary of the Interior certified these lands to the state for the use of the appellant. It is manifest that he did so under a mistake of the law, namely, that appellant, having made the earlier location of its road through these lands, became entitled to satisfy all its demands, either for lieu lands or for the extended grant of 1864, out of any odd section within 20 miles of that location, without regard to its proximity to the line of the other road. We have already shown that such is not the law, and this erroneous decision of his cannot deprive the Winona Company of rights which became vested by its selection of those lands. Johnson v. Towsley, 13 Wall. 72, 80 [20 L. Ed. 485]; Gibson v. Chouteau, 13 Wall. 92, 102 [20 L. Ed. 534]; Shepley v. Cowan, 91 U. S. 330, 340 [23 L. Ed. 424]; Moore v. Robbins, 96 U. S. 530, 536 [24 L. Ed. 848].'" And this, it may be added, is in conformity with the opinion of this court upon a similar question, expressed in Farnum v. Clarke, 148 Cal. 610, 84 Pac. 166.

[12] It results, therefore, that, while by the selection thus duly made the appellant did not acquire a perfected title, it did acquire vested equitable rights to title of which it could not be deprived by the fraud or mistake of the Interior Department and to which rights the courts will afford full protection when, as here, they are presented for consideration. The rejection of the selection was arbitrary and unwarranted, and so appellant's equitable vested rights are superior to those of any claimants whose rights have been initiated subsequent to the filing of the due selection. Were the patentee in this case an entryman wholly dissociated from and disconnected with plaintiff, his title would still be subject to the superior equities of the appellant. Much more must this

be true in the case of the vendee of plaintiff who has repudiated his contract by a failure to comply with its terms in the matter of payments (S. P. R. R. Co. v. Allen, 112 Cal. 455, 44 Pac. 796), and has secured his patent by representation that he is a bona fide purchaser from appellant, and who has done this in defiance of his written contract to do no act to hinder, delay, or impede the appellant from obtaining patent.

It is apparent, therefore, that plaintiff's bill is not lacking in equity. We express no opinion upon the equitable considerations of minor consequence, namely, whether defendant should at this date and after his repudiation of the contract be allowed to retain title to the land by a belated performance of his contract, or whether or not he should be allowed compensation for his costs and disbursements in the matter of securing the patent, since these are questions which can properly only come before us in review of the decision which the trial court may actually make upon these questions.

It should be plain, we think, from the foregoing that the order of restoration by the Secretary of the Interior was not a final determination that patent should not issue to appellant. The circumstances under which respondent secured patent from the United States are such as, under the plainest principles of equity, make him an involuntary trustee of the appellant of the title derived under that patent.

For which reasons the judgment is reversed and the cause remanded.

We concur: MELVIN, J.; SHAW, J.; LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.

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163 Cal. 127

PEEK v. STEINBERG et al. (S. F. 5,421.)

(Supreme Court of California. June 17, 1912.)

1. CORPORATIONS (§ 448*)—CONTRACT BY ORGANIZERS—LIABILITY FOR BREACH.

A corporation is not liable for breach of a contract made by its organizers before its organization, that they would have the corporation adopt certain by-laws and make a certain contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1709, 1789–1792; Dec. Dig. § 448.*]

2. CORPORATIONS (§ 513*)—CONTRACT BY ORGANIZERS — BREACH — PLEADINGS — SUFFICIENCY.

Where, in an action for breach of a contract made by the organizers of the corporation prior to its organization, the complaint alleged that these organizers owned nearly all of the corporate stock when suit was filed, and that the corporation received the benefits of the contract, but did not allege that they owned such stock or that the corporation knew of the contract when such benefits were received, it failed to show an estoppel on the corporation to deny liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2017–2027, 2031–2034, 2036–2045; Dec. Dig. § 513.*]

3. TRIAL (§ 333*)—VERDICT—INTERPRETATION.

Where the complaint set out two items of damage, each in a stated amount, the fact that the jury's verdict was for a total sum equal to the amount claimed for one item did not justify an inference that the damages were fixed with reference to this item alone.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 784, 786; Dec. Dig. § 333.*]

4. CONTRACTS (§ 346*)—BREACH—PLEADINGS—VARIANCE.

An allegation of the complaint in an action for breach of contract that the plaintiff has performed his part will not justify a recovery on proof of excuse for nonperformance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1714, 1718–1751; Dec. Dig. § 346.*]

5. CORPORATIONS (§ 77*)—STOCK AGREEMENT—CONSTRUCTION.

An agreement that plaintiff was to receive paid-up corporate stock to a stated amount did not entitle him to receive stock actually worth that amount, but merely to have stock of that total par value.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 210–212, 219–243, 455; Dec. Dig. § 77.*]

6. CORPORATIONS (§ 78*)—STOCK AGREEMENT—BREACH—MEASURE OF DAMAGES.

Where such corporate stock had no ascertainable market value, the measure of damages for failure to issue it to the plaintiff was its actual or intrinsic value at the time it should have been received by him.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 219–231, 420–424, 429–434; Dec. Dig. § 78.*]

7. CORPORATIONS (§ 78*)—MEASURE—BURDEN OF PROOF.

In an action for breach of contract to issue corporate stock to plaintiff, the burden was upon the plaintiff to show the extent of his damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 219–231, 420–424, 429–434; Dec. Dig. § 78.*]

8. CORPORATIONS (§ 78*)—STOCK AGREEMENT—BREACH—ADMISSIBILITY OF EVIDENCE.

In an action for breach of a contract to issue corporate stock to plaintiff, where the corporate assets consisted principally of contracts under which it should receive lumber, defendant's evidence of how much lumber was received by the corporation under these contracts was admissible upon the value of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 219–231, 420–424, 429–434; Dec. Dig. § 78.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by G. W. Peek against S. Steinberg and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Froman & Jacobs and Louis H. Brownstone, for appellants. Otto Irving Wise and R. S. Goldman, for respondent.

SLOSS, J. The action was brought to recover damages for the breach of an agreement alleged to have been entered into between plaintiff on the one hand and the defendants Steinberg and Strauss on the other. The agreement relied upon was in the form of a letter addressed by plaintiff to said defendants. It is set out in full in the complaint as follows: "San Francisco, June 4th, 1906. Messrs. Steinberg and Strauss—In accordance with our talk and understanding in organizing an incorporated company for the carrying on of the lumber business, the copartnership known as the Greater San Francisco Lumber Company, consisting of S. Steinberg and myself, it is agreed that we shall assign all interest in said partnership to the new corporation, excepting my agency commission to the amount of 15 million feet, with the mills, and to take paid-up stock in said company in payment. These contracts to be assigned to said company are as follows: The purchase of ten million feet of lumber from the Skelley Lumber Co. at $11 per M, two million feet from the Palmer Lumber Co. at same price, and ten million feet from the Riverton Lumber Co., besides such lumber as may be purchased from various mills. For such interest in these contracts as I hold I am to receive paid-up stock in said corporation to the amount of $12,000 as soon as said stock can be issued, and to hold the position as a director and general manager of said corporation for the term of at least two years at a salary of $175 per month and all business expenses paid. My duty shall be the managing of all outside business, the purchasing of all lumber, shingle and other forest products handled by said corporation, and the hiring and discharging of all help employed by said company outside of the office help. It is further understood and agreed that a complete inventory shall be taken every 90 days and a dividend thus declared from the profits, quarterly. That both Mr. Steinberg and Strauss shall invest each $10,000 in cash and receive each a salary of $175 per month. If you find these conditions satisfactory kindly agree that they will be adopted in the bylaws of the corporation and a contract made with me accordingly. Truly yours, G. W. Peek."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Under this writing appeared the following: "We approve of these conditions and agree to carry out same in the new corporation"—to which the defendants Steinberg and Strauss signed their names. The complaint alleges that in accordance with this agreement the plaintiff did assign to the defendant corporation the Greater City Lumber Company all of his interest in the copartnership referred to, but the defendants have failed to deliver to the plaintiff stock of said corporation of the value of $12,000, and have refused to employ plaintiff as the general manager of the corporation. The plaintiff further alleges performance on his part of all the terms and conditions of his agreement, and alleges that, by reason of the failure of the defendants to comply with their obligations, he has been damaged in the sum of $12,000, the value of the stock agreed to be delivered to him, and the further sum of $4,200, his salary for two years as general manager of the corporation. The complaint concludes with a prayer for judgment in the sum of $16,200. The defendants answered, denying performance by the plaintiff of the agreement on his part, and denying breach of the agreement by them. The case was tried before a jury which awarded a general verdict in favor of the plaintiff and against all three defendants for $12,000. Judgment was entered accordingly. From the judgment and from an order denying their motion for a new trial, the defendants appeal.

[1] It is quite apparent that the judgment against the Greater City Lumber Company cannot be sustained. The corporation was not a party to the agreement, and the writing, on its face, did not assume to bind any one but the three individuals who executed it. The concluding words of the paper indicate that the signers contemplated that a further contract between Peek and the corporation should be made. But it is not alleged that this provision was carried out. If Steinberg and Strauss failed to comply with their undertaking to have the corporation "adopt certain by-laws and make a contract with Peek accordingly," their failure could not make the corporation liable for the breach of a contract which it had never made.

[2] The respondent advances the contention that the corporation is liable because it accepted the benefits of the contract with knowledge of its terms. But this theory, if well founded in law, is not presented by the pleadings. All that is averred by the complaint is the making of the agreement by Peek, Steinberg, and Strauss, the assignment by Peek to the corporation of his interest in the copartnership, and the failure of the defendants to carry out the terms of the agreement. There is no averment that the corporation, at the time it took the assignment, had any knowledge of the agreement. The complaint does allege that Steinberg and Strauss own nearly all of the issued stock of the corporation. It is generally held that notice to a mere shareholder is not to be imputed to the corporation (10 Cyc. 1061, and cases cited), but, if the rule were otherwise, the plaintiff would not be aided, for the reason that the allegation of ownership of the stock is directed to the time of the filing of the complaint, not to the time of the assignment to the corporation.

[3] But there are further and more serious objections to the maintenance of the judgment as against any of the appellants. The plaintiff claimed two elements of damage, one of $12,000 for the failure to issue stock to him, the other of $4,200 for the failure to employ him for two years as general manager at a salary of $175 per month. The jury returned a general verdict in the sum of $12,000. It cannot be said, from the

face of the verdict, whether it is based on only one or both of these items. The respondent contends that the verdict is to be interpreted as refusing any relief for the failure to employ and as awarding the full amount claimed for the failure to issue stock. But we think the record affords no basis for so reading the verdict. The case was submitted to the jury on instructions presenting for determination the issues relating to both demands, and, as the verdict was single, we cannot say that the jury did not consider both in fixing the amount of damages. The fact that the total sum awarded was equal to the claim for nondelivery of stock alone does not justify an inference that the damages were fixed with reference to this item alone. The jury was not bound to find that plaintiff was entitled to the full amount claimed in this behalf, and the verdict is entirely consistent with the view that something less than $12,000 was allowed on account of the stock, and the balance for failure to carry out the contract of employment.

[4] In so far as the award may have been based on the failure to employ plaintiff as general manager, it is not sustained by the evidence. The averment of the complaint is that the defendants refused and failed to so employ him. The evidence is uncontradicted that he was so employed, and that he of his own motion terminated his relations with the corporation and declined to further serve as general manager. It is claimed that the defendant Steinberg, by interfering with the performance of his duties, prevented his acting as general manager. Without detailing the testimony, we content ourselves with saying that the evidence of interference was too trivial to justify a finding of prevention. But beyond all this the complaint did not tender any issue of prevention of performance. The allegation was that the plaintiff had performed on his part. Such an allegation will not justify a recovery on proof of a valid excuse for nonperformance. "The rule is fundamental that the complaint must either allege performance or a valid excuse for nonperformance. One is not the same as the other." Daley v. Russ, 86 Cal. 114, 24 Pac. 867; Kredo v. Phelps, 145 Cal. 526, 78 Pac. 1044; Estate of Warner, 158 Cal. 441-445, 111 Pac. 352. It must therefore be held that the court erred in instructing the jury that, if the defendants prevented the plaintiff from carrying out or performing the duty of general manager, such prevention would excuse the plaintiff from the further performance of his obligation to act as such general manager, and he would be entitled to all the benefits of such contract which he would have obtained if the contract had been performed by all the parties. This instruction correctly defines the law in a proper case, but it is inapplicable to a case where the plaintiff, instead of averring prevention of performance or a good excuse for nonperformance, pleads and relies upon a full performance of the obligation on his part.

Since the amount claimed for failure to employ was only $4,200, a large part of the verdict must, in any view, have been based on the failure to issue stock, and it becomes important, therefore, to ascertain what plaintiff's rights in this regard were, and whether those rights were properly submitted to the jury for its determination.

[5, 6] The agreement that plaintiff was to receive "paid-up stock in said corporation to the amount of $12,000" did not entitle him to receive stock actually worth $12,000, but merely to have stock of the nominal or par value of $12,000 issued to him. Noonan v. Ilsley, 17 Wis. 314, 84 Am. Dec. 742. The corporation was organized with a capital stock of $100,000 divided into 1,000 shares of the par value of $100 each. An issue to plaintiff of 120 of these shares, fully paid, would undoubtedly have been a full compliance with this part of the agreement. If such shares had been issued to him, it would hardly have been claimed that the defendants were bound under their contract to make the actual value of the stock equal to its par value. The measure of damages for the failure to issue the stock would then be the detriment suffered by plaintiff for such failure; that is to say, the actual value of the stock at the time when he should have received it. Civ. Code, §§ 3356-3358. Ordinarily the amount recoverable for failure to deliver stock of a corporation is measured by the market value of such stock, but where, as here, the stock has no ascertainable market value, "then the actual or intrinsic value must be taken as the basis." Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252; Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760; Neher v. Hansen, 12 Cal. App. 370, 107 Pac. 565.

[7] The burden of proving the extent of his damage was, of course, upon the plaintiff.

[8] The record discloses no substantial evidence tending to show, with any approach to accuracy, the value of stock in the defendant corporation. But it is urged that, in the absence of evidence, the par value of stock is, prima facie, its actual value. Conceding the correctness of this view, which has the support of authority (Alexander v. Relfe, 74 Mo. 495; Trust & Sav. Co. v. Home Lumber Co., 118 Mo. 447, 24 S. W. 129), it must certainly be open to the defendants to meet the prima facie case by proof that the actual value of the stock was not equal to its par value. Where there is no established market value for shares, the inquiry into the actual or intrinsic value should not be closely restricted. "This value may depend on many facts and circumstances, such as the value of the property and assets owned, the dividends paid, the character and per-

manency of the business, the control of the stock, the management, the markets for articles produced if a manufacturing concern, and other facts. The evidence would necessarily take a broad range, and would properly be admissible to prove any fact calculated to affect the value." Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252. The defendants undertook to show how much lumber had been received by the corporation, and, more specifically, how much had been received under the contracts with the several lumber companies mentioned in the agreement sued upon. Testimony relating to these matters was ruled out on the objection of the plaintiff. The evidence thus excluded was clearly relevant. The corporation was organized for the purpose of carrying on the lumber business. Among its principal assets, as plaintiff claimed, were contracts under which it was to receive, at stated prices, large quantities of lumber from the various companies named in the agreement. It was also to receive lumber to be purchased by Peek from various other mills. The value of these assets, and of the stock of the corporation, would be directly affected by the amount of lumber which the corporation could thus obtain. The defendants had the right to go into all the circumstances affecting these contracts for the delivery of lumber, as well as purchases made by Peek outside of the specified contracts, and to show, as bearing upon the value of the stock, how much lumber had been received by the corporation and how much it had been unable to receive. The rejection of this testimony was erroneous and manifestly prejudicial.

It becomes unnecessary, under the views expressed, to consider further points made by the appellants.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

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163 Cal. 135

HENRY v. PHILLIPS et al. (S. F. 5,794.)

(Supreme Court of California. June 17, 1912.)

1. PLEADING (§ 248*)—AMENDMENT—NEW CAUSE OF ACTION.

Where plaintiff's original complaint set out an action to quiet title in the usual form, and an amended complaint alleged plaintiff's title in substantially the same language as the original, but further set out at length facts constituting fraud, for which plaintiff sought to set aside a deed to one of the defendants which was one of the instruments as to which plaintiff sought to have his title quieted in the original complaint, the amendment was not objectionable as charging a new and different cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689–706, 709; Dec. Dig. § 248.*]

2. VENDOR AND PURCHASER (§ 244*)—BONA FIDE PURCHASERS—FRAUD—NOTICE.

In a suit to set aside certain deeds for fraud of the original grantee in obtaining a conveyance from plaintiff, evidence *held* insufficient to show that the subsequent grantees to whom the land was conveyed had any notice of the original grantee's fraud practiced on plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 609–611; Dec. Dig. § 244.*]

3. VENDOR AND PURCHASER (§ 228*)—DEED FROM FRAUDULENT GRANTOR—PART PAYMENT—RIGHTS OF PURCHASER.

Where a purchaser of real estate, having received a conveyance of the title and paid a part of the purchase money, obtains notice that his vendor obtained the land by fraud from the previous owner, such purchaser is not ordinarily entitled to protection as a bona fide purchaser except to the extent of the money paid by him before receiving such notice; the defrauded party being entitled to recover the land from such purchaser on condition that the latter be reimbursed for the amount paid before notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. § 228.*]

4. VENDOR AND PURCHASER (§ 228*)—BONA FIDE PURCHASER—FRAUDULENT VENDOR.

The rule that a purchaser from a fraudulent vendor will not be regarded as a bona fide purchaser except as to the extent of the money paid before notice of his fraud by the vendor, but will be entitled to hold the land until he is reimbursed for the consideration paid before notice of fraud, does not apply where the amount paid is only nominal or where, by reason of other circumstances, it would be a great hardship on the vendee to take the land from him, in which case he will be allowed to retain the land, and the defrauded party will be limited to a recovery of the unpaid portion of the price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 495–501; Dec. Dig. § 228.*]

5. CANCELLATION OF INSTRUMENTS (§ 59*)—PURCHASE FROM FRAUDULENT VENDOR—REIMBURSEMENT FOR PURCHASE MONEY.

Where plaintiff was induced to convey land by fraud, and his vendee conveyed the same to R., who paid half of the purchase price on execution of the deed without notice of the fraud, he was entitled, in plaintiff's action to quiet title and cancel the deeds, to a provision in the decree for his protection as to the money so paid either by making a return thereof, a condition precedent to any relief, or by declaring a lien therefor on a part of the land against plaintiff.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119–125; Dec. Dig. § 59.*]

In Bank. Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Michael Henry against Dixon L. Phillips and another. Judgment for plaintiff, and defendants appeal. Reversed.

Dixon L. Phillips and M. K. Harris, for appellants. F. H. Short and F. E. Cook, for respondent.

SHAW, J. The defendants appeal from the judgment. The evidence is presented in a bill of exceptions.

[1] 1. The objection that the court erred

in allowing the amended complaint to be filed is not well taken. The claim is made that it states a cause of action different from that set up in the original complaint. The first complaint states a cause of action, in the usual general form, to quiet plaintiff's title to a tract of land. The amended complaint sets forth the plaintiff's title in substantially the same language as in the first complaint, but it further alleges that the defendants' alleged unfounded claims are based on a certain deed executed by Henry to Phillips, and that said deed was void because it was without consideration and was procured by fraud. The facts constituting the fraud are stated at length. There is a specific prayer that said deed be declared void, otherwise the prayer is in substance the same as before. It is practically the same cause of action; the only difference being that the first complaint states the wrongful claim of defendants in general terms, while the second gives the details.

2. The deed from Henry to Phillips was executed on July 22, 1907. The land conveyed is the northwest quarter of section 10, township 20 south, range 15 east, Mt. Diablo meridian, containing 160 acres. On July 23, 1907, Phillips conveyed an undivided one-third thereof to Robert S. Rendall, who, on February 12, 1908, conveyed said one-third to the defendant George D. Roberts. Each of these deeds, including that of Phillips, recited a money consideration of $10. The evidence, however, shows without conflict that the consideration of the deed from Phillips to Rendall was $500, of which $250 was paid at the time, and the balance was to be paid on December 1, 1907. Rendall was absent when this deed was made and Roberts, as his agent, paid the $250 to Phillips and accepted the deed for Rendall. With respect to the deed from Rendall to Roberts, the evidence is to the effect that Roberts merely took the bargain from Rendall as it stood, allowing the $250 which he had advanced for Rendall to stand as a payment by him to Rendall, and assumed the payment of the remaining $250 due from Rendall to Phillips. This balance still remains unpaid.

[2] There is no evidence that either Rendall or Roberts had knowledge or notice of the negotiations between Henry and Phillips or of any fraud claimed to have been practiced by Phillips in obtaining the deed from Henry. On the contrary, the testimony of Roberts shows that he had no knowledge thereof. The court finds that Roberts took the deed from Rendall with full knowledge of the facts constituting the fraud. This finding has no support in the evidence.

From the evidence and from the other findings in the case, it is a fair inference that the finding just referred to was made by the court as its theory of the legal effect of other facts stated in the other findings, upon which facts it based a conclusion that Roberts and Rendall were chargeable with knowledge of fraud. These findings are that Phillips and Roberts "acted in conjunction in the matter of said transaction with the plaintiff in connection with the deeds to said land, and the said transaction with relation thereto as herein found, and at said time the said Roberts was acting for the said Robert S. Rendall, and in the said transaction in connection with which said Roberts received the said deed from the said plaintiff (defendant Phillips) to the said Rendall, the said Roberts was counseling and advising with said Phillips as to the value of said land and the transactions concerning the same, and it was understood and arranged between the said Phillips and the said Roberts, acting for the said Rendall, that, if the said Phillips purchased and acquired said land, he, the said Phillips, was to convey to the said Rendall, acting through the said Roberts, for a consideration of $500, an undivided one-third interest in and to said land, and the said defendants were acting together in the said transaction, and were jointly interested therein, and each of the said defendants is charged with notice of all of the acts and transactions of the other, and of all of the communications or notices received by either of them." Other findings show that Rendall was in Los Angeles and had no part, personally, in any of the transactions.

There is no substantial evidence of any joint interest, or of any agreement, plan, or scheme that Phillips should obtain the land for the joint benefit of himself and Roberts or Rendall, or in order that he might convey one-third to Rendall, or that Phillips and Roberts "acted in conjunction" in the affair with Henry, or that it was "understood and arranged" that, if Phillips bought the land of Henry, he should convey one-third to Rendall. Roberts testified that he was familiar with the oil business in that vicinity; that Rendall was his brother-in-law; that Rendall told him (apparently prior to the Henry deed, though it is not directly stated) that he (Rendall) could buy a one-third interest in the Henry land from Phillips for $500, and asked as to its value; that he then advised Rendall that the land was worth nothing unless it was oil land, and that, on the chance that it might be oil land, it was worth that sum as a kind of gamble; that he (Rendall) was obliged to go away, and he then authorized and requested Roberts to close the deal with Phillips; that he (Roberts) did so, and at the time paid Phillips $250 for Rendall on the price. Phillips testified that he understood that Roberts was representing Rendall, and after he obtained Henry's deed for the land, and on the same day, he telephoned from Hanford to Roberts, who was at Coalinga, to meet him in Fresno on the following day; that they met in Hanford the next day and went together to Fresno, where Phillips searched the public records and found the title satisfactory;

that Roberts then said that Rendall wanted to buy a third interest, and would pay $500 for it; that thereupon he accepted the offer, and at that time, being in the recorder's office, he drew up the Rendall deed, signed and acknowledged it, and delivered it to Roberts, and that Roberts paid $250 on the price. He also testified that, after the execution of the deed from Rendall to Roberts, Roberts told him that Rendall had gone to South America, and had asked Roberts to take this one-third interest off his hands, whereupon Rendall and his wife had conveyed the same to Roberts. There was no other evidence on this branch of the case.

No joint interest is here shown. No writing or other binding agreement concerning the one-third interest is even suggested by the testimony. No consideration had passed for any such agreement, and there is no proof that there had been anything looking towards an agreement between Phillips and Rendall or Roberts concerning this land other than a mere proposal or statement by Rendall to Phillips that, if Phillips got the land that, he (Rendall) would give him $500 for a one-third interest in it. Neither party was bound either in law or equity, and there is nothing to warrant a conclusion that Rendall, in order that he might secure the one-third interest, had delegated or requested Phillips to buy the land from Henry for that purpose, even by fair means, much less by deceit or fraud. There is nothing which makes Phillips the agent of Rendall or Roberts, or which makes either of them responsible for any fraud which may have been practiced by Phillips upon Henry to procure Henry's deed. The judgment declares that the deeds from Phillips to Rendall and that from Rendall to Roberts are null and void, and that Roberts has no right, title, or interest in the land. It makes no provision for the return of the $250 paid by Roberts for Rendall to Phillips, and afterwards adjusted by him with Rendall, and it gives Roberts no lien or claim on Henry or on the land therefor.

[3] The established rule is that the vendee of real estate, who has received a conveyance of the title and has paid a part of the purchase money, but who, before he pays all of it, receives notice of the fact that his vendor obtained the real estate by fraud from the previous owner, is not, under ordinary circumstances, entitled to protection as a bona fide purchaser, except to the extent of the money paid by him before receiving such notice, and that the defrauded party can obtain the land from such vendee, but that he can do so only upon the condition that the vendee is reimbursed what he had paid before notice. The following authorities support this view: Lewis v. Phillips, 17 Ind. 113, 79 Am. Dec. 457; Rhode v. Green, 36 Ind. 10; Burton v. Reagan, 75 Ind. 81; Clift v. Nay, 105 Ind. 356, 5 N. E. 1; Baldwin v. Sager, 70 Ill. 503; Webb v. Bailey, 41 W. Va. 469, 23 S. E. 644; Youst v. Martin, 3 Serg. & R. (Pa.) 428, 432; Lewis v. Bradford, 10 Watts (Pa.) 82; Kitteridge v. Chapman, 36 Iowa, 348; Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Digby v. Jones, 67 Mo. 104; Hardin v. Harrington, 74 Ky. 374; Davis v. Ward, 109 Cal. 191, 41 Pac. 1010, 50 Am. St. Rep. 29; 2 Warvelle on Vendors, § 610; 2 Pom. Eq. Jur. §§ 750, 755. Many others to the same effect might be cited.

[4] The rule is not absolute or invariable, but depends upon circumstances, and is governed by principles of equity and justice. For example, where the price was $1,000, and only $1 had been paid, it was said that the payment was merely nominal, and that the vendee had no standing as an innocent purchaser for value if he received notice before paying more. Kitteridge v. Chapman, supra. In other cases, where a very small part of the price was unpaid when notice was received, or where the defrauded party was negligent to the prejudice of the purchaser, or where, from the fact of improvements made in good faith, or other conditions, it would be a great hardship upon the vendee to take the land from him, it is said that he should be allowed to retain the land and the defrauded party limited to the recovery of the part of the purchase money still owing by such vendee. Haughwout v. Murphy, 22 N. J. Eq. 548; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 300; Flagg v. Mann, 2 Sumn. 563, Fed. Cas. No. 4,847. None of these conditions exist here. Roberts therefore is only entitled to the return of the amount paid by him to Phillips on the purchase price of the one-third interest sold by Phillips to Rendall.

[5] The decree should at least have made provision therefor, either by making such return a condition precedent to any relief at all, or by declaring a lien therefor on the undivided one-third of the land in favor of Roberts against Henry. Whether the decree is supportable against attack on other grounds remains to be considered.

3. The decree is not in accordance with the case stated in the complaint, and it is not in all respects supported by the evidence. As we have hereinbefore shown, the amended complaint, in effect, states a cause of action to quiet title, differing from the usual form in that it states the details of the defendants' claim and the facts to show that it is invalid. It does not purport to seek a rescission, and it does not show that Phillips had paid Henry any money on account of their dealings concerning the land. On the contrary, it alleges that the deed from Henry to Phillips was wholly without consideration. It proceeds entirely upon the theory that a deed, obtained by fraud without any consideration, is wholly void between the parties and others with notice, whenever the fraud is shown in a proper case.

The decree adjudges that the respective deeds of Henry to Phillips, Phillips to Rendall, and Rendall to Roberts, are void; that defendants have no right, title, claim, or interest in or to the land, or any part thereof; that the plaintiff is the owner thereof in fee; that his title thereto be quieted; and that the defendants be forever enjoined from claiming or asserting any right, title, or interest in or to the same. It further orders and adjudges that Henry pay to Phillips the sum of $255. It does not declare this sum a lien upon the land, nor make the relief awarded to Henry conditional upon such payment.

There is no foundation in the complaint for this provision in favor of Phillips. The answer of Phillips denies the allegation of the complaint that the deed of Henry was without consideration. It alleges that $245 of the consideration still remains unpaid; that Phillips is ready, able, and willing to pay it and makes tender of it; but it does not state what was the price agreed on, or that any money had been paid thereon. The court made a finding that a few days after the execution of the Henry deed Phillips paid to Henry $250, and later $5, which Henry received in the belief that it was an advance payment upon a sale of the land at $250 an acre made by Phillips for Henry to some third person not named. The judgment for the payment of this $255 would seem to be based upon this finding.

Such a decree cannot be sustained except upon the theory that the contract between Phillips and Henry, whatever its nature, was without consideration, and consequently that no restoration, or offer to restore, from Henry to Phillips, nor any provision securing restoration, was necessary. If a consideration was received by Henry, he could not maintain the action without either restoring it or tendering it to Phillips before the action was begun, or making an offer to do so in his complaint, and in either case the decree should make provision to secure the repayment if restoration was not made before. There are some cases which hold that a prior rescission or offer to rescind and restore is not always essential; that, under some circumstances, as where some reasonable excuse for not sooner restoring or offering to restore the consideration is shown, relief may be granted, notwithstanding the failure to make a previous offer to restore, and the decree may declare the party guilty of fraud, a trustee for the plaintiff, and direct a reconveyance upon terms which will be just and equitable to both parties. More v. More, 133 Cal. 493, 65 Pac. 1044, 66 Pac. 76, is an example of this class of cases. But in that case a good excuse for not making the prior offer was shown, and the court below had adjudged a reconveyance only upon the condition that the money paid by the guilty party be concurrently restored to him. It was because of these provisions that the judgment was approved. We know of no authority for the proposition that, where a grantee who obtains his deed by fraud has paid a part of the price, and has received no rents or other advantage from his bargain equivalent to what he has paid, he can be compelled to reconvey or to submit to a decree canceling his deed, without requiring repayment to him as a condition to the relief granted, or at least declaring a lien upon the land in his favor for the sum paid by him. The decree that the deeds are void, therefore, depends upon the accuracy of the finding that there was no consideration paid by Phillips.

The evidence on this subject consists entirely of the testimony of Phillips and Henry. That of Phillips showed that the transaction was a bona fide sale and conveyance of the land by Henry to him for $500, of which $255 had been paid. Henry's testimony is rambling, confused, and somewhat inconsistent with itself. It can be deemed veracious in intent only upon the theory that his recollection of the transaction is not good. The complaint avers that he understood and believed that the paper he signed was not an agreement or option to buy the land, but a mere power of attorney authorizing Phillips to sell the land as his agent. This allegation is not sustained by any evidence. Henry testified as follows: "I considered it was an option he had fixed up. * * * I thought as long as it was an option and would get me all the money out of this land I wanted, I thought I would let him handle it; I thought that was good enough to get. He didn't say whether it was $100 an acre or $1,000; nothing said about it." Being asked if any papers were read to him, he replied. "He read one, but I don't know how he did read it, I couldn't tell that, whether he called it a deed or an option; I couldn't tell which way he read it. Q. How did you understand it? A. I understood he was making out a deed to sell the land. Q. Would you know the difference between a deed and an agreement for a deed? A. Well, I don't know as I would." On cross-examination the following occurred: "Q. And did you know what the paper was? A. Well, I understood by my attorney that he was making out a deed to sell this land. Q. Making out a deed to sell it? A. An option. Q. Which do you mean, a deed or an option? A. An option. I understood he was making out an option, and he got a deed made out. * * * Q. Well, the paper you signed, who did you understand that deed or option, or whatever you thought it was, was made to? A. He made it out to himself. He didn't tell me about anybody else. Q. You understood at that time that this paper was from you to Phillips? A. Yes, sir."

In regard to the payment of $255, Phillips testified that, after recording the Henry deed at Fresno, he returned to Hanford on July

24th, and there paid Henry $250 as part of the price of the land; that Henry asked him to keep the $250 for him as a custodian and pay it out to or for him in small sums as he wanted it; that he assented to this arrangement and drew up a statement in duplicate, which they both signed, one of which Henry kept. This statement declared that Henry had deposited with Phillips $250 on account of the purchase price of the land, describing it; that Henry had received said sum from Phillips; that Henry could draw said deposited money from time to time as he desired it; and that the reason for making this deposit with Philips was because of the reckless manner in which said Henry handles his money, especially when he is drinking. This instrument was signed in duplicate by both parties, and its execution is admitted, as also is the delivery of the duplicate copy to Henry. The money so deposited was paid over by Phillips to Henry thereafter in small sums, the last payment, $119.95, being paid on September 10, 1907. The additional $5 was paid on February 11, 1909. Henry made no denial of the payment of this money in the manner stated, nor of the reason therefor as stated in the writing aforesaid. His testimony as to the payment was that Phillips returned to Hanford and reported to him that he made a sale of the land to some one, whose name Phillips did not give, at $250 an acre; that the purchase money would be paid in full within 30 days; that Henry would then get all of his money; and that this $250 was given to him (Henry) as an advance payment on said sale.

It is clear that this evidence does not support a finding that Henry was informed or believed that the paper he signed was a mere authorization to Phillips to sell the land for him as his agent, or a finding that it was in fact of that character. Disregarding Phillips' testimony, that of Henry shows that he understood that he was signing either an agreement to sell the land to Phillips, or an agreement giving Phillips an option to buy it from him. The paper of July 24th, the execution of which he admits, shows that the $250 was paid to him as part of the consideration for the land sold by him to Phillips. His testimony contains no denial of this fact. The finding that there was no consideration was therefore contrary to the evidence. The evidence is conflicting in this: That one party says the sale was evidenced by a deed, while the other understood, or at least says he understood, that it was evidenced by an executory agreement. In either case it would be necessary, as a condition to granting Henry any relief, to make adequate provision securing the return to Phillips of the money he paid to Henry. The case made by the evidence does not authorize a positive decree quieting plaintiff's title, but only a decree for the rescission of the contract, requiring repayment of the $250 as a condition thereof, or declaring it a lien on the land, or, what is in substance as equitable, declaring Phillips a trustee and directing a reconveyance concurrently with repayment of said sum to him. To this extent, there is a material variance between the pleadings and the proof. The judgment given is not warranted by the pleadings, the findings in some particulars are outside of the issues, and neither the complaint nor the findings are in entire harmony with the evidence.

This makes a reversal necessary. A large portion of the appellants' brief is devoted to a consideration of the relative credibility of the plaintiff and defendant Phillips. This is a question which must be determined by the trial court. We cannot enter upon a discussion of it.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

(163 Cal. 155)

BOYD v. WARDEN et al. (L. A. 2,901.)

(Supreme Court of California. June 19, 1912.)

1. SPECIFIC PERFORMANCE (§ 114*)—CONTRACTS FOR SALE OF REAL ESTATE—COMPLAINT—REQUISITES—"ADEQUATE CONSIDERATION."

A complaint in an action for specific performance of a contract to sell real estate need not allege in hæc verba that the contract is supported by adequate consideration, but an allegation that the value of the real estate at the time of the contract did not exceed $500, the consideration mentioned in the contract with interest, and that $440 with interest had been paid, and the remainder deposited in court for the vendor, alleges adequate consideration within Civ. Code, § 3391, prohibiting specific performance against a party who has not received an adequate consideration for the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–372; Dec. Dig. § 114.*

For other definitions, see Words and Phrases, vol. 8, p. 7565.]

2. SPECIFIC PERFORMANCE (§ 12*)—CONTRACTS FOR SALE OF REAL ESTATE—DEFENSES.

Where a contract for the sale of real estate contained an acknowledgment by the vendor of a receipt of a specified sum on account of the price, which sum was the amount fixed as the value of land conveyed by the purchaser to the vendor, and the vendor thereafter accepted monthly installments of the balance of the price, without objecting that the land received was not worth the amount specified, the vendor, in the absence of fraud preventing him from knowing the value of the land conveyed to him, could not rely on the fact that the land was not worth the amount represented by the purchaser, to defeat specific performance of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 26–28, 37; Dec. Dig. § 12.*]

3. EVIDENCE (§ 185*)—SECONDARY EVIDENCE—OBJECTIONS.

Where a party denied under oath the receipt of a letter from the adverse party, the admission of secondary evidence of the contents of the letter, without first making a written demand on the party for the letter, was not prejudicial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 642–660; Dec. Dig. § 185.*]

4. SPECIFIC PERFORMANCE (§ 120*) — CONTRACTS FOR SALE OF REAL ESTATE — EVIDENCE—ADMISSIBILITY.

Where, in a suit to enforce specific performance of a contract to sell real estate, the vendor relied on a forfeiture of the contract for nonpayment of installments of the price at maturity, evidence that the vendor had offered a discount for an immediate payment of the entire price, and that he had agreed to execute a deed on the payment of a specified sum, was admissible to show a course of dealing between the parties, and as indicating that the vendor did not treat the contract as at an end.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 384–386; Dec. Dig. § 120.*]

5. VENDOR AND PURCHASER (§ 187*)—CONTRACTS — NONPAYMENT OF INSTALLMENTS — FORFEITURE—WAIVER.

A contract for the sale of real estate made time of the essence, and called for monthly installments of the price. Various installments and interest were paid, but seldom on the exact dates fixed by the contract. The vendor in acknowledging the receipt of an installment paid a few days after maturity wrote, "Look to the terms of your contract." Thereafter the purchaser offered to pay the balance of the price on condition that she obtained a deed. The vendor gave no notice of his unwillingness to accept such payment. About three months later, she again tendered the amount due and tendered monthly installments due. The tenders were refused. *Held*, that the vendor waived his right to declare the contract forfeited for nonpayment of installments at maturity.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

Department 2. Appeal from Superior Court, Los Angeles County; Franklin J. Cole, Judge.

Action by L. Agnes Boyd against Julia P. Warden and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Julia P. Warden and C. D. Warden, in pro. per. Constan Jensen and Moore & Evans, for respondent.

MELVIN, J. Plaintiff sued to enforce specific performance of a contract for the conveyance of real property. Defendants appeal from a judgment against them on the ground that it is not supported by the evidence, and they appeal generally from an order denying their motion for a new trial.

The contract was signed by plaintiff and by Julia P. Warden. Defendant C. D. Warden is sued as the husband of the latter. By the terms of the instrument, Julia P. Warden agreed, upon full payment of the purchase price of the property described therein, to convey it by a good and sufficient deed of grant to L. Agnes Boyd, and to furnish a certificate by a certain abstract company showing the title to be vested in said Julia P. Warden. By the contract, the vendor acknowledged the receipt of $285, and the vendee agreed to pay $10 on the first of each month, beginning with November, 1907, until the full sum of $215 should be paid, with interest at the rate of 6 per cent. per annum, payable quarterly. Time was made of the essence of the contract, which provided that, in the event of failure by the vendee to comply with the terms thereof, the vendor should be "released from all obligations in law and equity to convey said property," and the vendee should "forfeit all right thereto and all money theretofore paid under the contract." The evidence showed that various amounts of principal and interest were paid by L. Agnes Boyd, seldom upon the exact dates fixed by the contract, but never very long thereafter. These were accepted by the vendor, and it was stipulated at the trial that on or about January 4, 1909, all payments due to February 1, 1909, had been made. The amount of the principal then unpaid was $60. The court found, upon conflicting testimony, that on or about January 8, 1909, plaintiff wrote defendant a letter requesting that she be permitted to pay the balance of the purchase price, $60 (no part of which was then due under the terms of the contract), and that upon said payment she should receive a deed and certificate as provided by the terms of the agreement. There was a further finding that this offer was bona fide; that defendants gave no notice of their unwillingness to accept it; that not until some time in March, 1909, when plaintiff called at the office of C. P. Warden, the agent of Julia P. Warden, to inquire for her certificate and deed, did she learn of the vendor's unwillingness to accept her offer; that she then and there tendered the whole sum of $60 which was refused; and that she also tendered $30, the payments for February, March, and April, 1909, which were also refused by the agent of the vendor. The court also found that, by mutual agreement of the parties thereto, payments under the contract were made at various places, sometimes to the agent of the vendor at the banking establishment in which plaintiff was employed, and that by reason thereof plaintiff relied on the said agent calling at the bank to get the balance due for the property and to deliver the certificate of title and the deed; that plaintiff was at all times ready, able, and willing to make good her offer; and that defendants had acted in bad faith and had practiced fraud and deceit upon plaintiff in seeking to gain advantage under the strict terms of the contract. Among the conclusions of law was one to the effect that defendants, by their acts and conduct, were estopped from forfeiting and canceling the contract.

[1] Several objections to the rulings of the court with reference to the demurrer to the complaint and the motion to strike out certain parts thereof are made, but they are without merit, and no one of them deserves

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

notice except the contention that the complaint does not characterize the consideration to be paid under the contract as adequate and the contract just and reasonable to defendants (citing Fritz v. Mills, 12 Cal. App. 115, 106 Pac. 725). This court has consistently upheld the rule set forth in the cited case, but it is not necessary that, to conform to the requirements of section 3391 of the Civil Code, there must be averment and finding in hæc verba of "adequate consideration." Wait v. Kern River Mining, etc., Co., 157 Cal. 25, 106 Pac. 98; Sunrise Land Co. v. Root, 160 Cal. 97, 116 Pac. 72. In the complaint in this case, there was an averment, found by the court to be true, "that the value of said real property at the time of the making of said contract did not exceed the sum of $500." As the consideration mentioned in the contract was $500 with interest, and as of that amount $440 with interest had been paid, and the remainder was deposited in court for the vendor, adequacy of consideration was sufficiently alleged and found.

[2] The court on motion struck out a so-called special defense, by which defendants alleged that the $285 mentioned in the contract as paid at the date thereof was represented by plaintiff's conveyance to Julia P. Warden of a lot in Tehama county, which did not exceed $50 in value, and that there was a failure of consideration as to $235. The mere statement of this purported defense shows the propriety of the court's action in striking it out. In the contract itself Julia P. Warden acknowledged the receipt of $285 on account of the purchase price. No court of equity should allow her, after many months during which she had accepted plaintiff's payments under the contract, to endeavor to impeach her own solemn acknowledgment of the payment to her of the $285, unless she fully averred fraud by which she was prevented from knowing the value of the land in Tehama county. There was no such allegation of fraud, and the statement of the attempted defense was wholly insufficient.

[3] Appellants complain of the ruling whereby plaintiff was permitted to testify to the contents of her letter of January 8, 1909, in which she tendered the balance of the purchase price for the property. Their objection to this testimony was based upon the failure to make written demand upon them for the letter, but, as its receipt by them was denied under oath, we fail to see how they were injured by the ruling.

[4] Plaintiff testified that she had a certain conversation with the agent of Julia P. Warden during 1908 in which he offered her a discount for an immediate payment to close the purchase of the property, and was told by her that she would consider the offer and let him know of her determination. This was admissible as showing the course of dealing between the parties, and as indicating one of plaintiff's reasons for believing that her offer, made in good faith, was being considered by the vendor. Testimony was given of another conversation between the same persons in which C. P. Warden, the agent of Julia P. Warden, offered, in March, 1909, to give plaintiff a deed upon payment of $125. But this was admissible, not upon the theory that the agent might vary the terms of the contract, but as one of the indications that the contract was not treated by the vendor as being at an end. It was not offered to show the making of a new contract, for plaintiff never contended that any new contract was made, consequently the case of Niles v. Hancock, 140 Cal. 157, 73 Pac. 840, cited by appellants, is not in point.

[5] The finding that defendants were guilty of fraud is not sustained by the evidence. The mere facts that plaintiff's letter in which she offered to pay the entire balance due on the property was not answered, that Julia P. Warden's agent in refusing the tender subsequently made expressed his intention of "getting even" with Miss Boyd, and the other circumstances given in evidence, are not sufficient to uphold the finding that Julia P. Warden, the vendor, and her husband, were, or that either of them was, guilty of actual fraud; but the finding of fraud is not essential to the upholding of the judgment. Without it, plaintiff is entitled to prevail in this suit. The conduct of defendants did amount to a waiver of the rights which they now assert under the clause of the contract declaring a forfeiture for failure to pay installments exactly on time. Miss Boyd was lulled into the belief that her offer of payment was acceptable. As soon as she learned that her written tender was repudiated, she again offered either to pay the balance due under the contract and a month's installment, or to make good her original tender of the whole balance. Both offers were refused. It was not shown at the trial that defendants were injured by the delay, or that the property had greatly increased in value. No demand was made upon plaintiff after January 1, 1909, nor was anything done by Julia P. Warden or her agent to give notice of the strict enforcement of the terms of the contract in the future. In the letter of January 8, 1909, acknowledging the receipt of the installment due on the first of that month, but paid on or about the fourth, was the sentence, "Look to the terms of your contract," and appellants took the position that this was notice of the intention of the vendor to stand thereafter strictly upon the provisions of the agreement. But the quoted sentence was unrelated to any other part of the letter and was not in any manner illuminated by the context. While somewhat portentous in sound, like the soothsayer's

warning to Cæsar, "Beware the ides of March," it was equally cryptic, and cannot be construed as the formal notice which appellants would have us pronounce it.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(163 Cal. 118)

FAY v. GERMAN GENERAL BENEVOLENT SOCIETY.

(S. F. 5,768.)

(Supreme Court of California. June 17, 1912. Rehearing Denied July 17, 1912.)

1. MASTER AND SERVANT (§ 292*)—EXISTENCE OF RELATION—INDEPENDENT CONTRACTORS AND THEIR EMPLOYÉS.

An agreement between an owner and contractor provided that the owner might remove the contractor under specified circumstances, that the labor should be paid by the owner and the materials by the contractor who should present a bill therefor to the owner with 5 per cent. added, and 5 per cent. of the bills for labor. The owner's superintendent testified that he had a right to discharge workmen for idling or shirking, but he had never exercised that power, and there was no evidence of any contract giving him any powers in excess of those given by the original agreement. The time of the workmen was kept by an employé of the owner. *Held*, that an instruction in an action by a workman employed by the contractor against the owner for negligence, that where the owner pays another a percentage of the cost of labor and materials, the labor and materials being paid for by the owner, and where the owner has power to discharge the workmen, such workmen are the servants of the owner, was improper, since the evidence did not show any right in the owner to discharge the workmen, and, even if he had that right, the instruction ignored direction and control required by Civ. Code, § 2009, as an essential element of the relation of master and servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1135; Dec. Dig. § 292.*]

2. MASTER AND SERVANT (§ 277*)—ACTIONS FOR INJURIES—SUFFICIENCY OF EVIDENCE—EXISTENCE OF RELATION.

In such action a verdict for the workman was unsupported by the evidence which failed to show the existence of the relation of master and servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 953; Dec. Dig. § 277.*]

3. MASTER AND SERVANT (§ 321*)—INDEPENDENT CONTRACTORS—FURNISHING DANGEROUS APPLIANCES.

In an action by an employé of an independent contractor against an owner for injuries caused by the breaking of a rope belonging to the owner, where it did not appear that the owner insisted on the use of the rope, or that the rope was not merely loaned to the contractor, the owner was not liable on the theory that he furnished an inherent dangerous instrumentality, especially where the case was not tried on that theory.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1262; Dec. Dig. § 321.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Edward Fay against the German General Benevolent Society. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed.

Lilienthal, McKinstry & Raymond and Goodfellow, Eells & Orrick, for appellant. Earll H. Webb, Robert P. Troy, and Andrew Thorne, for respondent.

MELVIN, J. Plaintiff, who was a plasterer, was seriously hurt by a fall due to the breaking of a rope holding the platform upon which he was standing while at work. That he was badly injured is not controverted, and that at the time of the accident he was putting a coat of plaster upon the sides of an air shaft in one of the buildings of the German Hospital which the defendant corporation was constructing is also undenied. Judgment was given in favor of plaintiff for $7,500. From this judgment, and from an order denying its motion for a new trial, defendant appeals.

The principal attack of defendant's counsel on the judgment is based upon the argument to the effect that the plaintiff was employed by an independent contractor and not by defendant. A contract had been let for the construction of the hospital, but the contractor failed to complete his work, and thereafter the superintendent of the hospital, W. P. Barry, was appointed to take charge of the work and to see that the building should be completed in accordance with the plans and specifications prepared by the architect. In performing his duties, Barry, as he testified, sometimes made contracts and sometimes did not. He entered into a written arrangement with Smythe Bros. for the work of plastering. By the terms of this agreement, Smythe Bros. were to do all the work of plastering to be done in the group of buildings known as the German Hospital. They promised to perform their part of the contract in a thorough and workmanlike manner, and in strict accordance with the plans and specifications of defendant's architects. This writing also contains the following: "Should the said Smythe Bros. fail at any time to have sufficient men or materials so as to delay the general work, or neglect the same in any way, or act in any way unsatisfactory to architect, it shall be in the power of said W. P. Barry to remove said Smythe Bros. from the work and continue the same without hindrance. All material necessary for said plastering to be purchased by said Smythe Bros. as required and they shall present a bill for the same monthly to the said German General Benevolent Society, adding to said bill 5 per cent. of the same and 5 per cent. of labor paid during the month said bills were contracted. All of the labor required in said plaster work shall be paid net by the German General Benevolent Society each week. On the final and satisfactory completion and acceptance of said work, said Smythe Bros. are to receive an additional 5 per cent. of all bills, for material and all labor paid during the progress of the work."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Under this agreement the work went on. Plaintiff was put to work by Gauldie, who was the foreman for Smythe Bros. Gauldie agreed with plaintiff how much the latter's pay should be, and his wages were handed to him by Gauldie. He testified that he took no orders from Barry, defendant's superintendent. On the witness stand, Barry stated that no one but Smythe and his foreman had control over the plasterers. Their money was sometimes paid by checks, drawn by Barry in favor of Smythe Bros., and sometimes sufficient sums of money for the wages were paid directly to Gauldie, foreman for the Smythes. The weekly receipts, signed by plaintiff and his co-workers, were given to Smythe Bros., and payment was acknowledged by them. The rope which broke and precipitated plaintiff down the airshaft was the property of defendant, but the court properly instructed the jury that that fact alone would not make defendant liable. The court gave the following instruction which may well be taken as the basis of the determination by the jury that Fay was a servant of the defendant corporation: "You are instructed that, where the owner of a building has certain work done thereon under another and pays that other as his compensation therefor a percentage upon the cost of labor performed and materials furnished, and the owner pays for the materials used and pays the men each week to perform the work and has the power to discharge them, then in that case the owner is the master, and the men who do the work are the servants of the master or owner, and the person who is thus paid such a percentage as his compensation is only the agent of the owner, and the men who do the work in such a case are the servants of the owner of the building."

[1, 2] This instruction ignored the elements of entire direction and control prescribed by section 2009 of the Civil Code, as defining the relation of master and servant. It overlooked the clear terms of the contract which did not give defendant the right to select or discharge the plasterers, but only to remove Smythe Bros., if at any time that firm should fail to have sufficient men or materials to prevent delay of the general work. As was said in Callan v. Bull, 113 Cal. 598, 45 Pac. 1018: "The master's liability for the negligence of his servant rests upon his right to select the servant and to control his work, but, when this selection and control rests in another, he is freed from such liability." See, also, Houghton v. Loma Prieta Lumber Co., 152 Cal. 577, 93 Pac. 377; Teller v. Bay & River Dredging Co., 151 Cal. 211, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779; Boswell v. Laird, 8 Cal. 489, 493, 68 Am. Dec. 345. There is nothing in the case of Needham v. Chandler, 8 Cal. App. 126, 96 Pac. 325, to sustain the position of respondent that a contract like the one here considered gives no independent status to the contractor. The point decided in that case was that, in a controversy between the original parties to the agreement, it was wholly immaterial whether or not the contract was filed for record. The contract provided for the payment of the architect by a percentage of the cost of constructing the building, and the court did say that, "in effect," the contract was "merely an authorization in writing by which plaintiff was to act as agent for defendant for a compensation named in the writing"; but the court was discussing the question of the alleged necessity for recording such an instrument. Responsibility for the act of a servant was in no manner involved in the case of Needham v. Chandler.

Respondent's belief is that the jury found upon conflicting evidence that Fay was a servant of the German General Benevolent Society. Really there was no substantial conflict. It is true that Barry testified to his right to discharge men if they were drinking, idling, shirking, "or anything of that kind"; but he never did exercise that authority, and there was no evidence of any contract, written or verbal, giving him powers in excess of those provided for in the agreement heretofore mentioned. Mere power to discharge men does not necessarily imply that they are the servants of the person possessing that authority. In Callan v. Bull, supra, the court held that: "The reservation by the employer of the right to remove any of the employés of the contractor does not relieve the latter from liability for the negligence of his employés. Reedie v. Railway Co., 4 Ex. 244; Cuff v. Newark, etc., R. R. Co., 35 N. J. Law, 17, 10 Am. Rep. 205."

So in this case, if the authority of Barry or of Walsh, his assistant, to remove men from the work be conceded, that does not indicate that Smythe Bros. were not independent contractors. Nor is the circumstance that defendant's servant kept the time of the plasterers at all significant of a condition not shown by the written contract. As the compensation of the firm having the contract for plastering depended partly upon the cost of the labor, it was very natural that defendant, acting after default of its general contractor as its own builder, should keep account of the labor and material used in the work of plastering. That Barry had the general direction of the work as to the results thereof is doubtless true, but he did not have authority to direct the *manner* in which the work was to be performed. As he himself said: "I did not offer any suggestions or opinions to the workmen at any time; I am not a plasterer; I would not know how to do the work." It would not be valuable to review the testimony of Barry and Walsh further regarding their own views of their powers as employés of the defendant corporation. It is sufficient to say that nothing in their conduct demonstrated a state of facts inconsistent with the standing of Smythe Bros. as independent contractors. We are satisfied that the instruction given by the court and quoted herein was not a correct statement of the law applicable to the evidence adduced at the trial, and that the proof did not justify the verdict.

[3] The only other matter requiring notice is the furnishing by defendant of the rope which broke and caused the accident. We are not unmindful of the rule that makes a principal responsible where he arbitrarily assumes to direct the employés of a subcontractor and thereby creates an unsafe place or furnishes an unsafe appliance for the conduct of their work. Majors v. Connor, 121 Pac. 373. In this case there was proof that many appliances, used by the original general contractor and others purchased by the defendant after it, through its agents, took charge of the work, were upon the premises. It does not appear that defendant's superintendent insisted upon the use by the servants of Smythe Bros. of the rope belonging to the defendant. For all the evidence shows, the rope may have been merely loaned to Smythe Bros. The case was not tried upon the theory that defendant was liable because it had furnished an inherently dangerous instrumentality. The court properly instructed the jury that this was a suit brought by the plaintiff as a servant against a master, and that, if the jurors believed Smythe Bros. to be independent contractors, their verdict should be for the defendant. No other questions in this case require consideration.

The judgment and order are reversed.

We concur: HENSHAW, J.; LORIGAN, J.

163 Cal. 207

CLARK v. KELLEY et al. (L. A. 2,863.)

(Supreme Court of California. June 27, 1912.)

1. Appeal and Error (§ 1078*)—Review—Waiver of Error—Failure to Argue in Briefs.

The overruling of defendant's demurrer will not be reviewed on appeal where his brief only restates the causes of demurrer and makes no argument or citation of authority.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256–4261; Dec. Dig. § 1078.*]

2. Parties (§ 54*)—New Parties—Cross-Complaint.

Under Code Civ. Proc. § 442, providing that, whenever a defendant seeks affirmative relief against any party to the action relating or depending on the contract or transaction, he may file a cross-complaint, a defendant may not introduce new parties by way of cross-complaint.

[Ed. Note.—For other cases, see Parties, Cent. Dig. § 85; Dec. Dig. § 54.*]

3. Set-Off and Counterclaim (§ 29*)—Cross-Complaint—"Transaction."

Under Code Civ. Proc. § 442, providing that, whenever a defendant seeks affirmative relief against any party to the action relating to or depending upon the contract or transaction on which it is brought, the term "transaction" means some commercial or business negotiation, and not a wrong of violence or fraud, and so, in an action on notes, defendant cannot set up a cross-action for damages because of the improper issuance and levy of an attachment in a former action on such notes.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 49–51; Dec. Dig. § 29.*

For other definitions, see Words and Phrases, vol. 8, pp. 7060–7062; vol. 8, pp. 7818–7819.]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Willard H. Clark against N. C. Kelley and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Hanson, Hackler & Heath, for appellant. Schweitzer & Hutton, for respondent.

MELVIN, J. Defendant Kelley appeals from a judgment against him entered after his default, following the court's order sustaining a demurrer to his cross-complaint.

In December, 1907, N. C. Kelley executed his promissory note to W. P. Fuller & Co. for $2,471.54, and at the same time by way of security assigned and delivered to W. P. Fuller & Co. three contracts executed by one Owings in favor of Kelley, by which said Owings agreed to purchase from Kelley certain parcels of real property. Subsequently the notes and contracts were assigned to Willard H. Clark, plaintiff and respondent herein, who, after the maturity of the note, commenced an action thereon, and procured the issuance of a writ of attachment under which the sheriff of Los Angeles county attached certain real property belonging to Kelley. He defended upon the ground that plaintiff had security in the shape of real estate for the payment of the note sued upon, and on the same ground moved for the dissolution of the attachment. The court determined that the attachment was improperly issued; dismissed it; and, finding that the note was secured by an equitable mortgage on real property, gave judgment for defendant.

In January, 1910, Willard H. Clark commenced the action at bar, joining Owings as a defendant with Kelley, and asking for the foreclosure of the equitable mortgage. To the complaint defendant Kelley demurred upon several grounds, and upon the overruling of his demurrer he filed an answer and cross-complaint. Both pleadings sought to bring into the case W. P. Fuller & Co. as the real parties in interest upon the ground that Clark was merely an agent in bringing the suit. The cross-complaint demanded damages for the improper levy of attachment upon Kelley's property, consisting of attorneys' fees incurred in defending the action, injury to cross-complainant's credit, and clouding his title to certain property with the result that pending and prospective sales were spoiled. Both cross-defendants successfully demurred to this cross-complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But two questions are argued in the briefs, appellant insisting that the court erred in (1) overruling his demurrer to the complaint, and (2) in sustaining the demurrers to his cross-complaint.

[1] The demurrer to the complaint was special and was based upon the contentions that Owings was improperly joined as a party defendant, as he had no privity of contract with the plaintiff; that the spouses of Owings and Kelley were not made parties defendant; that there was a misjoinder of causes of action because plaintiff sought to combine an action to foreclose an equitable mortgage with one to terminate the interest of Owings in the contracts for the purchase of real property; and that each of the three contracts should have been made the subject of a separate action. In their briefs, counsel for appellant merely restate these causes of demurrer without favoring us with any citations or argument in favor of their position, so without further comment we indorse the ruling of the lower court.

[2] The demurrer to the cross-complaint was based upon a number of objections, but counsel have devoted their briefs to the proposition that the matters set up in the cross-complaint are not so related to the main action that they are the proper subject of such a pleading. It is provided by section 442 of the Code of Civil Procedure that: "Whenever the defendant seeks affirmative relief against any party to the action, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may * * * file * * * a cross-complaint." As Whittier, Fuller & Co. were not "parties to the action," the demurrer interposed on their behalf was properly sustained. A defendant may not, under the power given by section 442 of the Code of Civil Procedure, bring in new parties by way of cross-complaint. Alpers v. Bliss, 145 Cal. 570, 79 Pac. 171; Merchants' Trust Co. v. Bentel, 10 Cal. App. 76, 101 Pac. 31.

[3] There is a wide diversity of decision in other jurisdictions with reference to cross-complaints and counterclaims pleaded under the provisions of statutes akin to sections 438 and 442 of our Code of Civil Procedure. Even in California there is apparent inconsistency of ruling in the earlier cases. In Waugenheim v. Graham, 39 Cal. 177, this court held (although that determination was not absolutely essential to the decision of the case) that, where a contract was payable in lumber, the demand of plaintiff for its payment in money and the suing out of an attachment prematurely might be made the bases of a cross-complaint for damages, while in the later case of Jeffreys v. Hancock, 57 Cal. 646, it was held that damages, arising by reason of an excessive attachment levy on defendant's property in the same action, might not be pleaded in a cross-complaint. In Glide v. Kayser, 142 Cal. 419, 76 Pac. 50, this court held that, in an action of claim and delivery, defendant may not recover damages by way of cross-complaint for injury by plaintiff's cattle to his realty. Mr. Justice McFarland, who wrote the opinion in that case, rather inclined to the doctrine (not necessarily involved therein, however) that "the term 'transaction' in a statute limiting counterclaims to demands arising out of the same transaction intends some commercial or business negotiation, and not a wrong of violence or fraud"—citing Abbott's Law Dictionary, and the court reaffirmed the rule announced in Meyer v. Quiggle, 140 Cal. 495, 74 Pac. 40: "It was not the intention of the reformed procedure to allow persons having independent claims against each other the relief authorized in one having no relation to that which could be given in the other, nor in any manner affecting it, to settle them all in one action upon the sole ground that, as they had been brought into court to contend against each other with respect to one case or dispute, they should at that time and place settle all other matters of controversy existing between them." The later case of Engebretson v. Gay, 158 Cal. 28, 109 Pac. 879, emphasizes the interpretation which denies the right to counterclaim or to file a cross-complaint for damages merely collateral to the main contract upon which suit is brought. If defendant Kelley had commenced an action against plaintiff Clark, asking for damages for the improper issuance and levy of an attachment in the former action, we do not think that the latter would or should have been permitted to set up by way of cross-complaint the note and assigned contracts here pleaded, because surely they would not have been "matters arising out of the transaction set forth in the complaint." The converse of this proposition is equally plain.

Judgment affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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163 Cal. 211

CITY OF SANTA ANA et al. v. SANTA ANA VALLEY IRR. CO. (L. A. 2,766.)

(Supreme Court of California. June 27, 1912.)

1. DEDICATION (§ 18*)—WHAT CONSTITUTES DEDICATION.

Where a landowner, in selling his lots which bordered on a public way, reserved a public way for road purposes, such reservation, which was in all of the deeds, constituted a dedication to the public to the full width of the reservation, even though the public had not yet acquired a prescriptive right over the road.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 33-36; Dec. Dig. § 18.*]

2. Dedication (§ 63*)—Abandonment.

Where a strip of land was dedicated for a public highway, the public's use of only a part of the strip was not an abandonment of the unused portion.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 103-106; Dec. Dig. § 63.*]

3. Easements (§ 47*) — Public Ways — Ditches.

Where a decree of partition gave defendant's grantors right to maintain a ditch over the allotments of others, and defendant's grantors placed such ditch within the limits of a highway which the other allottees had dedicated to the public, the ditch was subject to the easement of the public.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 103; Dec. Dig. § 47.*]

4. Municipal Corporations (§ 623*)—Highways—Regulation.

Under Const. art. 11, § 11, empowering any municipality to enforce within its limits local, police, sanitary, and other regulations, a municipal corporation has the right to require the closing of an open irrigating ditch which has, for more than the statutory period, been maintained at the side of a highway, such ditch having become a nuisance through the growth and development of the municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1371-1374; Dec. Dig. § 623.*]

Department 2. Appeal from Superior Court, Orange County; Frank F. Oster, Judge.

Action by the City of Santa Ana and others against the Santa Ana Valley Irrigation Company. From a decree for plaintiffs, defendant appeals. Affirmed.

E. E. Keech, for appellant. W. F. Heathman and Williams & Rutan, for respondents.

LORIGAN, J. The plaintiff city, and the other plaintiffs who are abutting owners on the south side of West Washington avenue in said city between Ross and Baker streets, a distance of some five blocks, and on East Seventeenth street, between Bush and French streets, a distance of two blocks, sued to restrain the defendant from maintaining an open water ditch on the south side of said avenue and street between said side streets, to have the same declared a public nuisance, and to require defendant to construct instead of said open water ditch some suitable, reasonable, and proper conduit placed underground along the street in its stead. A decree to that effect was awarded plaintiffs, and defendant appeals therefrom and from the order denying its motion for a new trial. The principal attack made by appellant is upon the findings as they apply to the open water ditch running along West Washington avenue between the streets mentioned. No attack is made on the findings or judgment as far as they affect the open water ditch of appellant on East Seventeenth street. It was stipulated on the trial that, if the ditch was found to be located on Seventeenth street, it was a nuisance thereon. The court found it was so located, but only to a very slight extent, and appellant acquiesces in the judgment so far as it affects the ditch on that street.

It may be said, preliminarily, that in 1868 a partition of the Rancho Santiago de Santa Ana, through which the Santa Ana river runs, was decreed and allotments made to the several tenants in common with the right to use the waters of the river on such lands as were irrigable therefrom. By the decree a right of way through the allotments was given for ditch purposes to carry water to such irrigable lands. It was in general terms; no way or course being described or specifically provided for. In 1882 a ditch, a portion of which is involved here, was constructed by the owners of certain allotments for the irrigation of some of their lands and was subsequently turned over to the defendant corporation. In 1886 the plaintiff city of Santa Ana was incorporated, and embraced within its corporate boundaries were included some of said allotments and a large portion of the ditch in question, including its length along what is now West Washington avenue between the streets referred to.

As to West Washington avenue and the ditch upon it, the court found that during the year 1882, and at the time of the construction of the ditch along the south of the center line of said avenue, there was, and ever since had been, and now is, a traveled public road, highway, and street along and on each side of the center line of said avenue, and that a portion of said road, highway, and street extended 25 feet south of the center line thereof; that said road, highway, and street ever since the year 1882, and prior to the construction of said ditch, have included within it the land over and upon which said ditch is constructed; that said open water ditch is 3 feet wide at the top, and 1 foot wide at the bottom, and 2½ feet deep; that the maintenance of said ditch as an open water ditch on said West Washington avenue was and is dangerous to the public and the lives and property of the persons traveling or living on either side of said street, and is an obstruction to the free use in the customary manner of said public street upon which it is situated; that the lands lying south of said avenue have not since the construction of said ditch along the south side of said avenue, and are not now, used entirely for agricultural purposes; that the larger portion of said lands are now used for building lots and residence purposes, and the lands lying north have never been irrigated from said ditch, and the owners thereof have no interest in it, and said property therein is used for residence purposes; that said defendant can change said open ditch where it is now located to a pipe line and conduct said water therein in order to supply abutting landowners and stockholders with water for irrigation, and can make the necessary standpipes therefor without interfering or obstructing said street.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is insisted by appellant that there was no evidence to sustain the particular finding that, when the ditch was located in 1882, what is now known as West Washington avenue was a traveled public road, highway, and street, and that the ditch of appellant was constructed thereon. The legal proposition relied on by appellant under this claim of the insufficiency of the evidence is that, if, when the ditch was dug, the land over which it was then constructed was not included within a then public road or highway and only became included as such subsequently, the right to the easement over it for the ditch had become a prior vested property right to which the easement for a public road, highway, or street was subordinate, and that the city in the exercise of its police powers, under which now it attempts to compel a change in its use, could not interfere with or impair this vested right; that such vested right could only be affected through condemnation or similar proceedings in which suit aside from other damages to which the appellant might be entitled the expense of making the change from an open to a covered ditch should be awarded it, or the expense of doing so should be borne by the municipality.

This question of who shall bear the burden of the change is really the only point in controversy in the case presented under the attack upon the findings. There seems, under the evidence, to be no room for any serious complaint on the part of the appellant against the finding that the maintenance of the ditch on the avenue in its present condition is under the existing and growing conditions of the city in its vicinity a nuisance; nor that the change as decreed from an open to a closed ditch is not entirely practicable. Neither do we understand counsel for appellant to question but that if there existed a public road or highway along what is now West Washington avenue in 1882, which then included the land on which its ditch was afterwards constructed, that the municipality, in the exercise of its police power, could not require the change in the use which has been decreed by the court, and that appellant must make the change at its own expense.

Now as to the finding of a pre-existing easement for highway purposes over the land when the ditch was constructed. While the existence of a public highway over the land when the ditch was constructed along it was made an issue under the pleadings, the evidence produced respecting it was presented exclusively by the respondent city. There can be no manner of question but that in 1887, a year after the incorporation of the city of Santa Ana, what is now known as West Washington avenue, and upon which the ditch in question was constructed, was and ever since has been a public highway or street. The claim of appellant, however, is that, when the ditch was constructed in 1882, it had not been established or dedicated as a highway, and that the evidence by which respondent sought to establish it fails to show it. Before considering this claim, it may be said that as early as 1875, and up to the time of the construction of the ditch, there was an existing highway running to a considerable width over and along the present course of what is now West Washington avenue. The country was then sparsely settled and the travel was not extensive, but it was generally used as a highway; the beaten track lying on either side of the center line of the present West Washington avenue, though not actually traveled as far south as along the 25 feet from said center line within which the ditch was thereafter located. At the time it was so being used as such highway, the title to the land over which it existed was in one Jacob Ross as allottee under the decree of partition of the Santa Ana Rancho made in 1868. In 1871 Jacob Ross conveyed his allotment to one Josiah Ross, who, by sundry deeds made between 1876 and 1881, conveyed to various persons portions thereof; the northern line of the lands conveyed being the center line of said highway, and in such deeds reserving 25 feet off of and along the northern boundary of the lands conveyed "for road purposes." These reservations included the land lying 25 feet south of the center line of the public road as it had theretofore for years existed. Ross also made conveyances of land in this allotment immediately north of the center line of the said existing highway, and made similar reservations of 25 feet along the north of the center line of said highway for road purposes, disposing of the last portion of the land owned by him abutting on the center line of said avenue in 1892. The plaintiffs in this action other than the city of Santa Ana are the successors in interest of Ross to the fee in the lands south of the center line of said avenue covered by the reservations for road purposes made by him. Subsequent to said reservations, and in 1882, the appellant proceeded to build its ditch. It was shown in evidence that, when the construction of this ditch was commenced, Ross protested against it being done, objecting, however, only to what he claimed was the construction of a canal, saying that in his "reserves for streets" he had put reserves in the deeds for ditches (which was an error on his part, because he had not), but that a canal was being constructed and not a ditch, and ordered the parties constructing it to desist. No attention was paid to his objection, and the ditch was constructed within the reserved 25-foot strip south of the center line of the highway, as it was the avowed purpose and intention of the builders to do when they commenced constructing it. The ditch has remained there ever since.

[1] Under the evidence, the claim of appellant is that as the old highway did not cover by actual user the strip of land 25 feet from the center line when the ditch was constructed thereover, the only support for the finding that it did must be based on the reservation thereof for road purposes made by Ross in his conveyances, and it is insisted that these reservations did not amount to a dedication of the strip to the public for road, highway, or street purposes; that the reservations by Ross were for his own use and not for the benefit of the public; that the right of the public to an easement over the portion reserved for road purposes did not attach until adverse user of it for such purposes for five years, which was long after the construction of the ditch over the reservations had occurred. In support of this claim they cite such cases as Taft v. Tarpey, 125 Cal. 376, 58 Pac. 24, and Pitcairn v. Harkness, 10 Cal. App. 295, 101 Pac. 809. But these cases are not in point under the evidence here. In those cases it is true the question was the extent to which the party making a reservation for road purposes intended it to apply, whether it showed an intention to dedicate the strip described to the public as a highway, or to declare a reservation for the benefit of the grantor alone. The actions were between successors in interest of the former owner who made the reservations and those claiming that the reservations were in effect a dedication for public use as a highway. The language used in making the reservations was similar to that used by Ross in his conveyances. But there was no evidence in those cases of any intent to devote the use of the land reserved for road purposes except as the language employed disclosed it. It was held that, considering the language alone in which the reservations were expressed, they appeared to be made for the benefit of the grantor only, and disclosed no intention to dedicate the land for public use.

But here the trial court had not only before it the language of the reservations themselves, but the circumstances and surroundings under which Ross made them, and his conduct after they were made, which sufficiently warranted it in concluding that Ross intended to and did by these reservations immediately dedicate all the land embraced therein to the use of the public as a highway.

It appears that Ross made many other deeds of portions of the large tract of land he owned besides those in which the reservations along what was then the old highway, but now West Washington avenue, were made; reservations along the four sides of said particular tracts from which it is only a fair and reasonable inference that in doing so he intended that these reservations should be used as public roads or streets connecting with each other as they thereafter did.

As far as the reservation of 25 feet along both sides of the center line of the present avenue is concerned, the use of the term "for road purposes" therein must, as reflecting his intention, be considered in the light of existing conditions when he used it. It is true that in his reservations he did not refer to an existing highway, nor make his reservations in terms on either side of the center line thereof, but there is no question in the case that the center line of the old highway was the line along which, on either side thereof, he reserved a 25-foot strip for road purposes. At the time he made his reservation, there existed, in fact, over his land and was included within its description an open road or highway. Whether a public easement had at that time been acquired or not over any portion of the strip reserved is immaterial. It was certainly then being traveled as a public highway under a claim of right and without objection or hindrance from Ross. He knew of this use and acquiesced in it. If by user the public had acquired an easement therein, the reservation of Ross could not have affected it and it is not to be assumed that he intended to do so. If an easement had not been acquired, then certainly it could not be questioned but that his reservation for "road purposes," used in general terms and applying to a strip of land a part of which was then being and had been for years actually used by the public for road purposes, would be construed as granting to or confirming in the public the same right to the use thereof and to the same extent that it was then being enjoyed, namely, as a public highway. But it is said that these circumstances, applied to the reservations, would at most only disclose an intention on the part of Ross to create an easement for highway purposes to the extent that the highway was then being traveled or used which did not actually extend to the full width of the strip described in the reservations and upon which the ditch of the appellant was constructed.

But, taking the reservations as disclosing an intention on the part of Ross to dedicate or confirm to the public an easement over the strip for at least the then existing highway which, we are satisfied, they do, there is no plausible ground for claiming any limitation as to his intention, or that he did not intend the entire width to be devoted to the same public highway purposes. The highway was being traveled, but it had no defined limits as to width. As is common on ungraded roads in an open country, the travel will at times vary largely on one side or the other from the general center line, depending on conditions of the road or the weather.

As the owner of the fee in land over which the highway existed, and while intending by his reservations to dedicate or confirm an easement therein to the public as such, it was to the interest of Ross to define the limits to which thereafter it should be used for that purpose, and he did so. This intention to devote the entire strip for public use as a highway is to some extent further disclosed from his language and conduct when the ditch was being constructed over it. While objecting to what he claimed was digging a canal instead of a ditch, he did not declare that the reservations were for his exclusive benefit, or that there was any restrictions upon their use for ordinary highway purposes, but on the contrary designated them as reserves for "streets." This was not the term he used in the reservations; there they are made for "road purposes." But when on the one hand he designates his reserves as for "road purposes," and on the other declares that they were made for "streets," a term which, as applied to cities or towns or growing communities contiguous thereto, means a public thoroughfare, the use of the terms interchangeably fairly indicates that what reservations he did make were not for his own benefit, but as highways for public use.

Upon these considerations and others which might be suggested, the trial court was warranted in finding that, prior to and at the time the ditch of appellant was constructed, the present West Washington avenue was and ever since has been a public highway, and that, when the ditch was constructed, it was constructed on land included in said highway.

[2] It is hardly necessary to say that, after the dedication of the strip for a public highway by Ross, the use of only a portion of it for such purposes by the public shows no abandonment of the unused portion. The acceptance by user of a portion of a road dedicated is an acceptance of it in its entirety. S. P. R. R. Co. v. Ferris, 93 Cal. 263, 28 Pac. 828, 18 L. R. A. 510.

[3] Aside from the claim that the portion of the strip upon which the ditch is located was not a portion of the public highway when the ditch was constructed, it is further insisted that, even if it was, it only became so under the reservations by Ross, and his right to create the easement for highway purposes, and the easement itself, were subject to and subordinate to a prior vested right in the defendant under the partition decree of 1868 to an easement over this strip for ditch purposes. This claim is based upon the terms of the partition decree which preserved to the several allottees under the partition a right to the use of the waters of the Santa Ana river on their allotments containing arable and irrigable lands and which provided that "any party, * * * holding allotment * * * of land irrigable from the waters of the Santa Ana river, shall have the right of way to enter over and upon the allotments lying above them for the purpose of keeping up a convenient zanja (ditch) and running water therein for irrigation." As we have heretofore stated, this ditch was constructed by the property owners other than Ross, having lands to the south thereof and on completion turned over to appellant. But this provision in the decree gave neither the allottees nor the defendant, their successor in interest to the ditch, any right to enter upon any portion of the lands of the owners of allotments that they saw fit. In constructing the ditch, the original constructors might have refused to construct it anywhere other than within the boundary lines of allotments, and could have refused to construct it along a public highway, or appellant refused to accept it as so constructed. This was not done. It was constructed over the strip which they knew had theretofore been dedicated and accepted as a highway, and, having done so, they made their location, subject to the prior easement vested in the public for highway purposes, and subordinate to the right of the public to so control the easement for the ditch that it should not interfere with such prior and paramount right and subject to a reasonable regulation of the use of the easement for ditch purposes by the municipality in the exercise of its police powers for the safety and comfort of the civic community.

[4] It appearing, therefore, that the avenue had been dedicated to public use as a highway or street when the ditch of the appellant was constructed thereon, and the easement acquired thereby was subject and subordinate to the prior right of the public to its use for highway purposes, it is quite clear that the judgment, at the instance of the city regulating its further use, was proper and warranted under section 11, art. 11, of the Constitution of the state, which empowers any municipality to enforce within its limits "local, police, sanitary and other regulations." It is to be noticed that this is not a case where it is claimed, on the part of the municipality, that the defendant has no right at all to occupy the public street with its ditch. It concedes the right to do so, but only requires that the manner of its use be changed so as not to interfere with the right of the public and the municipality to the free and unobstructed use and control of the street in the customary manner.

When the city of Santa Ana was incorporated in 1886, it included within its municipal boundaries the avenue upon which the ditch was constructed, and thereby acquired the right to control its use as a public street to the full extent that the public necessity then or thereafter demanded. At the time of the incorporation, and for years thereafter, the land on either side of the avenue and in its vicinity being principally farming or orchard property, and there being but a limited travel over the avenue, there was no necessity for interfering with the ditch as an open one. But within the past few years these land along the avenue and between the streets heretofore referred to have been laid out into blocks and lots, and to a large extent have become populous portions of the city with an increased travel along the avenue. The ditch in question consists of a cement open ditch 3 feet wide and 2½ feet deep, raised a foot and a half above the line of the street, and located along that portion of it where a sidewalk would ordinarily be placed. A ditch of this character, located on a public highway in the immediate vicinity of a residential part of the city, is, as the court found it to be, a public nuisance, and subjects the public traveling along the highway and the property owners and residents in its vicinity to danger, and is an interference with the right of the public to a free and unobstructed and entire use of the street for the purposes of travel, as it likewise prevents the municipality in the discharge of its public duty from placing and maintaining the street in its entirety for public use. That the police power of the city of Santa Ana, under the facts disclosed, is ample to require the defendant to change the manner of the use of one of the public streets of the municipality so as not to endanger the public safety or interfere with the free and unobstructed use thereof cannot be questioned. Nor need authorities in support of it be cited, because we do not understand counsel to claim that, if a public easement for highway or street purposes existed at the time the easement in West Washington avenue therefor for ditch purposes was imposed, the city of Santa Ana could not, under its police power, control or regulate the use of such ditch easement. We understand this to be conceded; the only claim being that the easement for the ditch was, for the reasons heretofore assigned and discussed, superior to the easement for a public highway. But that position we have decided is under the evidence untenable.

It is asserted by appellant that the only easement it acquired through the original and actual location of the ditch in 1882 was a right thereafter to maintain it as an open one only; that it has no legal right to use, nor could the court empower or compel it to use, a different conduit than such open ditch. But if this position were correct, as the easement of the appellant is subordinate to the easement for highway purposes, and the present manner of its maintenance has become a nuisance if it were impossible for it legally to change its present use, it would have to be abolished entirely. But to the advantage of appellant there is no merit in the claim of its counsel, because all the owners in fee in the lands impressed with the easements, both for highway and ditch purposes, are plaintiffs in this action, as well as the city having control of the highway easement, and, are all consenting and requiring that appellant make the change.

We are not to be understood in the discussion of this case to intimate or hold that, if the highway easement was subsequent or subordinate to the easement for the ditch, the municipality would not have the authority, in the exercise of its police power, to regulate its use; the burden of any expense in a change thereof to be borne by the owners of the ditch easement. We determine nothing on that point, as it is not involved, because here the easement for the highway is superior to the ditch easement, and there can be no question of the power of the city, under such circumstances, to regulate its use, and that any change in the manner thereof must be made at the expense and charge of the owners.

There is nothing further requiring consideration.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(163 Cal. 166)

In re HUSTON'S ESTATE. (Sac. 1,992.)

(Supreme Court of California. June 24, 1912. Rehearing Denied July 22, 1912.)

1. WILLS (§ 55*)—TESTATOR'S MENTAL CAPACITY—EVIDENCE—SUFFICIENCY.

In a will contest, evidence *held* to sustain a finding that testatrix was mentally incompetent when she executed the document.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137–158, 161; Dec. Dig. § 55.*]

2. WILLS (§ 50*)—TESTAMENTARY CAPACITY—MENTAL CONDITION.

One has sufficient mental capacity to make a will if he is able to understand the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those persons in whom and those things in which he has been mostly interested, and is capable of understanding what he is doing.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96–100; Dec. Dig. § 50.*]

3. WILLS (§ 360*)—REVIEW—OBJECTIONS NOT MADE BELOW.

On appeal in a will contest, objection to testimony of a physician as to testatrix's sanity on the ground that the testimony was incompetent as a privileged transaction within Code Civ. Proc. § 1881, subd. 4, will not be considered where the only objection at the trial was based on a claim that witness had not shown himself qualified to testify and that a question asked him was double.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 825; Dec. Dig. § 360.*]

4. EVIDENCE (§ 537*)—EXPERT OPINIONS—MENTAL CONDITION.

In a will contest, a physician was properly permitted to give an opinion as to whether testatrix was mentally sound during a period of his observations where he had qualified prima facie as an expert.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2345; Dec. Dig. § 537.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

5. Trial (§ 84*) — Evidence—Objections—Sufficiency.

On an issue of testatrix's mental capacity, testimony of a nurse, who attended testatrix while she was in the hospital a few weeks after the will was executed, as to the condition of testatrix's mind during "that time" was properly admitted as against objection to testimony of testatrix's mental condition "at the time of the execution of the will."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.*]

6. Insane Persons (§ 2*)—Evidence of Incompetency.

To show the condition of one's mind at a given time as to sanity, evidence tending to show such condition shortly before and shortly after the time is admissible.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 4-10; Dec. Dig. § 2.*]

7. Trial (§ 96*)—Motion to Strike Testimony—Sufficiency.

Motion to strike the entire testimony of a witness is properly overruled if it is partly admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 248; Dec. Dig. § 96.*]

8. Evidence (§ 474*)—Expert Testimony—Qualifications of Witness—Sufficiency of Showing.

That witness had known testatrix all his life and had met her "off and on, maybe once a month and maybe oftener," and that he observed her appearance, conduct, and conversation, was a sufficient prima facie showing of intimate acquaintanceship to qualify him to testify as to her condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

9. Evidence (§ 474*)—Expert Witnesses—Qualifications.

Under Code Civ. Proc. § 1870, subd. 10, a witness is not qualified to testify to the mental sanity of the signer of a document where he was a mere observer of such signer and not an expert or an intimate acquaintance, unless witness was a subscribing witness to the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196-2219; Dec. Dig. § 474.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Proceedings for the probate of the will of Nancy Huston, deceased. From an order denying probate, and from an order denying a new trial, the executor and another appeal. Affirmed.

L. G. Harrier and T. T. C. Gregory, for appellants. Theodore A. Bell and Frank R. Devlin, for respondent.

ANGELLOTTI, J. This is an appeal by the surviving executor named in the document offered for probate as the last will of deceased, and by Maggie Clark, a legatee named in said document, from an order denying probate of said document as the last will of deceased, and from an order denying their motion for a new trial.

Deceased died in the latter part of the year 1909, leaving an estate valued at about $6,000. On December 1, 1905, when 86 years of age, she had executed the document offered for probate as her last will. By this document, after providing for burial and payment of her debts, she gave to the contestant, Anne Murray, her only child, $25 "and no more. Her conduct and actions toward my husband and myself having been such in the past that I do not wish to make any further bequest to her." She then gave to her niece, Maggie Clark $200 "as a small return for the services rendered to my husband and myself while we were in trouble," and to the trustees of the First Presbyterian Church of Vallejo $500 for the use of the congregation. She then gave all the rest and residue of her estate one half to said Maggie Clark and the other half to the trustees of the general assembly of the Presbyterian Church of the United States of America, to be distributed in equal amounts among seven boards of said church. She appointed Rev. Theodore F. Burnham and Philip Steffan executors without bonds. When the document was offered for probate, it was contested by the daughter, Anne Murray, on the ground, among others, that the deceased at the time of its execution was not of sound and disposing mind and memory, and not competent to execute a last will and testament. The verdict of the jury was in favor of contestant on this ground of contest, and judgment was thereupon given denying the application for the admission of the document to probate.

[1] 1. It is very earnestly urged that the evidence is not legally sufficient to support the conclusion of mental incompetency of the deceased at the date of the execution of the alleged will. A full consideration of the evidence has satisfied us that this is not one of the cases in which it fairly may be said that there is only "some slight pretense of evidence" to support the verdict, or that "the jury were evidently actuated by motives which they had no right to consider." There was substantial evidence in support of the conclusion reached, and it is our opinion that the most that can be said in appellants' favor on this point is, as was said in the case from which we have already quoted, "the verdict might with propriety have been the other way; but we cannot say that it was entirely outside the legitimate province of the jury." Estate of Tibbetts, 137 Cal. 123, 69 Pac. 978.

We cannot agree at all with learned counsel for appellants that respondent is compelled to rely solely on a showing of insane delusions on the part of deceased to sustain the verdict. The ground of contest was want of competency of the deceased to make a will.

[2] The essentials to a sound and disposing mind and memory are well stated in Estate of Motz, 136 Cal. 558, 562, 69 Pac. 294, 295, cited by appellants, as follows: "The soundness of mind required for making a will has relation to the act of the testator in making final disposition of his property as he desires. Although feeble in health,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

suffering under disease, aged, and infirm, the testator, if of sound mind with reference to the disposition of his property, may make a will. If he is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him, with clear remembrance as to those in whom and those things in which he has been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty, free from any delusion, the effect of disease, which might lead him to dispose of his property otherwise than he would if he knew and understood what he was doing, he has the capacity to make his will. Whitney v. Twombly, 136 Mass. 145."

The law in this behalf was correctly stated to the jury in the following instructions; the first being given at the request of the appellants, and the second being given at the request of the contestant: "1. The law is that to be of sound and disposing mind and memory, so as to be capable of making a valid and binding will, it is sufficient if the testatrix has an understanding of the nature of the business in which she is engaged—a recollection of the property she means to dispose of—of the persons who are the objects of her bounty and the manner in which it is to be distributed among them." "3. If you believe, from a preponderance of the evidence in this case, that, at the time of the execution of the will herein, Nancy Huston was not able to understand and carry in mind the nature and situation of her property, and her relations to her relatives and those around her, with clear remembrance, as to those in whom and those things in which she had been mostly interested, and not capable of understanding the act she was doing and the relation in which she stood to the objects of her bounty, then I instruct you that your verdict must be for the contestant herein."

There was evidence tending to show that deceased commenced to fail quite rapidly, both physically and mentally, in the summer of 1905; that she thought a nurse at the St. Helena Sanitorium, where she and her husband were staying, had knocked her down and blackened her side, and had put her in a tub and tried to suffocate her; that she thought people were trying to poison her; that she was distrustful of her neighbors, and did not want any of them to come near her place; that she took no interest in things and was melancholy; that these conditions continued until the last of October, when Mrs. Murray left her and her husband at the ranch. When Mrs. Murray left, she employed a man to go to the ranch and look out for the old people, but they refused to allow him to stay, and deceased thereafter insisted to several people that Mrs. Murray had sent this man out to kill them. Shortly after Mrs. Murray left, deceased and her husband went to the house of the Clarks to live, and remained there until after the will was executed. Several witnesses, who had known the deceased for many years, gave it as their opinion that her mind was to some extent impaired during the year 1905. On December 29, 1905, she was taken seriously ill and was in Dr. Hogan's hospital at Vallejo from that date until February 22, 1906. Both Dr. Hogan and Miss Huntington, a nurse, were of the opinion that she was of unsound mind during the whole of this period. The testimony as to the making of the will was very meager; the lawyer who prepared it, Mr. Harvey, who was one of the subscribing witnesses, the other subscribing witness and Mr. Burnham, who was present, all having died before the trial. The only other person present was Mr. Steffan, who was appointed one of the executors. He was present in the lawyer's office the day before, and testified that deceased said, when Mr. Harvey asked her how she wanted the will drawn, that she would like to have a part of the money go to the church, and if there was any left, a part of it to Mr. Clark, and some "to the boy in San Jose," and that, when asked about "Annie" (Mrs. Murray), she said, "I don't feel like it, she got enough. She got all the cash money on the ranch and everything about eaten up, and she is going to have enough. I am willing to give her $25." As a matter of fact, Mrs. Murray had received nothing to speak of from the ranch. The will as finally drawn and signed made no provision for anybody in San Jose. In addition to this, there was evidence tending to show an antagonism to and distrust of the daughter entirely unnatural and unwarranted by anything the daughter had done, and accountable for only on the theory of impaired mental power. There is in all this enough, in our opinion, to legally sustain the conclusion of the jury and the trial judge that the deceased did not measure up to the standard in the matter of capacity to make a last will. It is true that there was considerable evidence tending to rationally explain the attitude of the mother toward her daughter in a manner entirely consistent with absolute soundness of mind, and tending to show that deceased was fully competent on December 1, 1905, to make a will, but to our minds all this does no more than create a conflict of evidence, upon which the decision of the jury and the judge of the trial court is conclusive.

[3, 4] 2. It is claimed that the trial court erred in allowing Dr. Hogan to give his opinion as to the sanity of deceased while she was in his hospital at Vallejo from December 29, 1905, to February 22, 1906; it being urged that such testimony was incompetent in view of subdivision 4 of section 1881 of the Code of Civil Procedure, which provides that "a licensed physician or surgeon cannot, without the consent of his patient, be exam-

ined in a civil action as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

We are satisfied that it must be held that this objection is not available to appellants. When the witness was called, he first testified as to his qualifications and experience as a physician and surgeon, and that he knew deceased during the month of December, 1905. He was then asked under what conditions he knew her, and appellants objected to the question on the ground stated above. This objection was not good, for the question did not call for any testimony prohibited by subdivision 4 of section 1881 of the Code of Civil Procedure. However, the question was not pressed. A new question was framed, and the witness was then allowed to testify, without objection, that he saw deceased daily and many times a day between December 29, 1905, and February 22, 1906. He was then asked: "From your observations of her, what, in your opinion, was her mental condition, was it sound or unsound during that period?" Up to this point it had not been made to appear that deceased was a patient of Dr. Hogan. Objection was interposed to this question solely on these grounds, viz.: "It is double joined, two questions in one. First, the doctor, if he testifies to mental unsoundness, must testify, if he know, that he knows her mental condition. In the second place * * * the doctor is not qualified. It does not appear from the testimony of the witness that he is qualified to pass upon the question of mental soundness; that he is not qualified to that extent. Furthermore, that it does not appear that he had, at that time, a sufficient opportunity of observation to determine whether or not the patient was of sound or unsound mind." Appellants asked no opportunity to examine the doctor further as to his qualifications as an expert, and, as will be seen from what we have said, did not object to the testimony on the ground that the same was incompetent under subdivision 4 of section 1881 of the Code of Civil Procedure. The objection made was not good. There had been a sufficient prima facie showing of the qualifications of the doctor as an expert. See Wheelock v. Godfrey, 100 Cal. 578, 589, 35 Pac. 317; Estate of Dolbeer, 149 Cal. 227, 248, 86 Pac. 695, 9 Ann. Cas. 795. Unquestionably there had been a sufficient prima facie showing of opportunity for observation. The objection was overruled. Even then the attorneys for contestant suggested to the attorneys for appellants that they were at liberty to ask the witness "any preliminary question to determine whether or not, as a physician, he may have got information that he used in declaring his opinion," but one of the attorneys for appellants said, "We are properly advised and satisfied with the situation." Dr. Hogan then answered the question, saying: "I took observations from her, and from my observations from December 29th to February 22d I thought she was of unsound mind." Appellants immediately moved "to strike out the answer on the same grounds as stated in the objection." The motion was denied. This was the only motion to strike out such answer that was made at any time. It was not until afterwards, and particularly during the cross-examination, that evidence was elicited showing that deceased was a patient of Dr. Hogan between the dates mentioned.

There is no ground for holding that the trial court erred in any of the rulings we have set forth. So far as the point urged in the briefs is concerned, the evidence was received without objection, and no motion was made to strike out such evidence after the facts were elicited upon which appellants base their claim that it was incompetent under subdivision 4 of section 1881 of the Code of Civil Procedure. A judgment cannot be reversed because of the admission of evidence incompetent under such a statute, where objection is not made to its admission on that ground in the trial court. See Wheelock v. Godfrey, 100 Cal. 588, 35 Pac. 317. There was no such objection interposed to the evidence elicited, either at the time it was elicited or thereafter when all of the facts tending to show the relation of physician and patient had been shown. The case of Green v. Southern Pacific Co., 122 Cal. 565, 55 Pac. 577, is not in point. There the evidence complained of was expressly objected to, and an exception had been reserved to the ruling of the court. It was sought to overcome this by showing that similar testimony was subsequently received from other witnesses without objection, and it was simply held that, the party having once formally taken exception to a certain line or character of evidence, he was not required to keep on objecting, and that his silence would not debar him from having the exception that he had taken to that line of evidence reviewed. Here there was never any ruling on the point made by appellants, and of course no exception. When the objection on this ground was made, it was not good, but, as we have shown, the question was withdrawn and a new question framed.

[5, 6] 3. The objection to the questions asked the nurse, who was in constant attendance upon deceased while she was in the hospital, as to her condition of mind during that time was as follows: "We object to the witness as not qualified to testify to the soundness or unsoundness of mind of Nancy Huston at the time of the execution of the will, not having any knowledge of the testatrix at that time. The knowledge of the witness appears to have been only of the time when she was suffering from an acute disease up in the hospital. Therefore it is incompetent, irrelevant, and immaterial, not an intimate acquaintance, and not a sufficient observation for the formation or expression of an expert witness." This objection was properly overruled. The witness was not asked as to her opinion as to the condition of the mind of the deceased *at the time of the execution of the will.* The question was directed to a period of time a few weeks after the day the will was executed. It is of course well settled that, to show the condition of one's mind at a given time as respects sanity or insanity, evidence tending to show such condition both shortly before and shortly after the time is admissible. A sufficient showing was made in regard to this witness to warrant the trial court in holding that she was entitled to give her opinion as an intimate acquaintance of deceased. Her testimony, already given, contained a statement of certain reasons for her conclusion. During a large portion of the period when the witness was on such intimate terms with deceased, the latter had passed the acute stage of her sickness. The arguments of learned counsel for appellants in regard to this evidence go rather to the question of the weight to be accorded it than to the question of its admissibility.

[7] 4. The motion to strike out the testimony of Mr. Thoreson upon the ground that he was not an intimate acquaintance was properly denied. We do not see how it could be held otherwise than that he was an intimate acquaintance, in view of his testimony as to the extent and nature of his acquaintance with deceased. This witness testified very fully as to his reasons for his conclusion, and the weight to be given that conclusion, in view of the reasons given therefor by the witness, was properly a question for the jury. In no event would it have been proper to grant the motion to strike out, even if the opinion should not have been allowed, for the motion was expressly directed "to the entire testimony of the witness," and there is no pretense that any of such testimony was objectionable other than the conclusion of the witness as to the unsoundness of the mind of the deceased.

[8] 5. In the closing brief of appellants it is urged that the testimony of Robert H. Brown, as to the condition of mind of deceased, should have been stricken out. The record shows no motion to strike out such evidence. The only objection to his evidence was one made after he had testified substantially that in his opinion she was of unsound mind, and the objection was simply "that the witness has not shown sufficient personal acquaintance to qualify him to testify." He had testified that he had known deceased all his life, that he met her "off and on, maybe once a month, and maybe oftener," and that "he observed her appearance, her conduct and talk, and her language, and her conversation." This certainly was a sufficient prima facie showing to warrant a conclusion that the witness was an intimate acquaintance.

[9] We agree entirely with learned counsel for appellants in their claim that the mere observer, who is not an expert or an intimate acquaintance, may not give his opinion as to the mental sanity of a person, except where he is a subscribing witness to a writing, the validity of which is in dispute, where he may give his opinion respecting the mental sanity of the signer. Subdivision 10, § 1870, Code Civ. Proc. The giving of such an opinion is a very different thing from testimony as to the appearance of a person at a given time, which testimony may be given by any observer. See People v. Manoogian, 141 Cal. 592, 75 Pac. 177. One or two remarks of the trial court made in ruling on the admission of evidence of alleged intimate acquaintances tend to indicate that there was a misapprehension in the mind of the learned judge of the trial court as to this, but there was nothing in the language used to indicate that the court was not satisfied that each of these witnesses was an intimate acquaintance, and we cannot hold as to any of the instances that the admission of the evidence was erroneous.

The orders appealed from are affirmed.

We concur: SHAW, J.; SLOSS J.

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163 Cal. 176

Ex parte SLATTERY. (Cr. 1,720.)

(Supreme Court of California. June 24, 1912.)

1. Criminal Law (§ 982*)—Punishment—Suspension of Sentence—Statutory Authority.

The court in exercising its powers to suspend sentence must do so in conformity with Pen. Code, § 1203, as amended in 1911 (St. 1911, p. 689).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

2. Criminal Law (§ 982*) — Suspending Sentence—Effect.

Where the court suspended sentence as authorized by Pen. Code, § 1203, as amended in 1911 (St. 1911, p. 689), authorizing the suspension of sentence, and providing that, where accused has fulfilled the conditions of his probation for the entire period thereof which cannot exceed the maximum possible term of sentence, the prosecution must be dismissed, it could not, after the expiration of the maximum possible term of sentence, enforce the original judgment; accused having complied with the conditions of his probation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501; Dec. Dig. § 982.*]

In Bank. Application for writ of habeas corpus by Mike Slattery against the Chief of Police of the City of Oakland for the discharge of the applicant from custody. Writ ordered.

Austin Lewis and R. M. Royce, for petitioner. A. A. Rogers, Deputy Dist. Atty., for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HENSHAW, J. The undisputed facts shown by the petitioner are that on the 24th day of April, 1911, he was adjudged guilty and sentenced by the police court of the city of Oakland to six months in the city prison of the city of Oakland; that the execution of his sentence was stayed by order of the court withholding the issuance of the commitment. Petitioner was allowed his liberty. He enjoyed his liberty until the 13th day of December, 1911, when he was again arrested and charged with drunkenness, and a commitment was issued upon the judgment pronounced upon April 24, 1911, by virtue of which commitment petitioner has been and is restrained of his liberty in the city prison of the city of Oakland. Upon these facts he contends that his imprisonment is in violation of section 1203 of the Penal Code of the state of California as amended in 1911.

It is conceded that section 1203 of the Penal Code in its present form, as amended in 1911, was in full force at the time judgment was pronounced against petitioner and the commitment upon such judgment withheld. The withholding of the commitment is the equivalent of suspending the execution of the sentence. We need not be at pains here to discuss the question of the inherent power of a court in a criminal case so to withhold the pronouncement of judgment or to suspend judgment when pronounced. This has been satisfactorily done in Re Collins, 8 Cal. App. 367, 97 Pac. 188. By section 1203 of the Penal Code (the probation act) the Legislature has prescribed the form and method by which these powers may be exercised.

[1] It will be held that courts, in exercising their powers so to withhold sentence or to suspend execution of sentence, do so in conformity with these legislative provisions, and it will not be held that, by reason of any informality or irregularity of the order so doing, a defendant should be made to suffer. He has no control over the form of the order which the court issues, and if, during the probationary period, he has himself lived up to the requirements of the law, it would be manifestly unjust that he should be made to suffer because of the court's error in any given particular.

[2] In the case at bar it appears that the order of the court suspending the execution of the sentence was made while the probation law in its present form was in force. So, treating the court's order as one permitted by and within the purview of section 1203, petitioner shows that his rearrest and the effort to enforce this early judgment against him were made after "the maximum possible term of his sentence" had expired. But by the provisions of the probation law, when a defendant has fulfilled the conditions of his probation for the entire period thereof, which cannot exceed the maximum possible term of such sentence, the power of the court to enforce its original judgment is at an end. Pen. Code, § 1203, subd. 5.

It follows, therefore, that the petitioner is entitled to his discharge, and it is so ordered accordingly.

We concur: LORIGAN, J.; SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; SHAW, J.

19 Cal. App. 128

SWAN v. WALDEN et ux. (Civ. 1,105.)

(District Court of Appeal, Second District, California. May 20, 1912. Rehearing Denied by Supreme Court July 19, 1912.)

HOMESTEAD (§ 72*)—DECLARATION—EFFECT.

A declaration of homestead on described lots, "together with a water right appurtenant thereto, consisting of four shares of the capital stock of" a corporation, impresses the homestead on the stock and the water represented thereby as appurtenant to the lots, within Civ. Code, § 662, declaring that a thing is deemed appurtenant to land when it is by right used with the land for its benefit.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 105; Dec. Dig. § 72.*]

Appeal from Superior Court, San Bernardino County; Frank F. Oster, Judge.

Action by W. H. Swan against Edward Walden and another. From a judgment for plaintiff, defendant Louella Walden appeals. Reversed, with directions.

See, also, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194.

Halsey W. Allen, for appellant. Leonard & Surr, for respondent.

SHAW, J. Defendants Edward and Louella Walden were husband and wife, and on May 15, 1907, were the owners as joint tenants of lots 3, 4, and 5, block L, Lugonia Park, city of Redlands, together with all water appurtenant to said property, and together with 4 shares of the capital stock of the Lugonia Park Water Company, and also 2⅔ shares of the capital stock of the Eastberne Water Company. On August 17, 1907, the defendant Edward Walden executed and delivered to plaintiff a grant deed purporting to convey to plaintiff all his interest in the property above described. Thereafter, plaintiff, alleging himself, by virtue of this deed, to be the owner of an undivided one-half interest in and to all of the said property, brought this suit to have the same partitioned. In her answer defendant Louella Walden denied the execution of the deed to plaintiff, and as an affirmative defense alleged that prior to the execution of the deed to plaintiff, to wit, on May 15, 1907, she executed and caused to be recorded a declaration of homestead upon "lots No. 3 and 4 of block L, according to plat of Lugonia Park, * * * together with the water right appurtenant thereto, consisting of 4 shares of the capital stock of the Lugonia

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Park Water Company, a corporation." At the trial, and in response to this issue so tendered, the court found that, as alleged, defendant Louella Walden did execute and record her "declaration of homestead upon lots 3 and 4 of block L of the property mentioned and described in the complaint, together with the water right, consisting of 4 shares of the capital stock of the Lugonia Park Water Company," but further found she was not at the time in the exclusive occupation or possession of said property upon which she attempted to impress such homestead, and therefore the declaration of homestead was without force or effect. As a conclusion of law the court held that plaintiff and Louella Walden were each the owner of an undivided one-half interest in all the property described in the deed from Edward Walden to plaintiff.

An interlocutory decree followed, from which defendant Louella Walden appealed. Swan v. Walden, 156 Cal. 195, 103 Pac. 931, 134 Am. St. Rep. 118, 20 Ann. Cas. 194. As shown by that appeal, appellant contended, first, that the estate held by herself and her husband in the property in controversy was a tenancy by the entirety, hence the husband was without power to convey any interest therein, and the deed to plaintiff was therefore null and void as a conveyance of any property; second, that at all events the deed was ineffectual as a conveyance of the property upon which the homestead had been impressed. The Supreme Court reversed the interlocutory decree from which said appeal was prosecuted, and in effect held that the conveyance made by Edward Walden to plaintiff was a sufficient conveyance of all the property described, except that which was made the subject of the declaration of homestead so executed by Louella Walden, and in the remittitur directed the trial court to enter judgment in conformity with its opinion. Following this decision, the trial court made and entered a new interlocutory decree, whereby it was adjudged and decreed that plaintiff and defendant Louella Walden were equal owners as tenants in common of lot 5 in said block L, "together with all water appurtenant to said property, and together with 4 shares of the capital stock of the Lugonia Park Water Company, and also 2⅔ shares of the capital stock of the Eastberne Water Company," and, in order to partition the same, directed a sale of said lot 5 in block L and the water appurtenant thereto, together with the 4 shares of the capital stock of the Lugonia Park Water Company, described in appellant's declaration of homestead as being appurtenant thereto. From this last decree Louella Walden has appealed upon the judgment roll; her contention now being that the 4 shares of the capital stock of the Lugonia Park Water Company constitute a water right appurtenant to said lots 3 and 4 as described and asserted in her declaration of homestead, and as to which the deed from her husband to plaintiff is inoperative as a transfer thereof.

The execution and recording of the declaration of homestead as alleged in the answer is deemed to be denied by plaintiff. Hence, not only the validity of the act, but every statement of claim therein made as to the property upon which the homestead was impressed, was put in issue. The declaration described the lots, "together with the water right appurtenant thereto, consisting of 4 shares of the capital stock of the Lugonia Park Water Company, a corporation." "A thing is deemed to be * * * appurtenant to land when it is by right used with the land for its benefit. * * *" Section 662, Civ. Code. The effect of the finding of the court that appellant had declared a homestead upon the lots, "together with the water right, consisting of 4 shares of the capital stock of the Lugonia Park Water Company, a corporation," is to sustain the alleged claim made by her that the right to the use of the water represented by such stock was appurtenant to said lots. Whether made so by describing the land in the certificates of stock and complying with the provisions of section 324, Civil Code, or otherwise, is immaterial. Since we construe the finding as supporting the statement that the water and the use thereof represented by this stock was appurtenant to the land, it must follow that the deed from Edward Walden to plaintiff was not only inoperative as to the lots described in the declaration of homestead, but likewise inoperative and ineffectual as a conveyance of the shares of stock, or water represented thereby.

The judgment is therefore reversed, and the trial court directed to enter a new interlocutory decree, whereby, not only lots 3 and 4 in said block L, but the 4 shares of the capital stock of the Lugonia Park Water Company and the water represented thereby and appurtenant thereto, be adjudged to be impressed with a valid homestead executed by said Louella Walden, and that as to said property the deed made by Edward Walden to plaintiff is inoperative and void.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 127

UPTON v. WOMAN'S CLUB OF KERN.

(Civ. 1,114.)

(District Court of Appeal, Second District, California. May 20, 1912.)

CORPORATIONS (§ 248*)—MEMBERS—LIABILITY FOR DEBTS.

Under Civ. Code, § 322, providing that liability for the debts of a corporation having no capital stock is equally distributed between all the members, the payment by a member of more than her share of a corporate debt was voluntary, and the excess was not recoverable from the corporation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 998–1001; Dec. Dig. § 248.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by Ellen R. Upton against the Woman's Club of Kern. From a judgment for defendant on demurrer, plaintiff appeals. Affirmed.

Emmons & Hudson, for appellant. C. L. Claflin, for respondent.

SHAW, J. The complaint alleges that defendant was at all times mentioned therein a corporation existing under the laws of this state; that plaintiff was at all said times a member therein; that between August 19, 1910, and October 21, 1910, defendant in constructing a clubhouse upon certain lots owned by it incurred an indebtedness to the extent of $753.20; that plaintiff, "in order to relieve herself of liability for the debts of said corporation, and to save herself from damage, and for the use and benefit of said corporation, and to arrest threatened attachment suits against it by its said creditors, and to forestall the filing of liens on said club building by said creditors," paid said amount. To this complaint the court sustained a general demurrer. Plaintiff declining to amend, judgment was entered for defendant, from which plaintiff appeals upon the judgment roll.

Assuming that defendant was a corporation having no capital stock (which fact, though not clearly appearing, is conceded by counsel), plaintiff's liability as a member thereof is fixed by section 322 of the Civil Code. Under this provision, the liability for the debts of such corporation is equally distributed between all the members thereof, and plaintiff, in the absence of any contractual obligation disclosed, by the complaint, was liable for her share only of such debt. Since the statutory obligation to pay the debt of the corporation was thus limited to her share thereof, upon payment of which she would secure a release of liability, it must follow that, in the absence of any act of defendant authorizing the same, the payment of any sum in excess of her share was a purely voluntary contribution on her part and imposed upon defendant corporation no legal obligation to reimburse her for the amount so contributed. Huddleston v. Washington, 136 Cal. 519, 69 Pac. 146; Curtis v. Parks, 55 Cal. 106; McGlew v. McDade, 146 Cal. 553, 80 Pac. 695.

It follows there was no error of the court in sustaining the demurrer, and the judgment is therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 135

ARCHER v. LEWIS et al. (Civ. 1,093.)

(District Court of Appeal, Second District, California. May 20, 1912. Rehearing Denied by Supreme Court July 19, 1912.)

VENDOR AND PURCHASER (§ 16*)—CONTRACT TO CONVEY—CONSTRUCTION.

An instrument reciting that, in consideration of $1, defendant authorized plaintiff's assignor to contract for defendant to sell certain property for $3,500 cash, defendant paying no commission, and reciting that defendant would release to "them" any amount in excess of the price named and would deed to "them," or any one named by "them" on compliance with such terms, and that the authorization should remain in force for 90 days, is properly construed as an agreement, not only authorizing plaintiff's assignor to contract in defendant's name to sell the land, but as binding defendant to convey to the assignor on the terms specified; the word "them" being properly construed as referring to plaintiff's assignor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by C. E. Archer against Mary Agnes Lewis and others. From a judgment of nonsuit and from an order denying a new trial, plaintiff appeals. Reversed.

Tobias R. Archer, for appellant. Lynn Helm, for respondents.

SHAW, J. Action to compel specific performance of a written contract assigned to plaintiff whereby it is claimed respondent agreed to sell and convey the real estate therein described.

At the close of plaintiff's evidence, the court granted a motion made by defendant Lewis for a nonsuit and gave judgment against plaintiff, from which, and an order denying his motion for a new trial, he appeals.

The basis of the action is a contract dated January 19, 1909, the material parts of which follow: "For and in consideration of the sum of one dollar, I hereby authorize A. H. Gregg to enter into and execute for me and in my name a contract to sell the following property: [Description], for the sum of $3,500, upon the following terms: Cash * * *, and should said A. H. Gregg make or cause to be made such sale I will pay no commission on said sale. I will release to them any amount in excess of the price named and will deed to them, or any one named by them, said described property on complying with above stated terms. This authorization is to remain in full force and effect for ninety days from date. [Signed] Mary Agnes Lewis. A. H. Gregg." On April 8, 1909, Gregg made an indorsement upon said contract as follows: "For value received, I hereby sell and assign all my right, title and interest in and to the within contract to C. E. Archer. A. H. Gregg." And then and there delivered the same to plaintiff. It appears from the testimony adduced at the trial that prior to the assignment of the contract so made by Gregg plaintiff proposed to purchase the property from respondent, and was told by her that she could not sell it to him for the reason that she had given "an option or contract on the land" to Gregg, which was to run 90 days from January 19, 1909, and that, if he would acquire such option, she would sell him the land. Plaintiff went to Gregg and procured an assignment of the contract, agreeing to pay him therefor $500, $100 of which was paid in cash. He then notified respondent that he had, by assignment, acquired the contract from Gregg and desired to complete the purchase, made a tender to her of $3,500, the purchase price therein named, and demanded a deed therefor in accordance with the terms of the contract, which she refused to make.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appellant contends that the contract made between respondent and defendant Gregg should be interpreted as an agreement on the part of respondent, not only authorizing Gregg to contract in her name for a sale of the land, but binding herself to sell and convey the property to Gregg himself, for the price and upon the terms specified therein. The question, therefore, is the interpretation to be placed upon the agreement. The contract must be considered as a whole so as to give effect to every part thereof. Section 1641, Civ. Code. So considered, some effect must be given to the provision whereby Lewis covenants that she will "deed to them, or any one named by them, said described property on complying with above stated terms." Gregg was the only person authorized to make the sale; hence, notwithstanding the use of the plural form of pronoun, the word "them" must have been intended to refer to Gregg to whom, or to any one named by him, she agreed to convey the property at any time within 90 days from January 19, 1909, upon the payment of the sum of $3,500. Moreover, it conclusively appears from the evidence that both Gregg and respondent herself construed the agreement as constituting an option to purchase the property given Gregg for an expressed consideration. Plaintiff testifies that she told him "she had given an option or contract on that land to A. H. Gregg," for which reason she could not sell the land unless plaintiff "procured that option"; and, further, "she told me that if I acquired that option that she would sell me the land." Gregg, by making the assignment, as well as by orally naming plaintiff as a purchaser ready and willing to consummate the deal, brought plaintiff directly within the provision whereby Lewis agreed to deed the property to "any one named by them"; that is, by Gregg. Even if the contract should be deemed ambiguous or uncertain, it should, under the provisions of section 1654, Civil Code, be interpreted most strongly against defendant Lewis. Applying this rule of interpretation, in connection with the fact that the contract was made for a valuable consideration expressed therein, and the sale, if made, was to be free of any charge for commissions, together with the declarations of Mrs. Lewis to the effect that by the terms of the instrument she had given to Gregg a ninety-day option or contract upon the land, leaves no doubt in our minds as to the intent of the parties in executing the instrument. Indeed, considering the contract as a whole, it sufficiently and clearly appears therefrom that Mrs. Lewis desired to sell the property within 90 days for $3,500, net cash; and with this end in view gave to Gregg the contract whereby she authorized him to execute in her name a contract for such sale, and, in addition thereto, agreed not only to deed the property pursuant to the terms of any contract which he might make for her, but also agreed, upon the performance of the conditions of the contract, to deed the same to him, or to any person whom he might designate as such purchaser. He not only assigned this option, but designated and named plaintiff as a purchaser ready, willing, and able to make the purchase, and who within 90 days tendered the amount and demanded a deed in consummation of the contract.

In our judgment the learned trial judge erred in granting the motion for nonsuit, and the judgment is therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

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19 Cal. App. 95

LAYNE v. JOHNSON et al. (Civ. 1,002.)

(District Court of Appeal, Second District, California. May 17, 1912.)

1. APPEAL AND ERROR (§ 356*)—PROCEEDS FOR TRANSFER OF CAUSE—TIME—SCOPE OF REVIEW—EVIDENCE.

Under the express provisions of Code Civ. Proc. § 939, the sufficiency of the evidence cannot be reviewed where the appeal from the judgment has been taken more than 60 days after rendition thereof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.*]

2. APPEAL AND ERROR (§ 867*)—REVIEW—SCOPE—DENIAL OF NEW TRIAL—REVIEW OF EVIDENCE.

Under the express provisions of Code Civ. Proc. § 648, the evidence cannot be reviewed on appeal from an order denying a new trial, where there is nothing in the record specifying the particulars of insufficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3476–3486; Dec. Dig. § 867.*]

3. EXECUTORS AND ADMINISTRATORS (§ 450*)—ACTION BY ADMINISTRATOR—EVIDENCE—ORDER OF APPOINTMENT.

Where, in an action to quiet title by a decedent's administrator and his heirs at law, defendant's answer did not deny plaintiff's appointment and qualification as administrator, a probate order of appointment, showing the date of decedent's death, was irrelevant, the date of such death not being essential to confer jurisdiction on the probate court, nor necessary for decision on the application for administration.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1850–1876; Dec. Dig. § 450.*]

4. EXECUTORS AND ADMINISTRATORS (§ 9*)—APPOINTMENT OF ADMINISTRATOR—JURISDICTIONAL FACTS.

Facts essential to the granting of administration, are death of the decedent at the time the petition for letters was filed, intestacy, and an estate to be administered within the county.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 21, 27, 28; Dec. Dig. § 9.*]

5. EXECUTORS AND ADMINISTRATORS (§ 29*)—APPOINTMENT OF ADMINISTRATOR—ORDER—CONCLUSIVENESS.

An order appointing an administrator of the estate of the decedent was only conclusive between the parties and their privies in respect to the matters directly adjudged, to wit, those necessary to confer jurisdiction to make the order.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177–182, 1411; Dec. Dig. § 29.*]

6. JUDGMENT (§ 497*)—COLLATERAL ATTACK.

Where a judgment in a suit to quiet title was regular on its face, and there was no claim that there was lack of jurisdiction in the court appearing on the face of the judgment roll, it imported absolute verity, and could not be collaterally attacked.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 937, 938; Dec. Dig. § 497.*]

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

Action by P. J. Layne, as public administrator, and administrator of J. H. A. Bartels, deceased, and others against Thomas J. Johnson and others. From a judgment for defendants and from an order denying plaintiff's motion for a new trial, they appeal. Affirmed.

J. C. Hizar, for appellants. E. S. Torrance, for respondents.

ALLEN, P. J. This is an action to quiet title brought by the administrator of the estate of J. H. A. Bartels, deceased, and his heirs at law, against Thomas J. Johnson, city of San Diego, a municipal corporation, and A. G. Robinson. The complaint is in the usual form, and alleges the appointment of Layne as administrator of the estate of Bartels on the 10th of November, 1905, by the superior court of San Diego county. The answer does not deny the allegation in reference to the appointment and qualification of Layne as administrator, but does deny that the other plaintiffs are the heirs at law of said Bartels, deceased. Defendant Johnson at the same time filed a cross-complaint, alleging that at the time of the commencement of the action, and for many years prior thereto, he was the owner in fee of the premises described in the complaint, and for many years had been in the rightful, lawful, and peaceable possession thereof, and continued to hold the same until a few days prior to the commencement of the action, when plaintiffs unlawfully and wrongfully entered said premises and ousted said defendant. He prayed a decree that plaintiffs and cross-defendants have no title, interest, or estate in the said premises. Upon the trial of the action, the court found that at the commencement of the action, and for many years prior thereto, Johnson was and now is the owner in fee of the real property described; that for many years prior to the commencement of the action he was in the rightful, lawful, and peaceable possession of said premises; that a few days prior to the commencement of the action plaintiffs and cross-defendants unlawfully and wrongfully entered into the possession of said premises, and ousted defendant and cross-complainant therefrom; that at the time of the death of J. H. A. Bartels he was not the owner in fee nor in possession of the real property described, nor did he have any interest or estate therein; that plaintiffs other than Layne and cross-defendants were the heirs at law of Bartels; that neither they nor Layne, at the time of the commencement of the action, were the owners in fee of the said premises, nor did they have any interest therein. A decree was rendered accordingly in favor of defendant Johnson and against plaintiffs and cross-defendants. This judgment and decree was entered December 5, 1910. Notice of motion for a new trial was duly given, which motion was by the court denied, and an appeal from the judgment and from the order denying the motion for a new trial was taken by plaintiffs and appellants on February 2, 1911.

[1] It is claimed by appellants that the evidence is insufficient to justify the decision. The sufficiency of such evidence cannot be reviewed under the record before us, the appeal from the judgment having been taken more than 60 days after the rendition of the judgment. Section 939, Code Civ. Proc.

[2] The appeal from the order denying a new trial is based upon a bill of exceptions purporting to contain the evidence. There is nothing in the record specifying the particulars in which the evidence is insufficient; hence, under section 648 of the Code of Civil Procedure, the evidence cannot be reviewed on appeal from the order.

[3] The only question presented which is subject of review relates to the action of the court in excluding certain evidence. Plaintiffs upon the trial offered in evidence certain deeds tending to show the title in Bartels in 1873. Defendant and cross-complainant offered in evidence the judgment roll and files in a certain action to quiet title instituted

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

by Amanda Johnson, his grantor, plaintiff, against Bartels and others, defendants, in 1893, from which it is made to appear that service was had upon Bartels by publication under an order therefor duly made by the superior court of San Diego county; that on the 27th day of December, 1893, the cause came on for hearing, and it was adjudged by the court that the action was one in which service of summons could be legally made by publication; that due and sufficient service of summons had been made upon defendants and each of them by publication; that defendants had failed to answer or plead to the complaint of plaintiff; that the default of defendants was accordingly entered, and, after the introduction of testimony, the court decreed the said Amanda Johnson to be the owner of the premises, and that defendants, including Bartels, had no right, title, or interest therein or thereto. Plaintiffs thereupon offered in evidence the order of the probate court of San Diego county appointing Layne administrator of the estate of Bartels, from which order it appears, and is found by the court, that Bartels died on the 1st day of December, 1882. The defendant and cross-complainant objected to the introduction of such order upon the ground of its incompetency, irrelevancy, and immateriality, and for the reason that it was an attempt to collaterally impeach the judgment of a court of general jurisdiction of this state, which objection was sustained by the court, and this action of the court in excluding from evidence such order of appointment is claimed by appellants to have been erroneous. We see no error of the court in its ruling.

[4] The facts essential to the granting of administration of Bartels' estate were his death at the time the petition for letters was filed, his intestacy, and that he left an estate to be administered in San Diego county. These matters were admitted in virtue of the admission of appointment. The exact date of his death was not essential to the jurisdiction of the probate court, and not necessary for decision upon the application for the appointment.

[5] Johnson was not a party to the probate proceedings, and, giving to the order of appointment the broadest effect possible under the law, it could only be conclusive between parties and their privies in respect of the matters directly adjudged, and these matters could only be those things necessary and essential in conferring jurisdiction and establishing the authority of the court to make the order.

[6] Aside from this, however, the judgment roll and files in the suit to quiet title introduced by defendant does not show, or at least attention has not been called to any matter which it is claimed would show, a lack of jurisdiction in the court appearing upon the face of the judgment roll. This being true, the judgment imports absolute verity, and cannot be attacked in a collateral proceeding. "The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment." Section 1917, Code Civ. Proc. A domestic judgment must be void upon its face in order to be the subject of collateral attack. Galvin v. Palmer, 134 Cal. 428, 66 Pac. 572; Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141; Ballerino v. Superior Court, 2 Cal. App. 760, 84 Pac. 225. Whatever may be the rights of parties in an action instituted in equity to set aside a judgment, it is clear that a domestic judgment, regular upon its face, is not the subject of collateral attack.

We see no error subject of review in the record, and the judgment and order are therefore affirmed.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 157

KERN v. SAN FRANCISCO CO. et al.

(Civ. 993.)

(District Court of Appeal, First District, California. May 21, 1912.)

1. MECHANICS' LIENS (§ 231*) — RIGHT TO LIEN — LIEN ON LAND — DESTRUCTION OF BUILDING.

The assertion of a mechanic's lien against the land on which a building is located is an incident to and grows out of the right to have a lien on the building, so that where, before the filing of a claim of lien, the building was destroyed by fire, no lien could thereafter be asserted against the land.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 413; Dec. Dig. § 231.*]

2. MECHANICS' LIENS (§ 128*)—PROCEEDINGS TO PERFECT—NECESSITY OF FILING CLAIM.

A mechanic's lien is not acquired by the mere completion of a building, but there must be the filing of a claim of lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 177; Dec. Dig. § 128.*]

3. MECHANICS' LIENS (§ 281*)—ENFORCEMENT —EVIDENCE.

In an action to enforce a mechanic's lien against land, evidence *held* insufficient to support a finding that a portion of the building for the construction of which the lien was claimed remained standing after a fire.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 565–572; Dec. Dig. § 281.*]

4. MECHANICS' LIENS (§ 291*)—JUDGMENT—SUPPORT IN COMPLAINT.

Where, in a complaint seeking to enforce a mechanic's lien against land, it does not appear that the building, for the construction of which the lien is claimed, occupied the entire parcel of land described, nor what portion of the land is necessary for the convenient use and occupation of the building, the awarding of the lien is not warranted.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 599–618; Dec. Dig. § 291.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by L. A. Kern against the San Francisco Company and A. B. McCreery. From a judgment for plaintiff, A. B. McCreery appeals. Reversed.

H. H. McPike, for appellant. F. J. Kierce and Walter Christie, for respondent.

HALL, J. Plaintiff, as assignee of Kern Bros., recovered judgment against appellant, subjecting the land of appellant to the lien of Kern Bros. as original contractors for the construction of a building for a lessee of appellant. The appeal is from this judgment, and was taken within 30 days after the rendition and entry thereof. The building was completed and accepted on the 11th day of April, 1906. Appellant, as a special defense, pleaded that on the 18th day of April, 1906, the said building was totally destroyed by fire and earthquake. The claim of lien was filed by plaintiff's assignors on the 4th day of June, 1906. The court found that the building was destroyed by fire on the 18th day of April, 1906, "except a portion of the front of the building which still remains." Appellant attacks the sufficiency of the evidence to support the finding to the effect that a portion of the front of the building was not destroyed and still remains.

The court seems to have been of the opinion that, if the building was ever completed, the lien attached upon its completion to the land necessary for its convenient use and occupation as it stood when completed, notwithstanding that it may have been subsequently destroyed before the filing of a claim of lien, for the court found "that all of said land hereinbefore described was necessary for the convenient use and occupation of the building which was erected thereon, as hereinbefore found, and which was standing thereon at the time of the completion thereof," and accordingly gave judgment for a lien against the land so found necessary for the convenient use of the building as it stood when completed. This we think to be an incorrect interpretation of the law.

[1, 2] The lien which contractors and materialmen acquire against the land upon which a building is constructed is incident to and grows out of the lien upon the building thus constructed. If no lien is ever acquired upon the building, no lien is acquired upon the land. No lien is acquired by the mere completion of the building. The completion of the building must be followed by the filing of a claim of lien. Until this is done, no lien is acquired either upon the building or the land. If the building be destroyed before the filing of the claim of lien, no lien can be acquired upon such building, and in consequence no lien can be acquired against the land. This is the view of the law taken in Humboldt Lumber Mill Co. v. Crisp, 146 Cal. 686, 81 Pac. 30, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, where the court said: "We are of opinion that, under the peculiar language of our mechanics' lien law, the lien has nothing to which it can attach if filed after the destruction of the building." It is true that in the case just cited the building was destroyed before completion; but the reasoning of the court is not based upon that incident, and the cases cited in the decision with approval from the state of Pennsylvania, where the statute is similar to ours, fully support the rule that the lien is lost, or rather is never acquired, if the building be destroyed before the filing of the claim of lien. In Presbyterian Church v. Stettler, 26 Pa. 246, the building was completed but was destroyed before the filing of the lien; and it was held that no lien was acquired upon the land. The same was true in Wigton & Brook's Appeal, 28 Pa. 161. In Coddington et al. v. Dry Dock Co., 31 N. J. Law, 477, it was held as to a dock: "It must have stood on the land when first erected, and continued to stand thereon until the lien claim was filed." In Wood & Co. v. Wilmington Conference Academy, 1 Marvel (Del.) 416, 41 Atl. 89, it was held that the lien was lost by the destruction of the building after the bringing of the action. The reasoning of the Pennsylvania cases above referred to is not only approved in Humboldt Lumber Mill Co. v. Crisp, supra, but it is there said: "There are, however, stronger reasons to be found in our statutes why the lien should not apply to the land, the building being destroyed, than are to be found in the statutes of any other state." In the case at bar, if the building was destroyed before any claim of lien was filed, no lien was ever acquired upon the land. "The incident follows the principal, and not the principal the incident." Section 3540, Civ. Code. The judgment rendered by the court in the case at bar is based upon the theory that plaintiff is entitled to a lien upon such land as was necessary for the convenient use and occupation of the building as it stood when completed, although the building was before the filing of the claim of lien destroyed. As above indicated, this is an erroneous theory of the law, and the judgment is therefore erroneous.

[3] This brings us to the consideration of the sufficiency of the evidence to sustain that portion of the finding to the effect that a portion of the front of the building was not destroyed; for, if a portion of the building remains, it may be that plaintiff would have a lien for some portion of his claim against such portion and such land as may be necessary for its convenient use. The only evidence in the record upon the subject is that the building "was totally destroyed through the earthquake and fire * * * on the 18th day of April, 1906," and

that "they were practically all destroyed" on the 18th day of April, 1906, by fire and earthquake. There is not a word to support the finding that a portion of the front of the building was not destroyed.

[4] The judgment must be reversed for another reason. The complaint describes a parcel of land upon which it is alleged the building was constructed. The boundaries of this one parcel of land are set forth in 12 calls of the dimensions as follows: 39 feet, 57 feet, 189 feet, 43 feet, 16 feet, 43 feet, 240 feet, 150 feet, 300 feet, 71 feet, 184 feet, 22 feet, finally closing at the point of commencement. It does not appear from the complaint that the building occupied the entire parcel, nor does it appear what portion thereof was covered or occupied by the building. It is not alleged in the complaint what, or that any, portion of the land is necessary for the convenient use and occupation of the building. There is no allegation in the complaint upon the subject. The finding on this point is therefore not within the issues, and will therefore not support the judgment. In other words, the complaint does not state a cause of action against appellant. Green v. Chandler, 54 Cal. 626; Willamette S. M. Co. v. Kremer, 94 Cal. 205, 29 Pac. 633.

The judgment appealed from is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

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19 Cal. App. 100

SCHARPF v. UNION OIL CO. OF CALIFORNIA. (Civ. 1,111.)

(District Court of Appeal, Second District, California. May 17, 1912.)

1. MUNICIPAL CORPORATIONS (§ 821*)—DEFECT IN STREETS—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

While plaintiff was driving along a city street, one of the wheels of her wagon sank into an improperly filled pipe line excavation, and she was thrown out and injured. She testified that she was obliged to cross the soft portion of the roadway in order to turn down another street, and that the place where she turned "looked like a mud puddle"; that, while she could see mud, she could not see how deep it was; that it was soft mud; and that the right wheel got across all right, but the left sank down, etc. There was nothing to give notice that the soft condition of the street continued to the bottom of the excavated part, and plaintiff had no actual knowledge of the real state of the hole or trench at the time she attempted to drive across it. *Held*, that she was not negligent as a matter of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745–1757; Dec. Dig. § 821.*]

2. APPEAL AND ERROR (§ 1051*)—EVIDENCE—PREJUDICE.

Where, in an action for injuries to a traveler by her wagon sinking into an improperly filled pipe trench in a street, there was no dispute as to the location of the pipe line, and there was ample evidence to show the location in the street of the excavation made by defendant, aside from that furnished by certain maps, the admission of the maps over objection was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

3. MUNICIPAL CORPORATIONS (§ 816*)—STREETS—DEFECTS—FILLING EXCAVATIONS—CITY ORDINANCE.

Where a complaint charged that plaintiff was injured by defendant's failure to properly refill a pipe line excavation in a street, the fact that plaintiff did not allege a city ordinance prescribing the method to be followed in replacing earth in such excavations did not prevent the admission of such ordinance to establish defendant's negligence in failing to comply with it, so as to leave the street reasonably safe.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711–1716, 1718, 1720, 1723; Dec. Dig. § 816.*]

4. DAMAGES (§ 166*)—PERSONAL INJURIES—PAIN AND SUFFERING.

In an action for injuries, plaintiff was properly permitted to describe her sufferings in detail resulting from the accident; there being no evidence that her sufferings or injuries had been increased by improper treatment.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 478, 479, 481; Dec. Dig. § 166.*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Anna Scharpf against the Union Oil Company of California. From judgment for plaintiff and from an order denying defendant's motion for a new trial, it appeals. Affirmed.

Lewis W. Andrews, Thomas O. Toland, Cedric E. Johnson, and T. F. Welch, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondent.

JAMES, J. Plaintiff brought this action to recover damages for personal injuries suffered by her as the alleged result of the negligent acts of defendant. Judgment in her favor for $2,500 was entered upon the verdict of a jury. An appeal has been taken from the judgment, and also from an order denying a motion made by defendant for a new trial.

Plaintiff on the day when she suffered her alleged injuries was riding in a vehicle termed in the evidence a light delivery wagon, to which was attached one horse. She was proceeding down Boyle avenue in the city of Los Angeles, and where that avenue intersects at right angles with Seventh street she turned about the corner preparatory to traveling toward the center of the city on said Seventh street. As she made this turn the left wheel of her vehicle sank into a hole, which caused her to pitch forward violently, and fall from the vehicle. She was a large woman, and struck the ground heavily upon her shoulder, and received a severe shock and other injuries. As she fell to the ground the horse became frightened and started forward, pulling the wheels of the vehicle across her feet. Prior to the day upon which the accident to plaintiff occurred a four-inch pipe line belonging to defendant had been taken up from along Boyle avenue and across the intersection of that avenue with Seventh street, and the earth had been replaced in the excavation made in the course of that operation. The alleged negligence charged by plaintiff against the defendant consisted in defendant not having refilled said excavation properly and having left it in such a condition at the corner of Seventh street and Boyle avenue as to permit of the wheels of vehicles dropping down to a considerable depth in the earth which had become wet and soft. It was admitted by defendant that it was the owner of the pipe line which had been taken up as described, that it had caused an excavation to be made for the purpose of removing the pipe, but it alleged that the earth had been properly refilled and tamped so as to leave the roadway in a good and passable condition. There was some difference between the testimony of certain of the witnesses as to whether the hole into which the wheels of plaintiff's vehicle sank was in the line of the refilled pipe ditch, or at some other point in the street, but by this difference a question of fact was presented to be solved by the jury and this court cannot review that matter. Appellant has suggested, among other contentions which it makes upon this appeal, that the uncontradicted evidence showed such negligence on the part of the plaintiff contributing to produce her injuries as to bar recovery therefor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We do not think that as a matter of law it can be said that plaintiff was guilty of any contributory negligence. She described the condition of the street as it appeared to her at the time, and also testified that the pipe ditch was filled with mud and water. She said that she was obliged to cross this soft portion of the roadway in order to turn down Seventh street, but that the point where she turned "looked like a mud puddle." She then said: "I could see that mud. I couldn't see how deep it was. It was soft mud in it. My right wheel got across all right, but the left wheel stuck in. It must be a weak spot that didn't have enough dirt in it." There was nothing presented to plaintiff's view, so far as the testimony in the record shows, by which she should as a reasonable person have apprehended the dangerous condition of the pipe ditch. No warning had been erected to give her notice that the soft condition of the surface continued to the bottom of the excavated part of the street, and it was shown that she had no actual knowledge of the real state of the hole or trench at the time she attempted to drive across it.

[2] Certain maps prepared by the defendant and filed in the city engineer's office pursuant to the regulations of the city of Los Angeles, showing the location of the pipe lines of defendant, particularly that laid along Boyle avenue, were offered in evidence and admitted under objection. It was alleged that, as these maps were filed more than a year prior to the date of the accident, they were not competent evidence to establish the location of the pipe line which had been removed from Boyle avenue. Whatever force there may have been to the objection seems to be rendered immaterial when the fact is considered that by the whole testimony it does not appear that any dispute was made at all as to the location of that pipe line, and there was ample evidence tending to establish the location in the street of the excavation made by defendant, aside from any furnished by the maps.

[3] An ordinance of the city of Los Angeles, which prescribed the method to be followed in replacing earth in excavations made upon the public streets, was also admitted over the objection of defendant. It is claimed that there was no warrant for the admission of this evidence, because nowhere in the complaint was it charged that defendant had failed to observe the requirements of such ordinance. It was not necessary that plaintiff should have set forth the existence of the ordinance and the noncompliance of defendant with it. The ultimate fact was sufficiently charged in the complaint that defendant had refilled this excavation in a negligent manner and so left it, whereby plaintiff was caused to be injured. The introduction of the ordinance merely furnished evidence tending to establish the negligent acts of defendant in that regard. In other words, the plaintiff did not rely upon the breach of duty imposed by the ordinance as furnishing her ground for recovery, but relied upon the charge made in her complaint that she suffered her injuries through the negligence of defendant, and the fact that defendant had failed to comply with an ordinance of the city prescribing the method to be observed in refilling excavations so as to leave them reasonably safe was evidence tending to establish the main fact only.

We have carefully examined the other exceptions taken by defendant to rulings of the court made during the course of the trial, of which there are a number, but do not consider that they possess enough merit to warrant extended discussion.

[4] The point was made that plaintiff should not have been permitted to describe in detail her sufferings entailed as a result of the accident. In order that the jury might properly consider the extent of plaintiff's injuries and the damages to be awarded to her, they were entitled to know the amount of pain and suffering which she had undergone, and her testimony on that point was all within the limits of proper proof. The evidence did not show that her sufferings or her injuries had been increased or made

greater by improper treatment. As to several exceptions taken to the refusal of the court to permit witnesses to testify in answer to certain questions asked by defendant, without here reciting the questions and objections, it is sufficient to say that in all of the instances where the admission of the precise testimony called for and ruled out might be considered properly as a debatable subject, the record of the testimony given shows, in other portions of it, that the matters so sought to be brought out were fully covered in substantial effect. We believe that the instructions to the jury stated fully and fairly the law as applicable to the case.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(19 Cal. App. 161)

BERNARDO et al. v. SODERMAN.

(Civ. 984.)

(District Court of Appeal, First District, California. May 21, 1912.)

1. Vendor and Purchaser (§ 334*)—Contract to Convey—Breach by Purchaser—Rescission—Right to Repayment.

On breach by a contract purchaser and rescission of the contract by mutual agreement, he is entitled to repayment of money paid on the purchase price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 959-980; Dec. Dig. § 334.*]

2. Vendor and Purchaser (§ 321*)—Breach by Purchaser—Vendor's Remedies.

On breach of a contract to pay by the purchaser, the vendor may stand on the terms of his contract and sue for its breach under Civ. Code, § 3307, or remain inactive, and yet retain to his own use the moneys paid by the purchaser; or he may seek specific performance; or agree for a mutual rescission, in which case the purchaser is entitled to repayment of money paid on the price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 943; Dec. Dig. § 321.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by J. P. Bernardo and another against Frederick Anton Soderman. Judgment for defendant, and plaintiffs appeal. Reversed and remanded.

Clinton G. Dodge, for appellants. Austin Lewis (R. M. Royce, of counsel), for respondent.

LENNON, P. J. This is an appeal from a judgment in an action wherein the plaintiffs sought to recover the sum of $835.50, claimed and admitted to have been paid to the defendant by the plaintiffs as the purchasers of certain real property pursuant to the terms of an installment contract. The case was tried by the lower court and submitted for decision upon an agreed statement of facts, which, by stipulation of the parties, constitute the trial court's findings of fact. It was also stipulated in the court below by the parties to the action that judgment might be rendered, in accordance with the law, upon the agreed statement and findings of fact as if a trial upon the issues purporting to have been raised by the pleadings had been had in the usual and ordinary way. Whereupon judgment was rendered and entered that plaintiffs take nothing by their action, and that defendant have and recover his costs from the plaintiffs. By the terms of the contract in controversy, it was mutually agreed that the defendant would sell to the plaintiffs, and that plaintiffs would purchase from the defendant, certain real property situated in the county of Alameda for the sum of $2,400. The contract recited that time was of the essence of the contract, and that, upon the failure of the plaintiffs to comply with its terms, the defendant would be released from all obligation to convey, and be entitled to a forfeiture of all sums of money paid under the contract. At the time of the execution of the contract $700 was paid on account of the purchase price. The balance of $1,700 was agreed to be paid in monthly installments of at least $20 per month on or before the 14th day of each and every month, commencing with October 14, 1907, and continuing until the full amount of the purchase price and interest was paid. Plaintiffs' cause of action was based primarily upon the allegations that, pursuant to the terms of the contract, they had paid the defendant in the aggregate the sum of $835; that on the 11th day of June, 1908, the contract was fully rescinded by mutual consent; that, notwithstanding such rescission, the defendant had failed and refused to return the several sums of money theretofore paid to him on account of the contract. The gist of the defendant's answer consists of a denial that the contract was rescinded by mutual consent or otherwise, on the 11th day of June, 1908, followed by an averment that on the 20th day of May, 1908, the defendant elected to, and did, rescind the contract because of the plaintiffs' default in the payment of the installments then due, and that written notice of such rescission was forthwith served upon the plaintiffs.

The plaintiffs interposed a demurrer to the defendant's answer, upon the ground that the facts stated therein did not constitute a defense, and prayed that they be given judgment upon the pleadings. The demurrer was overruled; and the plaintiffs now insist, as they did in the lower court, that, as a matter of law, they were entitled to judgment, not only upon the facts pleaded, but also upon the agreed statement of facts upon which the case was submitted and decided.

[1] We confess our inability to comprehend the theory of the defendant's pleaded defense to the action. It has been repeatedly

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

held in this state that where the vendor, in a contract for the sale of land, elects to rescind, and, with the consent of the vendee, does actually rescind because of the vendee's default in the prescribed payments, and the vendor does not seek to recoup any actual damage for the breach from the amount of the purchase money previously paid, the vendee may recover from the vendor all of the money paid under the contract. In short, it is the law that, upon the vendee's breach followed by a mutual agreement of abandonment and rescission, the vendee is entitled to a repayment of his money. Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257; Shively v. Semi-Tropic L. and W. Co., 99 Cal. 259, 33 Pac. 848; Merrill v. Merrill, 103 Cal. 287, 35 Pac. 768, 37 Pac. 392; Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Heilig v. Parlin, 134 Cal. 99, 66 Pac. 186. If the contract in the case at bar was in fact rescinded by the mutual agreement of the parties, as the pleadings in the case seem to indicate, the plaintiffs, under the authorities cited, were entitled to judgment upon the pleadings, and the exact date of the rescission was of little or no importance in determining the relative resulting rights of the parties. However that may be, the facts set out in the agreed statement upon which the judgment is founded are but an amplification of the facts set out in the pleadings, and completely and conclusively show that the contract was fully rescinded by mutual consent of the parties, and that after written notice of such rescission by the defendant, and written acceptance thereof by the plaintiffs, the defendant assumed control and possession of the property which formed the subject-mattter of the contract.

[2] The remedies which a vendor, in a contract for the sale of land, may resort to in the event of the vendee's breach of the covenant to pay, are specified and clearly defined in the case of Glock v. Howard, etc., Co., supra, where it is said that the vendor in such a case "may (1) stand upon the terms of his contract and sue for its breach under section 3307 of the Civil Code; (2) still resting upon the contract, he may remain inactive, yet retain to his own use the moneys paid by the vendee; (3) going into equity, still upon his contract, he may seek specific performance; or finally, if his generosity prompts him so to do, he may agree with his vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money."

Upon the admitted facts of this case the plaintiffs were entitled to judgment as prayed for. No other judgment being possible under the law and the facts, it is ordered that the judgment appealed from be reversed, and the cause remanded, with directions to the trial court to enter judgment in favor of the plaintiffs in the sum sued for.

We concur: HALL, J.; KERRIGAN, J.

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19 Cal. App. 124

LA DUE v. FORBES, Justice of the Peace.

(Civ. 1,129.)

(District Court of Appeal, Second District, California. May 20, 1912.)

1. Justices of the Peace (§ 44*)—Jurisdiction—Amount Involved.

Where the parties to two actions in justice court between the same parties stipulated that they might be consolidated and tried together, and the jury returned a verdict for plaintiff in each case for less than $300, the fact that in their verdict they also specified the aggregate of the two sums, which was more than $300, did not render the justice's judgment thereon void as being in excess of his jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 157–172; Dec. Dig. § 44.*]

2. Justices of the Peace (§ 194*)—Review of Judgment by Certiorari—Adequate Remedy by Appeal.

A judgment of a justice of the peace is not reviewable by certiorari merely because in excess of his jurisdiction; the aggrieved party having a plain and adequate remedy by appeal.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 774, 775; Dec. Dig. § 194.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Certiorari by Stanley S. La Due against Frank S. Forbes, Justice of the Peace for Los Angeles Township, Los Angeles County. From an order dismissing the writ, the petitioner appeals. Affirmed.

Hugh J. Crawford, for appellant. F. E. Davis, for respondent.

SHAW, J. Plaintiff, as petitioner, filed in the superior court his application for a writ of certiorari, the purpose of which was to have reviewed certain proceedings had and taken in the justice's court of Los Angeles township in two certain cases wherein Will H. Grosscup was plaintiff and Stanley S. La Due, the petitioner, was defendant.

[1] In one of said cases, numbered upon the justice's docket at 14,003, the amount of the demand was $212.50; in the other, the number of which upon the justice's docket was 14,004, the amount of the demand was $175. At the trial it was in open court stipulated by the parties "that the two actions might be consolidated for the purpose of trial and be tried together and that the evidence and arguments of the one case might be considered as the evidence and arguments in the other case, and that the cases might be submitted to the jury for decision at one and the same time upon the same

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence and same arguments; that this stipulation was adhered to by both parties and their respective attorneys throughout the entire trial, and the said two cases were both submitted to the said jury for determination at the same time." The jury called to try the cases brought in a verdict as follows:

[Title of Court and Cause.] Case No. 14,003.
Case No. 14,004.

We, the Jury in the above entitled case, find for the plaintiff in the sum of 387.50 dollars.
14003—212 50
14004—175.00, Other case.
Foreman,
E. H. McAninch.

Upon this verdict the justice entered upon his docket a judgment in case No. 14,003 for $212.50 and costs, and in case No. 14,004 gave judgment for the sum of $175 and costs. At the hearing upon the application for the writ the same was dismissed, and petitioner appeals from the order dismissing the same.

Appellant contends that the verdict of the jury was in excess of the jurisdiction of the justice's court, and therefor null and void and ineffectual as a basis for the judgments rendered. The verdict appears to have been rendered pursuant to the stipulation, and we are unable to perceive any uncertainty therein. It clearly appears therefrom that in the one case the jury by its verdict found the sum of $212.50 to be due, and that in the other it found the sum of $175 to be due. The fact that it also specified the aggregate of these two sums is no ground for the contention that the verdict is uncertain, or that it purported to specify an amount in excess of that over which the court had jurisdiction. The verdict does not purport to be for $387.50 in either case, but particularly specifies the sum due in each case, the total of which amounts to $387.50.

[2] However this may be, and even though it be conceded that the acts of the court were in excess of its jurisdiction, nevertheless petitioner had an adequate remedy on appeal to the superior court. Want of jurisdiction alone will not justify the issuance of the writ of review, but it must further appear that there is no plain, speedy, and adequate remedy. Section 1068, Code Civ. Proc.; Bennett v. Wallace, 43 Cal. 25; Valentine v. Police Court, 141 Cal. 617, 75 Pac. 336.

The order from which petitioner appeals is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

(19 Cal. App. 168)

In re CARLIN et al. (Civ. 949.)

(District Court of Appeal, Second District, California. May 21, 1912. Rehearing Denied by Supreme Court July 19, 1912.)

1. Husband and Wife (§ 254*)—Community Property—Title in Wife.

As the legal title to community property may be held by either spouse, land purchased during coverture with community funds and deeded to the wife was, where not made the subject of a gift from the husband, community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 897–899; Dec. Dig. § 254.*]

2. Appeal and Error (§ 1010*)—Review—Questions of Fact—Finality of Determination Below.

Whether a husband made a gift to his wife of property purchased with community funds, the title of which was taken in her name, is a question of fact for the trial court, and its conclusion, unless manifestly without sufficient support, will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982, 4024; Dec. Dig. § 1010.*]

3. Husband and Wife (§ 262*)—Conveyances to Wife—Presumption of Ownership—Onus Probandi.

Civ. Code, § 164, which provides that, whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property, is a mere rule of evidence fixing the onus probandi in cases where the question of ownership is in litigation, and it is only when the husband fails to overcome the presumption by evidence, showing that it was not a gift, that it is conclusive.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 913, 914; Dec. Dig. § 262.*]

4. Gifts (§ 15*)—Delivery—Intent.

To constitute a valid gift of property, the delivery of the deed thereto to the apparent donee must have been made with the intention of making a gift and passing title.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 14; Dec. Dig. § 15.*]

5. Husband and Wife (§ 264*)—Community Property—Title in Wife—Evidence.

In an action by a husband to determine his interest in alleged community property of himself and deceased wife, evidence *held* to show no intention on his part of making a gift upon the purchase of the property and the taking of title in the wife's name.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 916; Dec. Dig. § 264.*]

6. Constitutional Law (§ 70*)—Province of Legislature—Policy of Law.

The determination of the policy of permitting the presumption arising from a conveyance of real estate purchased with community funds to a married woman to be overthrown after the wife's death by evidence of an undisclosed intent on the part of the husband that it was not the subject of a gift is for the Legislature, rather than the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129–132, 137; Dec. Dig. § 70.*]

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Petition by L. C. Carlin to have his interest in community property determined. From a judgment determining the petitioner's interest, contestant appeals. Affirmed.

H. A. Massey and Fred Fette, for appellant.
Julius Lyons, for respondent.

SHAW, J. On February 24, 1912, an opinion was filed herein reversing the judgment and order of the trial court. Thereafter an order was made granting a rehearing.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The proceeding was had and taken pursuant to the provisions of section 1723 of the Code of Civil Procedure to determine the interest of L. C. Carlin as surviving husband of Aurora Carlin, deceased, in whom the legal title was vested, in a certain tract of land alleged by him to have been the community property of himself and his deceased wife. The claim was contested by a sister of Aurora Carlin (she having neither father, mother nor child surviving), who contended the property was the separate estate of deceased, in and to which the contestant and her brother and sister were entitled to a one-half interest. The court found that the land was the community estate of petitioner and Aurora Carlin, and by its decree adjudged the entire property vested in L. C. Carlin, the surviving husband of deceased. From this decree, and an order denying contestant's motion for a new trial, she appeals, claiming the evidence is insufficient to justify the finding of the court.

[1] The land was deeded to the wife, Aurora Carlin, by a third person, and the consideration therefor paid from the community funds of husband and wife. Since either spouse may hold the legal title to community property, it follows that the land so acquired during coverture with community funds was, unless made the subject of a gift from L. C. Carlin to his wife, the community estate of the marital relation.

[2] As to whether or not it was a gift was a question of fact to be determined by the trial court upon the evidence adduced at the trial, and its conclusion, unless manifestly without sufficient support, should not be disturbed by an appellate court.

[3] "Whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property." Section 164, Civ. Code. "But this is a mere rule of evidence fixing the onus probandi in cases where the question of ownership is in litigation." Jackson v. Torrence, 83 Cal. 521, 23 Pac. 695. "Under such circumstances (as here disclosed), the wife is not required to prove that it was a gift, but it devolves upon the husband to overcome the presumption by showing that it was not a gift." Killian v. Killian, 10 Cal. App. 316, 101 Pac. 807; Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657. "Where the controversy is between the husband and the legal representative of the (deceased) wife, the presumption may be controverted by other evidence, direct or indirect, and it is only where it is not so controverted that the court or jury is bound to find according to the presumption." Fanning v. Green, 156 Cal. 279, 104 Pac. 308.

[4] The question, therefore, presented is whether the act of L. C. Carlin in having the property deeded to his wife was accompanied by an intent to give it to her, for "to constitute a valid gift the delivery must be made with the intention of making a gift and passing title; a mere delivery of property without such intent passes no title." 14 Am. & Eng. Ency. of Law, p. 1020.

[5] After showing that L. C. Carlin paid for the property out of community funds, he was asked "how the deed came to be made to" his wife, and in reply said: "I had it made out to her in order to secure a home for herself and myself. I did not intend to make it a gift to her. * * * My intention, why I had this made out to her, as I have stated, was simply in order that we were to have a home together, and if I should die, why she would not be troubled by any of my heirs. * * * I didn't want her to have any trouble about the matter. * * * I wanted her to have the property after I was gone." Another witness testified that Mrs. Carlin stated in her presence "we [referring to herself and husband] are going to make improvements on our ranch," and that she frequently referred to the place as "our ranch," "our property," etc.

This is substantially all the evidence, and, while it is meager, the fact that Carlin placed the title in his wife's name, believing that by so doing he was not only providing a home for his wife, but likewise providing a home for himself, is inconsistent with an intent on his part to strip himself of all interest in or right to the property. Moreover, as in the case of Fanning v. Green, supra, he testified positively that in having the property deeded to his wife it was not his intention to give it to her. In the absence of evidence of the existence of any circumstances inconsistent with his testimony, received without objection and conceded to be competent, we are constrained to hold the conclusion of the trial court should not be disturbed.

[6] The policy of permitting the presumption arising from a conveyance of real estate purchased with community funds to a married woman to be overthrown after the wife's death by evidence of an undisclosed intent on the part of the husband that it was not the subject of a gift may well be questioned. It is the province of the Legislature, however, and not the courts, to determine questions of policy.

The judgment and order appealed from are therefore affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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19 Cal. App. 139

MORISON v. WEIK et al. (Civ. 1,089.)

(District Court of Appeal, Second District, California. May 20, 1912.)

1. EVIDENCE (§ 159*)—SECONDARY EVIDENCE—FORGERY.

In an action to cancel a deed, purporting to have been executed by plaintiff, on the ground of forgery, defendants were not precluded from contradicting plaintiff's testimony that she did not sign the deed, through failure to produce the deed or prove its loss.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 471, 474; Dec. Dig. § 159.*]

2. Evidence (§ 183*)—Best and Secondary.

Evidence *held* to warrant a finding that a deed was lost or mislaid, as affecting the admissibility of secondary evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605-637; Dec. Dig. § 183.*]

3. Appeal and Error (§ 970*)—Evidence (§ 187*) — Judicial Discretion — Secondary Evidence.

The quantity of proof of loss of an instrument, required as a preliminary to secondary evidence, lies within the sound discretion of the trial judge, exercise of which discretion will not be disturbed, unless the preliminary showing is manifestly insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970;* Evidence, Cent. Dig. §§ 674, 675; Dec. Dig. § 187.*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by Addie F. Morison against Fred G. Weik and another. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Charles H. Mattingly, for appellant. Louis Luckel and Hahn & Hahn, for respondents.

SHAW, J. Action to have a certain deed, which purported to have been made by plaintiff to defendant Anna Ilmer Weik, canceled and annulled upon the ground that the signature thereto had been forged by defendants. The court upon ample evidence found that the instrument had been duly signed and executed by plaintiff, and accordingly gave judgment for defendants, from which, and an order denying her motion for a new trial, plaintiff appeals.

[1, 2] The sole alleged error upon which appellant bases her claim for reversal is that the court, over plaintiff's objection, permitted the introduction of evidence on behalf of defendants tending to show that plaintiff signed and executed the deed, which defendants were, by reason of the loss thereof, unable to produce in court. Plaintiff testified that she did not sign the deed, and now on appeal contends that defendants should not have been permitted to prove the contrary, since they did not produce the deed, nor offer sufficient proof of its loss. The question at issue, however, was not the contents of the instrument, which, it was conceded by the complaint, purported to be a conveyance of the property described therein, but whether the name of plaintiff attached thereto was in fact her genuine signature. While the production of the alleged forged signature would have afforded opportunity for its inspection and comparison with admitted genuine signatures of plaintiff, thus aiding in the determination of the question at issue, the want of such production constituted no ground for the exclusion of evidence touching the fact in controversy, upon the ground that it was secondary in character, and hence not admissible until the loss of the deed was shown. Moreover, conceding that the testimony offered, and to the introduction of which plaintiff objected, was competent only upon proof of the loss of the instrument, we think the evidence clearly and sufficiently established such fact. The evidence shows that, subsequent to the bringing of the suit accusing defendants of the forgery, one of them, Fred G. Weik, had the deed in his possession, and, accompanied by his attorney, went to the office of plaintiff's attorney, to whom he exhibited the deed and tendered it to him for inspection. Upon the latter refusing to accept it, or look at it, the same was returned to the office of his attorney. Thereafter defendant obtained it to show to some of his friends, and again returned it to the office of his attorney. It appears that both said defendant and his attorney made diligent search and effort, but without success, to find the deed. The fact that the deed was tendered to plaintiff's attorney for inspection negatives any suspicion that might otherwise arise from withholding it.

[3] Without entering upon a full discussion of the evidence, suffice it to say that it was sufficient to satisfy the mind of the court that the instrument was unintentionally mislaid or lost, and that after a diligent search made therefor it could not be found. Such preliminary proof is left to the discretion of the trial judge, and, unless manifestly insufficient to warrant the introduction of secondary evidence, his ruling will not be disturbed on appeal. Kenniff v. Caulfield, 140 Cal. 35, 73 Pac. 803.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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19 Cal. App. 165

SMITH v. RIVERSIDE GROVES & WATER CO. (Civ. 1,052.)

(District Court of Appeal, Second District, California. May 21, 1912.)

Exceptions, Bill of (§ 41*)—Filing—Time —Default—Vacation.

Defendant having failed to file its bill of exceptions in time applied for relief from its default. On the hearing of the motion, it was stipulated that plaintiff should have 10 days after notice of the ruling within which to serve amendments to its proposed bill of exceptions. Relief from the default having been granted, defendant was allowed five days within which to serve its proposed bill of exceptions. Defendant, relying on the service of the proposed bill originally served out of time and the stipulation, did not serve a new bill, and again suffered default, and, on being advised that the order was intended to supersede the stipulation, again applied for relief from its default, which the court denied. *Held*, that the service of the original bill out of time was not a compliance with the order, and that the court's refusal to again relieve defendant from its default was not an abuse of discretion.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 65–71; Dec. Dig. § 41.*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by B. R. Smith against the Riverside Groves & Water Company. Judgment for plaintiff, and from an order denying relief from defendant's default in seasonably filing a bill of exceptions defendant appeals. Affirmed.

Myron W. Tilden and Watkins & Blodget, for appellant. Collier, Carnahan & Craig, for respondent.

ALLEN, P. J. Judgment was duly given and made in plaintiff's favor and against defendant on March 3, 1910, and on the same day notice thereof given. Notice of appeal from such judgment was served and filed on March 14, 1910. On April 14th following defendant served on plaintiff's attorneys what purported to be a bill of exceptions, service of which was acknowledged, "reserving all objections to the same that might be made because the same was not served within the time allowed by law or the order of court." On April 19th, recognizing its default in serving such bill within proper time, defendant made application to the court for relief from said default under section 473, Code of Civil Procedure. The parties upon the date of such hearing stipulated in open court that plaintiff should have 10 days after service of the notice of the ruling upon such application within which to serve amendments to defendant's proposed bill of exceptions. Thereafter, on May 4th, the court by its order relieved defendant on account of its default, and granted defendant five days from and after May 4th within which to serve said proposed bill of exceptions, and plaintiff was given 10 days from date of service within which to propose amendments. Defendant served no proposed bill within the time specified in the order, relying upon the service of the bill originally served out of time and the stipulation with reference to amendments thereto, and again suffered default. Thereafter, being advised by the court that the order was intended to supersede or take precedence over any stipulation with reference to the time for filing amendments, defendant again made application for relief from such default, and this the court, on June 4, 1910, denied. On August 4th following notice of appeal from such order denying relief was filed. This ruling of the court is sought to be reviewed upon a bill of exceptions disclosing the facts above stated.

It is insisted by respondent that the court cannot consider the bill of exceptions last mentioned, because the appeal was not taken within 60 days after entry of judgment and service of notice thereof. Subdivision 3, § 939, Code Civ. Proc. A motion to dismiss the appeal upon this and other grounds was denied by the Supreme Court without prejudice, and the motion has not been renewed since the transfer of the case to this court. We are of opinion, however, that the judgment and order should be affirmed. Admittedly no proposed bill entitled to consideration had been served at the date of the stipulation. The very motion for relief in the first instance affirmatively shows that there was no attempt to vivify the previously served proposed bill; but, on the contrary, defendant was seeking an order through which it could serve and file a new bill of exceptions, which might or might not contain the matters and things set forth in the other bill. The first proposed bill not being filed in time, no amendments were required or warranted. Appellant saw fit to ignore the plain order of the court made at its instance, relying upon the proposition that the court did not mean what it said by the order. Defendant had applied to the court for an order and when such order was made it was its duty to observe it. No mistake appears, and neither is excusable neglect shown; simply an assumption by appellant that the court in making the order had overlooked the stipulation. This was not such conduct as should be exercised by a prudent man in a matter of material concern to him. The rule is well settled that the discretionary power of the court in proceedings of this character will not be disturbed unless a clear abuse of discretion is made to appear. "It is only in exceptional cases that orders of that kind will be reversed." Shearman v. Jorgensen, 106 Cal. 483, 39 Pac. 863. While the correctness of the ruling may be doubted, nevertheless, an appellate court will not substitute its own opinion, and thereby divest the trial court of that discretionary power reposed in it. We do not feel able to say that a clear abuse of discretion is made to appear, and, under the established rule, the order and judgment of the superior court should be affirmed; and it is so ordered.

We concur: JAMES, J.; SHAW, J.

19 Cal. App. 109

PEOPLE v. GREEN. (Cr. 239.)

(District Court of Appeal, Second District, California. May 18, 1912.)

BASTARDS (§ 16*)—DUTY OF FATHER TO SUPPORT.

Pen. Code, § 270, makes it an offense for a parent to willfully omit to furnish necessary food, shelter, or medical attendance for his child; and Civ. Code, § 200, provides that the mother of an illegitimate, unmarried, minor child, is entitled to its custody, services, and earnings. *Held* that, since the mother of an illegitimate, unmarried, minor child is entitled to its custody, services, and earnings, she has the whole burden of providing for its support, and the father is not subject to prosecution for failure to provide therefor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 21-23; Dec. Dig. § 16.*]

Appeal from Superior Court, Riverside County; Paul J. McCormick, Judge.

Frank Green was prosecuted for willfully omitting to furnish necessary food, shelter, and medical attendance for his child, and he appeals. Reversed.

Lafayette Gill, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant herein was prosecuted under the provisions of section 270, Penal Code, which declare it to be an offense for a parent to willfully omit to furnish necessary food, clothing, shelter, or medical attendance for his child. The jury returned a verdict of guilty, and defendant, having been sentenced to imprisonment in the penitentiary for a term of one year, has appealed from the judgment and from an order denying his motion for a new trial.

The evidence taken at the trial showed without dispute or conflict that defendant had never been married to, nor had he lived with the mother of the child whom he was alleged to have failed to furnish with the necessaries of life, and no contention is made upon this appeal that the child was other than illegitimate. The mother testified that she had held illicit relation with defendant, as well as with one other man, not her husband, prior to the birth of the child. Section 270 of the Penal Code seems to have been enacted with the purpose of furnishing a complement to those sections of the Civil Code which determine the obligations of parents to support and maintain their children. By the sections of the Civil Code it is determined what those obligations are, and by the section referred to of the Penal Code it is made a felony for a parent to fail to discharge his duties in those respects. Section 196 of the Civil Code provides as follows: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances. If the support and education which the father of a legitimate child is able to give are inadequate, the mother must assist him to the extent of her ability." By section 200 of the same Code it is then provided: "The mother of an illegitimate unmarried minor is entitled to its custody, services, and earnings." It therefore appears that, as the mother of an illegitimate unmarried minor is entitled to its custody, services, and earnings, she then has the whole burden of providing it with support, and no duty in that regard rests upon the father.

This being the state of the law, it must follow logically that the father of an illegitimate child is not subject to prosecution under section 270 of the Penal Code for a failure to support the minor. It was not shown that the defendant ever acknowledged the paternity of the child, or that he ever received it into his home, or performed any act tending to show an intent to adopt it as his own. It has been held that, where a statute required the assent of the parent, if living, to the adoption of a child, the word "parent," as there used, was intended to designate only the lawful mother or father, and not the father of an illegitimate minor. In re Gibson, 154 Mass. 381, 28 N. E. 297. The Massachusetts court in that case said: "There is no reason why the Legislature should confer upon the father the right to notice in such cases. He has no right to the custody of the child, or to the use or control of its estate." We are of opinion that the conviction of the defendant under the facts shown in evidence was improper and cannot be sustained.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 104

SANTA ANA SCHOOL DIST. OF ORANGE COUNTY et al. v. TALBERT.

(Civ. 1,156.)

(District Court of Appeal, Second District, California. May 17, 1912.)

1. Statutes (§ 167*)—Revision—Repeal of Prior Statutes.

A statute, which is a complete revision of existing statutes on a subject, is a substitute for the existing statutes, which must be deemed repealed.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 242, 243; Dec. Dig. § 167.*]

2. Schools and School Districts (§ 97*)—Bonds—Resolution of Board of Education—Validity.

Under St. 1909, p. 528, authorizing the board of education of any school district to call an election on the question of the issuance of bonds to purchase school lots, build or repair schoolhouses, and supply the necessary furniture, and to liquidate indebtedness for such purposes, a resolution of a board of education submitting the question of the issuance of bonds to raise money to purchase school lots, to build a schoolhouse, and supply the same with furniture and necessary apparatus, "and afford better facilities for educating the school children within" the district, defines a legal purpose for the issuance of the proposed bonds, and the quoted phrase is but indicative of the object of the preceding expressed purposes, and bonds issued pursuant to an election are valid.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 224-232; Dec. Dig. § 97.*]

Mandamus by the Santa Ana School District of Orange County, Cal., and another, against T. B. Talbert, Chairman of the Board of Supervisors of the County of Orange, to compel defendant to sign bonds issued by the school district. Writ granted.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Williams & Rutan and W. F. Heathman, for petitioners. L. A. West, Dist. Atty., and A. E. Koepsel, Deputy Dist. Atty., for respondent.

ALLEN, P. J. The verified petition of the parties beneficially interested alleges that the Santa Ana school district and the boundaries and territory comprising said school district are the same as that of the city of Santa Ana, a municipal corporation of the fifth class; that on the 14th day of November, 1911, the board of education of the city of Santa Ana at a regular meeting of said board, by unanimous vote, resolved to call a special election of the qualified voters of said school district for the purpose of submitting to said voters the question whether or not $25,000 in bonds of said school district should be issued and sold "to raise money for the purpose of purchasing school lots and for building one more schoolhouse and supplying the same with furniture, necessary apparatus, and for improving the grounds of said schoolhouse within said district, and afford better facilities for educating the school children within said school district"; that said special election was duly held under proper and legal notice; that due and proper canvass and return of the votes cast at said election was made; that more than two-thirds of the votes cast were in favor of issuing the said bonds, all of which was entered upon the minutes of said board of education, and the same were duly certified to the board of supervisors of Orange county, together with all proceedings had in the premises; that on the 9th day of January, 1912, said board authorized and directed the issuance and sale of said bonds of said school district, due notice thereof being given, sealed bids received, opened, and the said bonds were awarded to said Statts Company, a corporation; that on the same day the board entered upon its minutes the form of said bonds and of the interest coupons attached thereto, fixing the time when the whole or any part of the principal of said bonds would be payable, which time was not more than 40 years from the date thereof; that in the form prescribed it was required that the chairman of said board of supervisors should sign each and every one of said bonds; that the total amount of said bonds so issued does not exceed 5 per cent. of the taxable property of the district as shown by the last equalized assessment book of the county; that said bonds were prepared and presented to the said defendant, chairman of said board, for signature, and he refused, and still refuses, to attach his signature thereto as chairman of the board of supervisors. Petitioners therefore ask for a writ of mandate commanding the said chairman of the board of supervisors to so attach his signature, and their petition presents reasons sufficient to warrant the issuance of the writ by this court in the first instance.

[1] The action of the chairman of the board of supervisors in refusing to sign and the resistance to the issuance of this writ are based solely upon the ground that the phrase, "and afford better facilities for educating the school children within said school district," is within itself an expressed purpose, in addition to the other purposes mentioned, and one not recognized by statute as a purpose for which bonds may be issued. The authority of a board of education and a school district in a city of the fifth class to call an election for the issuance of bonds is given by the act approved March 20, 1909. St. 1909, p. 528. This act, being a complete revision of the subject to which earlier statutes related, is manifestly intended as a substitute for the former legislation, and such prior acts in relation to the subject must be considered as repealed. State v. Conkling, 19 Cal. 501; Mack v. Jastro, 126 Cal. 130, 58 Pac. 372.

[2] Section 1 of the act above mentioned provides: "The board of education of any school district in a city of the fifth class * * * may, when in their judgment it is advisable, * * * call an election and submit to the electors of the district whether the bonds of such district shall be issued and sold for the purpose of raising money to purchase school lots, and for building or purchasing or repairing one or more schoolhouses, and supplying the same with furniture, necessary apparatus, and improving the grounds, and for liquidating any indebtedness already incurred for such purposes." If, as contended by respondent, the bonds are issued and sold to raise money for purposes not contemplated by the statute, the invalidity of the bonds is conceded. The sole question, then, for determination upon the application for this writ, is whether or not the words, "and afford better facilities for educating the school children within said school district," are in themselves an expression of a purpose. We are of opinion that such language cannot be held to amount to the declaration of a purpose. Had the resolution of the board of education contained only this clause as the purpose for which the bonds were proposed to be issued, there should be no controversy as to the insufficiency of the resolution to declare a purpose. If, then, no purpose would be declared because of its indefinite character, no purpose is expressed merely because it is added to the other expressed purposes. If the word "and" had been omitted, we take it that there would be no controversy in relation to this matter; that the remainder of the phrase would be accepted as a conclusion of the board with reference to the effect and object of the purposes thereinbefore specifically expressed. The language of the resolution defined clearly certain purposes which, under

the statute, were sufficient to authorize the calling of an election. The act of 1909 does not require that the purposes shall be designated in the notice of election, but does require that they be expressed in the resolution directing the call for such an election. Some significance may be attached to the omission of the word "to" in the clause mentioned as indicating the effect which should be given the expression. We think, correctly speaking, that the clause should be read, "and affording better facilities," etc., as indicative of the object of the preceding expressed purposes. To our minds, this objectionable clause was but an expression of opinion by the board that the building of the schoolhouses, etc., would thereby afford better facilities. While such expression was unnecessary, and added nothing to the resolution, we do not feel willing to conclude that its effect was to add an additional purpose to those properly expressed purposes preceding it.

Writ granted.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 108

SANTA ANA HIGH SCHOOL DIST. OF ORANGE COUNTY et al. v. TALBERT.

(Civ. 1,157.)

(District Court of Appeal, Second District, California. May 17, 1912.)

Mandamus by the Santa Ana High School District of Orange County, Cal., and another, against T. B. Talbert, Chairman of the Board of Supervisors of the County of Orange. Writ granted.

Williams & Rutan and W. F. Heathman, for petitioners. L. A. West, Dist. Atty., and A. E. Koepsel, Deputy Dist. Atty., for respondent.

ALLEN, P. J. The facts and questions presented in this application for writ of mandate are identical with those stated in our opinion in the case of Santa Ana School District of Orange County, Cal., et al. v. T. B. Talbert, Chairman, etc. (Civil No. 1,156) 124 Pac. 872, this day filed, with one exception, namely, that the objectionable clause is not preceded by the word "and." In other words, after the legitimate and particular purposes are specified, there is appended thereto the statement "to afford better facilities," etc. This to our minds is a clear expression of a conclusion, as distinguished from the statement of a purpose, and its insertion in the resolution of the board does not render invalid the bonds sought to be issued in such proceeding.

Writ granted.

We concur: JAMES, J.; SHAW, J.

ALMON v. McEVOY et al. (Civ. 958.)

(District Court of Appeal, First District, California. May 20, 1912.)

1. JUSTICES OF THE PEACE (§ 3*)—ELECTIONS—NUMBER OF CANDIDATES.

If a township is entitled to elect two justices of the peace and if the electors vote for that number, two should be declared elected, even if the proclamation called for the election of but one, since the electors have a right to take notice of the law, which entitles them to select two officers.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

2. JUSTICES OF THE PEACE (§ 3*)—ELECTIONS—NUMBER OF CANDIDATES.

Though a township was entitled to elect two justices of the peace, one of two candidates who received the second highest number of votes is not entitled to be declared elected, where the contest was held for one office only.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 5, 6; Dec. Dig. § 3.*]

Appeal from Superior Court, San Mateo County; M. T. Dooling, Judge.

Petition by William H. Almon for writ of mandate against P. H. McEvoy and others, as the Board of Supervisors, etc. Judgment dismissing the petition, and petitioner appeals. Affirmed.

J. L. & P. B. Nagle, for appellant. Franklin Swart, Dist. Atty., for respondents.

KERRIGAN, J. This is an appeal from a judgment dismissing a petition for a writ of mandate to compel respondents as members of the board of supervisors, to issue a certificate of election to the petitioner, who claims that he was elected to the office of justice of the peace of township No. 1 of San Mateo county.

The petition alleges facts which show that township No. 1 of San Mateo county was, prior to the amendment of 1911 (St. 1911, p. 12) to section 4014 of the Political Code, entitled to two justices of the peace. It also states that at an election held in November, 1910, the petitioner was a candidate for that office, and received next to the highest vote therefor. It further sets forth that respondents, contrary to the rights of the petitioner, refused to declare him elected. Consequently he prays for a writ of mandate to compel them to do so. To this petition respondents demurred, and the trial court sustained the demurrer, and judgment was entered dismissing the petition and awarding respondents their costs. The appeal is from such judgment.

[1] If the electors of township No. 1 had voted for two justices of the peace at the election in November, 1910, doubtless two should have been declared elected, even if the proclamation of the board of supervisors called for the election of but one. In such a case, say the authorities, the statute gives notice of the time and place of election, and the officers to be elected, and the voters have a right to take notice of the law and deposit their ballots at the time and place prescribed, notwithstanding that the officer, whose duty it was to give the notice of the election, fails in that duty. People v. Brenham, 3 Cal. 487; Sanchez v. Fordyce, 141 Cal. 430,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

75 Pac. 56; Cooley on Const. Lim. (6th Ed.) 759.

[2] Here it not only appears that the election was held for the purpose of electing only one justice of the peace, but also that only one in fact was voted for. Apparently the election for the office of justice of the peace in said township was a contest between the petitioner and another candidate for but one place, under which circumstance, of course, it cannot be held that the petitioner, having received a less number of votes than his opponent, is entitled to the relief demanded. Gray v. Mullins, 15 Cal. App. 118, 113 Pac. 694; People, etc., v. Board of Canvassers of Kent Co., 11 Mich. 111. While what was said in the first of these cases in line with the position here adopted was unnecessary for a decision therein, still we think it was sound, and we now approve it. In the other case, under a law authorizing the election of two commissioners, an election was held and conducted in all respects as if only one was to be chosen, and each elector voted for but one of two opposing candidates. In that case it was held that only the one receiving the highest number of votes was elected, and that, as to the other office of commissioner there was a failure to choose; the court observing: "The ballots show that in no single instance did any person vote for more than one candidate. This being the case, it would be absurd to assume that an election was held to fill more than one office."

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

(19 Cal. App. 9)

NEWHALL et al. v. JOSEPH LEVY BAG CO.

(Civ. 945.)

(District Court of Appeal, Third District, California. May 7, 1912. Rehearing Denied by Supreme Court July 5, 1912.)

1. CORPORATIONS (§ 425*)—ACTS OF OFFICERS —PURCHASE OF GOODS—AUTHORITY—ESTOPPEL TO DENY.

Defendant corporation, engaged in buying and selling bags, having contracted to purchase 1,000 bales of bags from plaintiffs to be delivered in June or July, 1908, at buyer's option, the validity of which was not denied, and being unable to complete the purchase, a settlement was made after plaintiffs had procured the bags ready for delivery, by defendant paying some cash, giving a note, and making a new contract to take a similar quantity on like terms, delivery in June or July, 1909. The settlement was agreed to by defendant's president and secretary and one other director, and defendant paid the money, executed the note, and later paid the same. With the knowledge and consent of these same directors, the secretary executed the new contract which plaintiff accepted in part settlement of its claim, purchased the bags in a foreign market, and had them on hand ready for delivery when defendant repudiated the contract. *Held*, that defendant was estopped to deny that the new contract was made by the secretary with authority, and that defendant was bound in its corporate capacity.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

2. PRINCIPAL AND AGENT (§ 171*)—UNAUTHORIZED ACTS — RATIFICATION — ACCEPTANCE OF BENEFIT.

Where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized acts of his agent and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, to repudiate it to the injury of the other.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 644–655; Dec. Dig. § 171.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by E. W. Newhall and others, doing business under the name of H. M. Newhall & Company, against Joseph Levy Bag Company. Judgment for defendant, and plaintiffs appeal. Reversed.

Thos. H. Breeze, Gordan Hall, and Albert Fink, for appellants. Otto Irving Wise, for respondent

CHIPMAN, P. J. Plaintiffs allege in their complaint: That on August 3, 1908, defendant "made, executed, and entered into a certain contract in writing with said plaintiffs, which said contract was in words and figures as follows: 'August 3/08. Bag Contract. For and in consideration of one dollar in hand paid, the receipt whereof is hereby acknowledged, we hereby purchase from H. M. Newhall & Co. one thousand (1,000) bales (each bale 1,000 bags) 36x22-12 oz. Standard Calcutta grain bags: To be delivered in good order and condition at San Francisco, California, ex steamer and/or ship and/or warehouse at seller's option. Time of delivery buyer's option during June-July, 1909. (Bags to be importation of 1908-1909.) Price 7⅛ c net each bag, duty paid. Payable at San Francisco, California, as delivered, in U. S. gold coin. This sale is based on the present customs tariff, viz.: Seven-eighths of one cent per pound and fifteen per centum ad valorem. Any change to be for account of the purchaser. Joseph Levy Bag Co., Buyers. Sam J. Oppenheim, Secretary.'" That plaintiff thereafter purchased the bags called for in said contract, "and held the same subject to defendant's order during the months of June and July, 1909." That at no time during said months or at any time did defendant request delivery of said bags, or any of them. That on July 31, 1909, plaintiffs tendered to defendant said bags, and defendant "then and there wholly refused said tender and refused to accept delivery of said bags or any of them, and wholly refused to pay the price in and by said contract reserved for said bags, or any price whatsoever." That thereafter, to wit, on August 3, 1909, plaintiff sold said bags for the best obtainable price, to wit, 5¼ cents per bag, and on said day "made demand on defendant for the payment of the difference between the contract price for the purchase of said bags and the selling price thereof, to wit, the sum of $18,750." That defendant refused and still refuses to pay said sum, and the same and the whole thereof is unpaid. Judgment is prayed for said sum with interest from August 1, 1909. A general and special demurrer was overruled, and defendant answered, specifically denying the averments of the complaint. At the close of plaintiffs' evidence they were denied leave to file an amended complaint, and defendant's motion for a nonsuit was granted, and judgment was entered for defendant. Plaintiffs moved for a new trial, which was denied. The appeal is from the judgment and order on bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is somewhat difficult to extract from the record the precise state of the evidence on which the nonsuit was granted. Plaintiffs opened the case by calling witness Mills, a bag broker who had business relations with defendant, and offering to prove by him a contract, entered into by defendant, August 12, 1907, with plaintiffs, which is in all respects the same as the contract sued upon except that it called for the delivery of the bags "during June-July, 1908," and was signed by the secretary and president of the corporation and attested by its seal and is marked "Exhibit I"; whereas the contract set out in the complaint called for delivery of the bags "during June-July, 1909," and was signed "Joseph Levy Bag Co., Buyers. Sam J. Oppenheim, Secretary." It was conceded that this latter contract was required, by the statute of frauds, to be in writing. The following statement by one of plaintiffs' attorneys will give a key to the controversy and will contribute to a better understanding of the rulings on the evidence and of the final order of nonsuit: Mr. Breeze: I assume the defense will be failure of authority to execute the contract set forth in the complaint. If your honor please, the making of this contract is denied. We propose to show that they received benefits under this contract. We propose to show they acquiesced in the making of this contract by the secretary. In the year 1907 the Joseph Levy Bag Company and the firm of H. M. Newhall & Co. entered into a contract for the purchase of bags for June and July delivery in the year 1908, at the rate of 7⅛ cents per bag; the contract being for 1,000 bales. That original contract was signed Joseph Levy Bag Company, by Charles Levy as president, and Samuel J. Oppenheim as secretary, and was under the corporate seal. In June and July of the following year the price of bags had fallen, and the Joseph Levy Bag Company was unable to accept under that contract. They went to Newhall & Co. and entered into an agreement whereby they agreed to pay $5,000 and give their promissory note for $2,000; it being understood that Newhall & Co. would waive their claim for damages for breach of that contract at that time— The Court: That has not the least bit of bearing on this writing before me (contract sued on). Mr. Breeze: I desire to show the authority to enter into this contract. These people have received the benefit of it. The Court: What have they received—the sacks? Mr. Breeze: They received a remission of the damages accrued by reason of breach of the former contract. I presume I may show authority by proving ostensible agency, by proving ratification, by proving acquiescence, and by proving estoppel in pais; that they received a valuable consideration for entering into this contract which they have retained. My proposition is that this contract was part of a prior transaction. It was given in consideration of the rescission of an old contract upon which they had sustained damages for something like $18,000. They settled that contract, that controversy—by paying $5,000 in cash and giving their promissory note, and also the contract was renewed for the following year at the same price. The Court: That does not help me a bit. We want to get at this man's authority to sign this contract" (the contract sued on).

Thereupon Edwin A. Newhall, one of the plaintiffs, was called as a witness on their behalf. He testified that his firm had business dealings with defendant in August, 1908, and, when asked "the nature of that transaction," defendant objected on the ground that "those transactions were merged in the written contract, and the written contract is the best evidence." The objection was sustained. His attention was called to the contract of August 3, 1908, set out in the complaint, and he testified to the signature of Oppenheim. This contract was offered in evidence and is designated as "Exhibit II," the court remarking: "It is not admitted just now. We pass on." The witness stated that he had negotiations with Joseph Levy Bag Company prior to the receipt of this contract, but he was not permitted to state anything relating to such negotiations, nor was he permitted to state that plaintiffs took steps to enable them to deliver the bags. Counsel suggested that he could not put in his entire case at once. "The Court: I realize the proposition that you have just stated, but I think in this case I will call for proof of this contract first. Mr. Breeze: I will have to prove that contract by acquiescence and estoppel. The Court: Go ahead and prove it by acquiescence and estoppel, but I can't see how you can prove it in such a way." The witness was permitted to testify that he had conversations with some of the officers and directors of the bag company in regard to this contract at which at least three of the five directors, including the president and secretary, were present, and also some other members of plaintiff company; but he was not permitted to testify to anything that occurred at those meetings. In reply to counsel that he proposed by the witness "to show an acquiescence in this contract," that the directors of the corporation knew of the contract "and did not deny execution of it until the following year when the bag market took a drop," the court said: "I do not understand that that makes any difference to me." Counsel then stated to the court more fully his view of the matter as follows: "Mr. Breeze: They are estopped from denying authority unless they put us in the position which we were in at the time the breach of the original contract occurred. In June, 1908, they were in default in the fulfillment of the contract which matured on that date. They arranged with Newhall & Co. to remit damages, and the damages were remitted under an agreement by which we were paid a certain sum in lieu of the carrying charges on those bags during the year. They were to give a new contract which was in effect an extension of the old contract for a year more. They received a benefit or a valuable consideration for entering into this contract, namely, the remission of those damages. There was a valuable consideration paid by Newhall & Co. for the execution of this contract. The Court: You have not asked any questions to show that, Mr. Breeze. Mr. Breeze: I did, I propose to show it by this witness. The Court: Go on and question him about it." Counsel then proceeded to put questions to the witness in various forms in his effort to show the history of the transaction as he claimed it to be; the circumstances surrounding the parties; that plaintiffs' dealings with Oppenheim were with him as secretary of defendant corporation; what representations he made when he brought the contract to plaintiffs; the consideration for its execution; that plaintiffs' negotiations had been with at least three of the directors assuming to act for the defendant; that the president and secretary of the defendant corporation were present at the delivery of the contract—but the court sustained objection to all such questions. Notwithstanding these and subsequent rulings, most of the essential facts in the transaction came out without objection, as is hereinafter shown.

It appeared that defendant was engaged in the business of "buying and selling bags, burlap, and twine," and it was admitted that Oppenheim was a director and secretary of the corporation. It was also admitted that Elias, Charles, and William Levy were directors of the corporation "and participated with him (Oppenheim) in the conduct of the affairs of the corporation." Plaintiffs offered to prove that these four persons owned an equal number of shares in the corporation, "the fifth director holding only one share of qualifying stock, so that it was in effect a copartnership conducted in the form of a corporation for convenience"; but all such evidence was denied.

When on the witness stand, Oppenheim was asked whether the Levys above named knew that he was "going to take this contract up and deliver it to plaintiffs"; also, "what knowledge, if any, your associates, Messrs. Levy that I have named, had of the contract which you say you delivered on the 3d of August, 1908"; also, whether or not he was directed by his associates to deliver the contract; also, whether he or his associates, after the delivery of this contract, disaffirmed "the same or in any way notified the plaintiffs that it was unauthorized and not a corporate act." Objections to these questions as irrelevant, incompetent, and immaterial, and not within the issues, were sustained.

The deposition of William L. Martin was admitted in evidence and, except as noted, without objection. He testified as follows: "I reside in San Francisco. I am manager of the bag department of H. M. Newhall & Co. I have been engaged in that occupation 21 years. I was manager of that department during the years 1907–1909. I know the defendant, Joseph Levy Bag Company. I know Mr. Charles Levy. He is president of the defendant corporation. I know Samuel J. Oppenheim. He is the secretary of the defendant corporation. I have met one of the other directors. I am not sure whether he is named Elias or William. It is either one or the other. I recognize a paper which is shown me marked 'Copy Bag Contract' under date of August 12, 1907. It purports to be a contract for the sale of 1,000 bags, Calcutta grain bags, to Joseph Levy Bag Company. I have seen the original of the paper of which this purports to be a copy. (The paper identified by witness is a copy of plaintiffs' Exhibit I.) I saw it on file in our office. It was returned to the Joseph Levy Bag Company. This is a correct copy of the original except that the original had Charles Levy's signature as president and Samuel J. Oppenheim's as secretary. The corporate seal was attached to it. I know it to be a correct copy of the original. I have made personal comparison of it with the original." The contract of August 12, 1907, was offered in evidence, the court reserving its ruling, after objection. "The witness (continuing): On or about the end of July, 1908, I had a conversation with Mr. Charles Levy, Mr. Oppenheim, and either Elias or William Levy in regard to business transactions between the firm of H. M. Newhall & Co. and Joseph Levy Bag Company. The conversation was about the delivery of the bags and the Joseph Levy Bag Company taking them up and paying for them. They said they were short of funds and could not pay for the bags and were willing to continue the contract for another year. Q. That is, the Joseph Levy Bag Company? A. Yes, sir. After a great deal of discussion we decided to renew the contract for another year provided they paid carrying over charges. Q. Did they make such payment? A. They did. They paid in all $7,000, of which $2,000 was in shape of a promissory note and $5,000 in cash. While these negotiations were pending, we had four conversations at least, probably more. The terms of the proposed agreement were discussed in the presence of all three gentlemen I have mentioned. As a result of these negotiations, we entered into a further contract for the sale of bags. I recognize a typewritten document shown me on the letter heading of H. M. Newhall & Co. dated August 3, 1908, marked 'Bag Contract.' It is a copy of the contract which was signed August 3, 1908. (The paper identified by witness is a copy of plaintiffs' Exhibit II.) This is the contract to which I have referred in my previous testimony as being entered into as a result of these negotiations. The original I suppose is in our office. I have made search for it but so far have been unable to find it." The contract of August 3, 1908, was then offered in evidence and after objection, the court reserved its ruling. "The witness (continuing): After this contract was signed by Oppenheim on behalf of Joseph Levy Bag Company, no notice whatever was received from the Joseph Levy Bag Company or any officer or agent thereof, that Mr. Oppenheim had no authority to enter into the contract on behalf of Joseph Levy Bag Company." Witness was asked whether plaintiffs procured the sacks necessary to fill the contract; what plaintiffs did in reference to the contract after its date; whether plaintiffs had bags on hand to fill the contract during July and August; whether plaintiffs communicated with defendant in regard to the contract during July and August, 1908. To all these questions objection was sustained. Also, a letter written by plaintiffs and sent to defendant on July 27, 1909, informing defendant that plaintiffs were prepared to deliver the 1,000 bales of bags mentioned in the contract of August 3, 1908; and the reply of defendant, of July 29, 1909, denying the execution of the contract; also, letter of plaintiffs informing defendant that they would at once proceed to dispose of the bags and would hold defendant responsible for any loss under the contract; also, letter of August 2, 1909, advising defendant that the best bid received for the bags was 5¼ cents and that they proposed to close out the transaction on that basis, holding defendant for the difference. All these letters were objected to and the objections sustained; as, also, all subsequent questions to show what plaintiffs did with the bags; the prevailing demand and price, and like matters. "The witness (continuing): At the termination of the year following the making of the contract of 1907, Charles Levy said that Joseph Levy Bag Company had not money to take up the bags. We agreed to cancel the first contract upon certain conditions. We determined the amount that should be paid for the cancellation of that contract by ascertaining the approximate carrying charges including interest, fire insurance, and warehouse charges, for the term of one year following. The cancellation of the contract of 1907 was made dependent upon the entering into of a new contract—the contract of August 3, 1908. We had no intimation that the Levy Company disclaimed the authority of Mr. Oppenheim to enter into, or disclaimed the making of, that contract, prior to receipt of the letter from Mr. Wise." This letter was written July 29, 1909.

Witness Newhall was recalled and testified that the meeting to which he had testified occurred before the contract of August 3, 1908, was entered into. Continuing, he testified: "In August, 1908, we had negotiations with Charles Levy, Elias Levy, and Mr. Oppenheim with reference to the sale of 1,000 bales of bags for future delivery. These negotiations began during the latter part of July, 1908, and occurred in my office. There was present during these negotiations Charles Levy, Mr. Oppenheim, and Elias Levy, Mr. Martin, and my brother George A. Newhall. We had three interviews. One a few days before this. Q. By Mr. Wise: The conversation about which you are now being interrogated resulted in the execution of this paper of August 3, 1908, which was shown to you yesterday? A. Yes. * * * The witness thereupon was shown plaintiffs' Exhibit I. Q. State whether or not you entered into that contract set forth on that paper of the 12th of August, 1907, with the defendant corporation. A. We did. The Court: Q. On August 3, 1908, did your firm have any claim against the Joseph Levy Bag Company for want of compliance with that contract? A. Yes. Q. What was the amount that you claimed as damages for noncompliance? A. The damages were about $12,000." Continuing, he testified: "Q. State whether or not on or about the 3d of August, 1908, or just prior thereto, you waived any claim or demand which you had against the defendant at that time in consideration of its doing certain things, and what, if any, acts it was to perform in consideration of that waiver. A. We made them three offers. We wrote three offers to waive the rights. I can't find them. They were delivered to Mr. Charles Levy. I have not a copy of that letter or instrument. It was just a memorandum. Either Mr. Martin or myself delivered it to Mr. Charles Levy. We were both in the office at the time he was there. It was handed to Mr. Charles Levy in my presence. Mr. Martin wrote out the memorandum. I read it after it was written. I saw it delivered to Mr. Charles Levy. I am able to state its contents. There were three options to close this old contract. One of the options was that they should pay up for the bags and make delivery. The other was that they should pay $7,000 carrying charges and take a new contract at the same price as the contract of 1907. The third option was that they should take a new contract at the ruling price of the market at that date and pay us the difference in cash. This memorandum was delivered to Mr. Levy at the second interview. The third interview was held about the 1st of August. Q. State what transpired at the third interview about the first of August. (Objection sustained.) Q. State what, if anything, the defendant did with reference to availing itself of any of these three options. A. They accepted the second option, that they would pay— The Court: What did he say? You say they accepted—who was talking to you, and what was stated? A. Charles Levy. Mr. Fink: Q. In the presence of whom, if anybody? A. The presence of Mr. Oppenheim, my brother, and Mr. William Martin. I think Mr. Elias Levy was there. They accepted the second option. Mr. Charles Levy stated that they would accept the second option. That is, we were asking $7,000. They stated that they could not pay but $5,000, but they would give a note for $2,000, and we told him we would accept it if they would put an indorser on the note, and on the 3d of August they brought a check for $5,000 to us and also a note signed by Levy Bag Company and indorsed by Herman Levy. We accepted that on the 3d of August and then issued the new contract at the same price as the 1907 contract. On August 3d they came to the office and brought a check on the London, Paris, and American bank, and the note signed and indorsed by Mr. Herman Levy, and at that time we gave them the new contract at the same price as the old one. We turned over the document of August 12, 1907, tearing it out of our book. Q. Now, I will ask you to state whether or not in your interview with Mr. Charles Levy, Mr. Elias Levy, and Mr. Oppenheim about the 1st of August, 1908, anything was said by them about sending around this new contract and the character of it. A. Mr. Charles Levy accepted the second option and said that he would fix it up in a day or so. At the same time he said that they ought not to pay more than $5,000. We stood on $7,000 and said we could not let them have it for less than $7,000. On the 3d of August they said then that they would send it around in a day or two. They sent the check over with the note." The witness was asked whether or not plaintiffs would have surrendered the contract, Exhibit I, to defendant, "except in exchange for the check, note, and contract of August 3, 1908"; what, if anything, plaintiffs caused to be done to put themselves in a position to deliver the bags under this second contract, but objection was sustained, and the witness was not permitted to answer. "The Court: If there is anything in this case at all, it is on a count altogether different from the one that you have got in the complaint. I don't know whether an amendment could be prepared that is proper or not. You had better try and prepare an amended pleading. The Witness (continuing): We had the bags on hand from the old contract. I think we had them for a whole year. It was at our expense for the reason that we had to pay storage and insurance and interest. Q. State whether or not you would have so acted except for the contract delivered to you on the 3d of August, by Oppenheim. (Objection sustained.) Q. Now state whether or not in July and August, 1909, these bags were accepted by the defendant. A. They were not accepted by the defendant; we sold them. We put them in the hands of a bag broker. The market price of bags in that quantity at that time was less than 5¼ cents, about 5⅛, and the broker was not able to sell them at that price. We finally bought them in ourselves at 5¼ cents. We credited the defendant with that amount. We made demand upon the defendant for the difference between the market price of the bags and the contract price. The defendant did not pay us. In the latter part of July we took warehouse delivery orders for 1,000 bales and presented them to Mr. Charles Levy and Mr. Oppenheim. That was about the end of July. I think it was about the 27th or 29th. We wrote to them a letter, and then we got an answer to that letter from Mr. Wise, and as soon as we got that letter we presented the warehouse delivery orders for 1,000 bales with a bill for the total amount. The defendant would not accept them. We had a talk with Mr. Levy on the subject. Q. What did he say? A. He said nothing. It is in the hands of Mr. Wise, and we cannot do anything. We had the bags at that time ready to deliver. We had them ready to deliver up to the 31st day of July, 1910. Mr. Wise: I am willing to admit that plaintiffs will testify to the possession of 1,000 bales and the warehouse receipts; that he will testify that they are in his possession; that he had the property and warehouse receipts in San Francisco as testified to by him. Mr. Breeze: And will you also admit that we made tender of the warehouse receipts? Mr. Wise: I will admit that Mr. Newhall will testify that the tender was made on the day just referred to."

Witness Mills, recalled, testified: "I am acquainted with Elias Levy, William Levy, Charles Levy, and Mr. Oppenheim. I was present at an interview at which there was present Mr. Charles Levy, Mr. Oppenheim, E. W. Newhall, Mr. Martin, myself, and I think Mr. George Newhall was at his desk, in the latter part of July, 1908, when the contract of 1907 was about to mature. I was the broker in that transaction. Charles Levy and Mr. Oppenheim pleaded that they could not take up the contract. That they did not have the money and could not pay up. They left after stating that. I was present at another interview between them and Mr. Newhall some days after that. There was some talk of the same kind. Mr. Elias Levy was there also. They pleaded their inability again to pay the amount that H. M. Newhall & Co. demanded and wanted to cancel the old contract. I had conversations with Mr. Charles Levy and Mr. Oppenheim down in their office with reference to the third option which had been given them by Mr. Newhall. Mr. Elias Levy may have been present. I talked more than once with them. I don't think Mr. William Levy was present. Q. What was said by them about these options? (Objection sustained.) Q. I will ask you to state whether or not finally in your presence they decided to accept one of these options? (Objections sustained.) Q. State what, if anything, they did with reference to accepting one of these options? A. They told me they could pay $5,000. I know the money was paid and the note was given and the other contract was issued. Samuel Oppenheim took the money up himself. I met him on the street on the way up and he told me he was going to pay it. I did not see the money paid or the note delivered. Q. After August 3, 1908, and between that date and June and July, 1909, did you have any conversation with either of the Levys or Mr. Oppenheim with reference to the contract of 1908 for 1,000 bales? (Objection sustained.) Mr. Fink: I offer to prove by this witness that frequently during the period between August 3, 1908, and June and July, 1909, he had conversation with Elias Levy, Charles Levy, and Mr. Oppenheim in which their purchase of this 1,000 bales of bags under the contract of August 3, 1908, was discussed with this witness, and in which they asked this witness to endeavor if possible to make a sale of the bags for the defendant corporation. (Objection sustained.) The Witness (continuing): I received a commission on the 1907 deal. Q. Did you receive any commission on the 1908 deal? (Objection sustained.) Mr. Fink: I offer to prove that he did not. (Objection sustained.) Mr. Fink: If the court please, that is our case. We ask permission, in the event your honor thinks we have not proved a case under the present complaint, to permit us to file an amended complaint. I have a rough draft of it now. It sets out this entire transaction just as it has been testified to by the witnesses. The Court: I don't see that there is any complaint that can be filed in this action under which I can give you relief. Mr. Wise: Let the record show a formal motion for a nonsuit upon the ground that plaintiffs have failed to establish a case or have failed to establish any contract as set forth in the complaint, or otherwise, or at all, or have established or proved or submitted any evidence oral or documentary to sustain the allegations of their complaint as to the execution of a contract by defendant or its breach or any damages thereunder. The court took said motion under advisement. Thereafter plaintiffs prepared an amended complaint and requested leave of court to file the same, which said request the court then and there denied, stating that the document offered as the contract of the defendant corporation is not in law the contract of the defendant; that such contract was never ratified by the defendant; that, as the defendant has received nothing under the alleged contract, no estoppel exists or can be proven, and for the said reasons, and for no other, the court denied the application for leave to file an amended complaint. (To which ruling of the court plaintiffs then and there duly excepted and now assign said ruling as error.)"

This proposed amended complaint set forth the transaction of 1907, the failure of defendants to comply with it, the negotiations following their failure, the surrender of that contract and waiver of the damages which accrued to plaintiffs, the adjustment of those damages and surrender of the contract in consideration of certain money payments, and the further consideration that defendant would enter into a new contract, the contract of August 3, 1908, for the purchase of a like number of bags the following year on like terms, the purchase by plaintiffs of bags to meet the contract, the failure and refusal of defendant to accept them when the time of delivery arrived, the tender and demand made by plaintiffs, and, on refusal by defendant, the sale in the open market for the best obtainable price leaving still due plaintiffs the amount claimed. In brief, this proposed amended complaint alleges the facts and circumstances as proved or sought to be proved and as appears by the foregoing narrative of what took place at the trial.

It is a fact of common knowledge that a very large part of the mercantile business of the country is, as matter of convenience, if not, indeed, as matter of necessity, carried on by corporate organizations rather than by partnerships. It would greatly hamper their usefulness if all the daily current purchases and sales of merchandise could be made only by resolution of directors, or that the public dealing with their officers would do so at the peril of having their contracts repudiated when they might happen to be unfavorable to the corporation, or less profitable than was anticipated when made. Suppose an incorporated mercantile house of San Francisco should, in its corporate name, signed by its secretary, and on the verbal authority of the president and one other of the five directors, cable an order to a Paris house for a bale of dry goods of a kind and value previously purchased from the latter by the former. Must the Paris house demand and receive an authenticated copy of a resolution by the board of directors of the San Francisco house authorizing the order for goods before the Paris house could safely fill the order? Suppose the Paris house should ship the goods, and on arrival it happened that they had depreciated in value and the San Francisco house repudiated the contract, claiming their right to do so under the rule now contended for. A system of law that would tolerate such an evasion of responsibility would be unworthy of a civilized people.

[1] Yet that is substantially what happened here. Defendant, by its president, secretary, and another director, personally ordered the bags from plaintiffs, and the latter, at great cost, purchased them in a foreign market and shipped them to San Francisco and held them for delivery as they had agreed to do. Meanwhile the price fell off and defendant repudiated the contract. Indeed, the case is stronger than appears by this simple statement. There is evidence in the record showing the following facts: That, in 1907, defendant executed a contract, whose validity is not to be questioned, to purchase 1,000 bales of bags from plaintiffs to be delivered in June or July, 1908, at buyer's option; that plaintiffs purchased bags to meet the contract and had them on hand for delivery; that when the time for delivery arrived defendant was unable to meet its obligations and sought a settlement with plaintiffs; that the damage to plaintiffs resulting from defendant's default was about $12,000; that plaintiffs finally agreed to cancel this contract on condition that defendant would pay them $5,000 cash and execute its note for $2,000 and would also make a new contract for a like number of bags on like terms, delivery to be made in June or July, 1909; that defendant agreed to this, i. e., the president and secretary and one other of the directors so agreed, and the defendant, in its corporate capacity, did in fact pay the money, execute the note, and later pay the same; that with the knowledge of these same directors and by their direction and pursuant to the agreement made with plaintiffs, by which defendant was released from the first contract, thus avoiding the payment of the remaining damage caused by defendant's breach of the contract of 1907, the secretary of defendant, and in its name, executed and delivered to plaintiffs the contract of 1908 in question; that plaintiffs accepted this contract in part settlement of their claim, proceeded in good faith to meet its requirements on their part, purchased the bags in Calcutta, and had on hand for delivery the necessary number, and not until about the last day for delivery were they notified of defendant's repudiation of the contract; that at this time the price of bags had dropped to a point involving the damages claimed by plaintiffs. It appeared that the board of directors consisted of Oppenheim, secretary, Charles Levy, president, Elias and William Levy, and one other. It was admitted by defendant "that the three Levys named were directors and participated with him (Oppenheim) in the conduct of the affairs of the corporation." The corporation recognized and acquiesced in the contract by paying money, and in its corporate capacity executing a note and paying it, which note formed part of the contract. The transaction was in pursuance of the only business the corporation was engaged in—the buying and selling bags, burlap, and twine. In fact, the contract was but the renewal of one canceled, about which latter no question of its validity can arise. Defendant is seeking to avoid this substituted contract, which plaintiffs accepted in good faith, surrendered a considerable part of their claim for damages under the first contract, expended a large sum of money in purchasing bags to fill the second contract. We think that the beneficent principle of estoppel was adopted by the courts to meet just such cases as this. This would seem to us the equitable and reasonable view of the case in the absence of authority. But we think it supported, not alone by its intrinsic merit, but by adjudicated cases of recognized value.

From the viewpoint of the learned trial judge, he consistently ruled out both contracts and many questions intended to cast light upon the transactions which, in our view, should have been allowed. Indeed, from his conception of the case it is somewhat remarkable that he let in the facts which we have been able to extract from the record.

In Crowley v. Genessee Mining Co., 55 Cal. 273, the court said of the common-law rule contended for by respondent: "In the United States, nothing more is requisite than to show the authority of the agent to contract. That authority may be conferred by the corporation at a regular meeting of the directors, or by their separate assent, or by any other mode of their doing such acts. 'If this were not so,' says Mr. Chief Justice Redfield, 'it would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations in this country, is without any formal meetings or votes of the board. Hence there follows a necessity of giving effect to the acts of such corporations, according to the mode in which they choose to allow them to be transacted.'"

The modern mercantile corporations have come into use since this was written. Their business is of such a character as to require even greater latitude in conducting their affairs than the classes above named.

[2] In Gribble v. Columbus Brewing Co., 100 Cal. 67, 71, 34 Pac. 527, 529, the court

said: "The most that can be claimed is that the contract, as executed, was in excess of the power conferred by the board of directors upon the president; that it varied from his authority. In this respect the transaction does not differ from that of an agent of an individual who has exceeded his authority. That which the principal may authorize an agent to perform he may ratify when performed by the latter without authority. And where with full knowledge of all the facts involved a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter. And this doctrine applies to corporations equally with individuals"—citing cases. "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations rising from it, so far as the facts are known, or ought to be known, to the person accepting." Civ. Code, § 1589. Among the maxims found in the Code is the following: "He who takes the benefit must bear the burden." Civ. Code, § 3521. It was held in Phillips v. Sanger Lumber Co., 130 Cal. 431, 62 Pac. 749, that an oral authorization would suffice for conferring an agency to execute the promissory note of a corporation; and it will be ratified by accepting or retaining the benefit of the act, with notice thereof. Civ. Code, § 2310. See West v. Will C. Prather & Co., 7 Cal. App. 81, 93 Pac. 892. Without prolonging the discussion, we refer to one more case. Kelsey v. National Bank of Crawford County, 69 Pa. 426. The cashier of defendant offered a reward for the detection of the thieves who had robbed the bank, and the question of his authority arose when plaintiff sought to prove that the reward was offered by the cashier in the presence of some of the directors, pursuant to which plaintiff undertook the detection of the thief; that more than a majority of the directors had knowledge of the offered reward and sanctioned and approved it. The trial court rejected the evidence. On appeal it was held admissible. Among other things the court said: "It is not necessary to decide whether the cashier ex officio had authority to offer the reward in question for the detection of the thieves that robbed the bank. If he had no authority, the bank is liable for the reward if the offer was acquiesced in and ratified by the directors. The law is well settled that a principal who neglects promptly to disavow an act of his agent, by which the latter has transcended his authority, makes the act his own (Bredin v. Dubarry, 14 Serg. & R. [Pa.] 30), and the waiver which makes the ratification equivalent to precedent authority is as much predicable of a corporation as it is of ratification by any other principal; and it is equally to be presumed from the absence of dissent (Gordon v. Preston, 1 Watts [Pa.] 387 [26 Am. Dec. 75])." Quoting from the Bank of Pennsylvania v. Reed, 1 Watts & S. (Pa.) 101, the court said: "When the principal has been informed of what has been done, he must dissent and give notice of it in a reasonable time; and, if he does not, his assent and ratification will be presumed. * * * Nor was it necessary, in order to bind the bank by their acquiescence, that notice should have been given to the directors, when sitting in their official capacity as a board. If they were personally cognizant of the offer made by the cashier, it was their duty to call a meeting of the board and disavow the act, if they were unwilling that the bank should be bound by it. It would be unjust to permit the plaintiff to spend his time and money for the detection of the thief, on the faith of the promised reward, and then repudiate the offer, as unauthorized, when he had succeeded. * * * If the evidence, tending to show that the directors had notice of the offer and that they acquiesced in it, was sufficient to establish the fact, if believed, the case should have been permitted to go to the jury. We think the evidence was sufficient, and that it should not have been withheld from them. It tended to show that the cashier offered the reward at the instance of one of the directors, and upon his suggestion that the directors would bear him out in it; and that the offer was made in the presence of three of the directors; and that the plaintiff 'separately met all the directors and talked the matter over with them,' with the exception of William Davis, Jr. * * * The evidence touching the question was amply sufficient to go to the jury."

It is our opinion that the learned trial judge tried the case on an erroneous conception of the law, that he refused much evidence which should have been admitted, that the court erred in granting the nonsuit, and that plaintiffs should have been permitted to amend their complaint.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

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19 Cal. App. 75

PEOPLE v. MATSICURA. (Cr. 238.)

(District Court of Appeal, Second District, California. May 16, 1912.)

PROSTITUTION (§ 1*)—PANDERING—STATUTE—CONSTRUCTION—"INMATE."

Act Feb. 8, 1911 (St. 1911, p. 9) § 1, provides that any person who shall procure a female inmate of a house of prostitution, or shall procure for a female person a place in such house or as an inmate therein, shall be guilty of pandering. *Held*, that the word "inmate" means one who occupies or lodges in a place with others, or any occupant, even if alone, so that the act must be construed as requiring the procuring of a place in a house of prostitution for one who actually becomes an inmate thereof, and where defendant had agreed to let one of a number of designated rooms in such a house to a prostitute when it was ready for occupancy, but the room was never put in condition, and was never occupied by her, the offense was not complete.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 4, pp. 3623-3624.]

Appeal from Superior Court, Kern County; G. W. Nicol, Judge.

Pete Matsicura was convicted of pandering, and he appeals. Reversed and remanded.

J. R. Dorsey and Thomas Scott, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

ALLEN, P. J. An information was filed against the defendant charging him with the crime of pandering, in that "on or about the 12th day of July, 1912, at and in the said county of Kern, state of California, and prior to the filing of this information, he did then and there willfully, unlawfully, and feloniously procure for a female person, to wit, June McIntosh, a place as inmate of a house of prostitution, said house of prostitution being then and there situate at No. 2131 M street in the city of Bakersfield, county of Kern, state of California." Trial was regularly had, and the defendant was found guilty by the verdict of a jury, and from the judgment pronounced, and from an order denying a new trial, defendant appeals.

The undisputed facts in the record may be briefly stated as these: At the date alleged in the information, and for many months prior thereto, defendant was and had been the owner or lessee of a house devoted to purposes of prostitution; this house containing many rooms occupied by harlots plying their vocation. Many months prior to the date alleged in the information the girl June McIntosh had been one of these inmates. She, however, had left the premises and gone to Stockton. On July 12th she wired defendant to come to Stockton or send a ticket at once. Defendant through the proper channel procured a ticket to be delivered to her, and she arrived in Bakersfield on the morning of the 13th of July. The woman went from the depot to the house of defendant and awakened him. Not yet having had her breakfast, defendant went with her to a restaurant, where they breakfasted. While at breakfast the defendant was arrested charged with the offense set out in the information. The woman did not have sexual intercourse with any one after her arrival at Bakersfield, did not go to any room or place designated by defendant or any other person, or actually enter any house of prostitution or place designed for such purpose. It is shown, however, that she did at breakfast ask defendant, "Is my crib ready for me?" the defendant answering, "No; not yet, but after breakfast I will fix it up for you." That was all that was said. Defendant did not designate what particular room she was to have, but pointed out some back rooms, and said, "You may have one of these." His front rooms were all occupied. This is a summary of the evidence appearing in the record.

Section 1 of the act of February 8, 1911 (Stats., 1911, p. 9), upon which this information is based, provides: "Any person who shall procure a female inmate for a house of prostitution, * * * or shall procure for a female person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state," is guilty of pandering. The principal question suggested upon this appeal, then, relates to the construction which should be given this section, or that portion of it alleged in the information to have been violated. The offense defined is that of procuring a place for a female as inmate of a house of prostitution. There can be no question but that defendant intended to commit the crime charged in the information, but, in our opinion, he stopped short of its actual commission. The word "inmate" is defined by the Standard Dictionary as "one who occupies or lodges in a place with others," or "any occupant, even if alone"; in other words, the words "inmate" and "occupant," when employed with reference to a building, are synonyms. The statute must, therefore, be construed as defining the offense to be the procuring of a place in a house of prostitution for one who becomes an inmate thereof; and it must necessarily follow that, in order to complete the offense, it must be made to appear that the female person actually became an occupant of the place designated or procured. A place may be said to be procured where the owner of a building permits the occupancy, as completely as though one not the owner had leased, rented, or secured a room of the actual owner, but that the offense should be complete something more must be done than the mere selection or procurement of the room. The offense does not consist in procuring a room intended to be occupied or used for purposes of prostitution. It must be occupied by the female, and when so occupied, and not before, is the statute violated. There is no claim that this woman June McIntosh ever occupied any room owned by defendant, leased by him, or designated by him, or by him devoted to purposes of prostitution. The most that can be said is that he agreed with her that after the rooms were put in preparation she might have one of a number of designated rooms in which to continue her prostitution. But the room was never put in condition for occupancy, was never occupied, and, in our opinion, no offense was committed under this section of the statute as charged in the information.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defendant asked the court to charge the jury that: "You are further instructed that if you believe from the evidence that the defendant procured a place for said June McIntosh in a house of prostitution, and the prosecution has failed to prove that she became an inmate of any such house, then I further charge you that it is your duty to acquit the defendant." Another instruction requested by the defendant was to the effect that it was necessary for the prosecution to prove beyond a reasonable doubt that the said June McIntosh became an inmate of a house of prostitution. These charges were refused by the court, and none given covering the subject. We think the court erred in refusing to give those charges; that the evidence appearing in the record was such that the defendant was entitled to an instruction directing the jury to acquit upon the ground that the offense charged was not shown to have been committed. Respondent contends that this statute is similar to that relating to abduction, as defined by section 267 of the Penal Code, in the construction of which our Supreme Court has said in People v. Lewis, 141 Cal. 543, 75 Pac. 189, that the taking of a child from its parents for the purposes of prostitution completes the offense; but it will be observed that that section in plain language provides that every person "who takes away any female under the age of eighteen years from her father, mother, guardian, or other person having the legal charge of her person, without their consent, for the purpose of prostitution, is punishable." There is a marked distinction between the two sections. Section 267 makes the mere taking the offense, while the section under consideration makes the occupancy—that is to say, the procuring of a place actually occupied—the offense; and we think that the authorities cited in connection with section 267 have no application here.

Judgment reversed and cause remanded.

We concur: JAMES, J.; SHAW, J.

(19 Cal. App. 66)

Ex parte DONDERO. (Cr. 378.)

(District Court of Appeal, First District, California. May 16, 1912.)

MUNICIPAL CORPORATIONS (§ 626*) — ORDINANCES—VALIDITY.

A municipal ordinance making it unlawful to construct any building to be used as a stable for horses or other animals without obtaining a permit from the board of supervisors and the board of health, and making it unlawful to maintain as a stable any existing structure not used as such at the date of the passage of the ordinance without obtaining such permit, is invalid, as improperly discriminating between structures used as a stable at the time of the passage of the ordinance and those not so used.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1380; Dec. Dig. § 626.*]

Application by Luigi Dondero for a writ of habeas corpus. Petitioner discharged.

Louis Ferrari, for petitioner. Leo C. Lennon, for respondent.

HALL, J. Upon application of petitioner a writ of habeas corpus was issued out of this court, to which a return has been made by the chief of police of the city and county of San Francisco. From the record thus made up it appears that the petitioner has been charged, convicted, and sentenced for violating section 197 of Ordinance No. 1008 (new series) of the board of supervisors of the city and county of San Francisco. It is not disputed but that the complaint is sufficient to charge an offense, if the section of the ordinance is valid. The only question to be determined by this court is as to the validity of the provision of the ordinance for the violation of which petitioner was convicted. The section is as follows: "Section 197. It shall be unlawful for any person, firm or corporation hereafter to construct any building or premises to be used as a stable for horses, mules, cows or other animals without first obtaining a permit from the board of supervisors and the board of health, specifying the name of the permittee and the location of building to be used as a stable, and the number of animals intended to be kept therein. It shall be unlawful for any person, firm or corporation to maintain as a stable for horses or mules any existing structure not used at the date of the passage of this ordinance for stable purposes, without first obtaining a permit from the board of supervisors and board of health, specifying the name of the permittee, the location of the building or premises to be used as such, and the number of animals to be kept therein." Petitioner was charged with having constructed and maintained, at a time subsequent to the enactment of the ordinance, a stable for horses without first obtaining a permit from the board of supervisors and the board of health.

It is claimed by petitioner that the ordinance is invalid, first, because it makes the right to construct and maintain a stable dependent upon the permission of the boards of supervisors and health, which permits may be granted or withheld at the discretion of said boards, to be exercised upon each case; and, second, because it discriminates between stables in operation at the date of the passage of the ordinance and such as may be established and maintained thereafter.

As to the validity of ordinances which vest in certain municipal officers the power at their discretion to grant permits to carry on such business or operations as are proper subjects of municipal regulation, the authorities are not uniform, as may be seen by an examination of the cases collected in the note to Elkhart v. Murray, reported in 1 L. R. A. (N. S.) 940. It is said in Fischer v. St. Louis, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018, that the authority to delegate such discretion to a board for that purpose is sustained by the great weight of authority. We do not find it necessary to decide this point, for under the rule laid down in Ex parte Bohen, 115 Cal. 372, 47 Pac. 55, 36 L. R. A. 618, and followed and approved in Los Angeles v. Hollywood Cemetery Association, 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75, the ordinance is invalid for the reason stated as the second ground of attack. It is plain that the purpose of the ordinance is to regulate the maintenance of stables. The mere erection of a building for stable purposes could not injuriously affect the community. It is the maintenance and operation of a stable that might injuriously affect the public health or otherwise create a nuisance; yet, under this ordinance, if a structure was being used as a stable at the enactment of the ordinance, no permit to maintain such stable in such structure is required, either of the board of supervisors or the board of health, while such permit is required to maintain a stable in any structure not so used at the time of the enactment of the ordinance.

These provisions bring this case clearly within the rule laid down in Ex parte Bohen, supra, where it was held that an ordinance, which assumed to prohibit the sale of cemetery lots for burial purposes and the burial of bodies therein, while permitting burials in lots already purchased for burial purposes, was discriminating in its operation between individuals similarly situated, and was for that reason unreasonable and invalid. The Bohen Case is approved and followed in Los Angeles v. Hollywood Cemetery Ass'n, supra. We cannot differentiate the case at bar from these cases and are bound to follow them. The case of Fischer v. St. Louis, 194 U. S. 363, 24 Sup. Ct. 673, 48 L. Ed. 1018, relied upon by respondent, does not touch upon the point decided by the two California cases above cited.

It is ordered that the petitioner be discharged, and the bail given by him to answer to the order of this court is exonerated.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 91)

BARTNETT v. HULL et ux. (Civ. 962.)

(District Court of Appeal, First District, California. May 17, 1912.)

1. Justices of the Peace (§ 167*)—Appeal—Dismissal of Action for Want of Jurisdiction.

Where, on an appeal from a judgment of a justice of the peace on the law and the facts, the defendant seasonably challenges the jurisdiction of the justice's court over the subject-matter of the action, if such want of jurisdiction appears on the face of the record, the superior court should dismiss the action for want of jurisdiction.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 647–651, 654; Dec. Dig. § 167.*]

2. Justices of the Peace (§ 44*)—Pleading—Complaint.

A complaint filed in justice's court consisted of a copy of a bill showing a balance due under date of November 21, 1905, of $271, which was followed by an item reading: "Nov. 9, 1909, to 3 years 11 ⅔ mos. interest due on note at 10%...........107.66." *Held* that, as $107.66 was the correct amount of interest from November 21, 1905, to November 9, 1909, the complaint would not be construed as demanding the sum of $107.66 as a part of the principal sum sued for, and hence as showing that the justice of the peace had no jurisdiction, especially where the parties and the justice of the peace apparently construed it as demanding $271 and interest thereon.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 157–172; Dec. Dig. § 44.*]

3. Appeal and Error (§ 192*)—Review—Questions Not Raised Below.

Where a pleading is ambiguous, uncertain, or susceptible of two interpretations, and the parties have apparently adopted and acquiesced in one interpretation in the trial court, the losing party cannot insist, on appeal, that it should have been differently construed, since, if the uncertainty had been pointed out in the trial court, it could have been corrected by amendment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221–1225; Dec. Dig. § 192.*]

4. Courts (§ 212*)—Jurisdiction—Supreme Court.

Where a justice's court had jurisdiction of an action and the superior court had appellate jurisdiction, the Court of Appeal has no jurisdiction of an appeal from the superior court's judgment, except to dismiss the appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 511–516; Dec. Dig. § 212.*]

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by D. G. Bartnett against J. F. Hull and wife brought in a justice's court, and tried de novo in the superior court. From a judgment for plaintiff, defendants appeal. Appeal dismissed.

Robert F. Bell, for appellants. J. E. Rodgers, for respondent.

HALL, J. This is an appeal from a judgment for plaintiff, rendered by the superior court, in the sum of $271, together with interest thereon at the legal rate to date of judgment, amounting to $97.20. The action was brought in the justice court, where it was tried upon the issues raised by the answer of defendant to the complaint. The justice of the peace rendered judgment for the plaintiff for the principal sum of $235.05, together with interest in the sum of $75.47. Defendants appealed to the superior court upon questions of law and fact.

Before the cause came on for trial in the superior court, defendants moved said court to dismiss the action upon the ground that neither the justice court nor the superior court had jurisdiction of the action, for the reason, as defendants claimed, that it appeared upon the face of plaintiff's complaint that the amount sued for exceeded the sum of $300, exclusive of interest. The motion was denied. Subsequently, when the cause was called for trial upon its merits, defendants renewed their motion, and it was again denied, and the court tried the cause upon its merits. At the conclusion of plaintiff's evidence defendants moved for a nonsuit upon the ground that the court had no jurisdiction for the same reasons as were urged upon the motion to dismiss.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] We believe the law to be that where, as in this case, a defendant, after appealing to the superior court upon questions of law and fact, seasonably challenges the jurisdiction of the court to try the action upon its merits, by reason of want of jurisdiction of the justice court over the subject-matter of the action appearing upon the face of the record, such defendant is entitled to a judgment or order dismissing the action for want of jurisdiction to try it upon its merits. Ballerino v. Bigelow, 90 Cal. 500, 27 Pac. 372; Hoban v. Ryan, 130 Cal. 97, 62 Pac. 296; Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440; Poyser v. Murray, 6 Ind. 35; Darrell v. Biscoe, 94 Md. 684, 51 Atl. 410; Elder v. Dwight Co., 4 Gray (Mass.) 201; Berroth v. McElvain, 41 Kan. 269, 20 Pac. 850; Hope v. Hurt, 59 Miss. 174; Barnett v. Railroad Co., 68 Mo. 56, 30 Am. Rep. 773; Ball v. Biggam, 43 Kan. 327, 23 Pac. 565; Shea v. Regan, 29 Mont. 309, 74 Pac. 737; Southern Ry. Co. v. Born Steel Range Co., 122 Ga. 658, 50 S. E. 488; McHenry v. Mays, 110 Ga. 299, 34 S. E. 1010; Missoula E. L. Co. v. Morgan, 13 Mont. 397, 34 Pac. 488. We therefore pass to the consideration of the contention that the complaint upon its face shows that the justice court did not have jurisdiction of the action for the reason that plaintiff sued for a sum amounting to $300 and over, exclusive of interest.

[2] The complaint filed in the justice court consisted of a copy of a bill, as is allowed in such courts, made up of various debit items under various dates, amounting to the sum of $362.50. There next followed several credits under various dates aggregating $91.50. The complaint or copy of the bill then concludes with the following entries:

Nov. 21, 1905, balance	$271 00
Nov. 9, 1909, to 3 years 11⅔ mos. interest due on note at 10%	107 66

It is claimed by appellants that it thus appears from the face of the complaint that the item under date of November 9, 1909, of $107.66 was claimed as a principal sum, and not as interest upon the balance of $271 sued for. We cannot agree with this contention. The most that can be fairly claimed is that the complaint is uncertain or ambiguous. No attack, however, was made in the justice court on this ground or any other. It does not appear that it ever occurred to defendants until after the cause had been appealed to the superior court that plaintiff had sued for a sum, exclusive of interest, in excess of $300.

It may be noted that the sum of $107.66, claimed as interest under date November 9, 1909, is the correct amount of interest at 10 per cent. upon $271, the balance stated under date of November 21, 1905, for the period between said dates, which period amounts to 3 years 11⅔ months. The words "due on note" in the item as to the interest suggests the idea that the amount of the balance sued for as the principal sum was also evidenced by a note. Nevertheless, the complaint is fairly and most reasonably susceptible of the interpretation that the interest claimed was interest on the identical sum of $271, constituting the balance of the principal sum claimed. That such was the interpretation put upon the complaint by defendants is manifest from the fact that they did not attack the jurisdiction of the justice court or the sufficiency of the complaint in such court by demurrer or otherwise. The same interpretation was put upon the complaint by the justice of the peace as is evidenced by the entry in his docket as to the amount of the demand, which is "Demand $271.00 and interest." The same interpretation of the complaint was followed by the plaintiff in his affidavit for an attachment, in which he set forth that defendants were indebted to him in the sum of $271, "together with interest thereon from Nov. 21, 1905, at the rate of 10% per annum," etc.

[3] Where, as in this case, a pleading is perhaps ambiguous and uncertain, or susceptible of two interpretations as to its meaning, and all parties to the action apparently adopt and acquiesce in an interpretation that sustains the jurisdiction of the court as to the subject-matter of the action, the losing party in such court should not be allowed upon appeal for the first time to insist upon a different interpretation of the pleading—one that will oust the court of its jurisdiction. If the uncertainty in the complaint had been pointed out in the justice court, it could have been readily amended so as to have certainly corrected the defect and placed the question of jurisdiction beyond cavil.

[4] We are therefore of the opinion that the record shows that the sum claimed in plaintiff's complaint, exclusive of interest thereon, did not amount to $300, and the justice court therefore had original jurisdiction of the action, and the superior court had appellate jurisdiction thereof to try the same upon its merits.

It follows that this court has no jurisdiction of this appeal other than to order a dismissal thereof, and this appeal is accordingly dismissed.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 69)

PEOPLE v. EARL. (Cr. 220.)

(District Court of Appeal, Second District, California. May 16, 1912.)

1. STATUTES (§ 217*)—CONSTRUCTION—INTENT OF LEGISLATURE.

The function of the courts in construing statutes is to give effect to the intent of the lawmakers, which may be ascertained from the history of the legislation and concurrent statutes.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. § 217.*]

2. STATUTES (§ 181*) — CONSTRUCTION — EFFECT.

The fact that the enforcement of a statute according to its literal import will prohibit necessary and useful acts raises a presumption that it was not the intent of the Legislature to so operate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. § 181.*]

3. TELEGRAPHS AND TELEPHONES (§ 79*) — OFFENSE INCIDENT TO OPERATION.

Pen. Code, § 619, provides that every person who willfully discloses the contents of a telegraphic or telephonic message addressed to another person without permission, unless directed to so do by an order of court, is punishable by imprisonment. Section 620 provides that every person who willfully alters the meaning of a telegraphic or telephonic message is punishable as provided in the preceding section. Section 621 provides that every person not connected with any telegraph or telephone office, who, without the authority or consent of the addressee, opens any sealed message with the purpose of learning its contents, is guilty of an offense. *Held*, that the offense denounced by the first section was that of disclosure by persons engaged in the transmission of messages, and not by ordinary individuals, who, through an innocent means, learned of their contents.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.*]

4. INDICTMENT AND INFORMATION (§ 110*)—SUFFICIENCY—WORDS OF STATUTE.

While ordinarily an indictment in the words of a statute is sufficient, it is not sufficient if the statute does not fully express the facts necessary to a complete offense, so that an indictment under Pen. Code, § 619, denouncing the offense of disclosing the contents of a telegraphic or telephonic message, though in the words of the statute, is insufficient if failing to show that the accused was in some way connected with the company transmitting the message.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289–294; Dec. Dig. § 110.*]

5. CRIMINAL LAW (§ 304*) — JUDICIAL NOTICE.

The courts will not take judicial notice as to whether wireless is the only means of communicating with an island some distance from the coast line of the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 295½, 700–717; Dec. Dig. § 304.*]

6. TELEGRAPHS AND TELEPHONES (§ 79*) — OFFENSES INCIDENT TO OPERATION—INDICTMENT—CONSTRUCTION.

In a prosecution for an unauthorized disclosure of the contents of a telegraphic message, the bare allegation that the message was transmitted by the Union Wireless Telegraph Company is not an allegation of the means of transmission.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 22; Dec. Dig. § 79.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Edwin T. Earl was indicted for willfully disclosing the contents of a telegraphic message, and from an order sustaining a demurrer to the indictment the People appeal. Affirmed.

U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., J. D. Fredericks, Dist. Atty., and G. Ray Horton, and Arthur Keetch, Deputy Dist. Attys., for the People. T. E. Gibbon, Anderson & Anderson, Edwin A. Meserve, and Shirley C. Ward, for respondent.

JAMES, J. This is an appeal taken by the people from a judgment entered for defendant on a demurrer to an indictment.

Defendant was indicted under the provisions of section 619 of the Penal Code, which provides as follows: "Every person who willfully discloses the contents of a telegraphic or telephonic message, or any part thereof, addressed to another person, without the permission of such person, unless directed so to do by the lawful order of a court, is punishable by imprisonment in the state prison not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both fine and imprisonment."

The indictment charged that on the 31st day of July, 1911, in the county of Los Angeles, a telegraphic message was transmitted by the Union Wireless Telegraph Company by means of its telegraphic apparatus to one F. F. Peard, from the city of Los Angeles, at Avalon, Catalina Island, which said telegram was signed by one Fenner H. Webb. The indictment then proceeds to charge as follows: "That the said Edwin T. Earl did then and there willfully, unlawfully, and feloniously print, publish, and cause to be printed and published the contents of said message in a certain newspaper, to wit, the Los Angeles Tribune, and which said newspaper was then and there printed, published, circulated, and distributed in said county to one D. J. Johnson and to the subscribers of said newspaper and to divers other persons (too numerous to mention and to the grand jury unknown and for that reason not herein specifically named), and that he, the said Edwin T. Earl, did then and there and thereby willfully, unlawfully, and feloniously disclose the contents of said telegraphic message to the said D. J. Johnson and to the subscribers of said newspaper and to divers other persons (too numerous to mention and to the grand jury unknown and for that reason not herein specifically named), without first having obtained the permission of said F. F. Peard, sometimes called and known as F. S. Peard, so to do, and without having first been directed so to do by the lawful order of a court." The indictment did not set forth how or in what manner defendant obtained knowledge of the contents of the telegraphic message, nor that he was connected in any way with the transmitting company, or that he had any duty to perform with respect to the transmission of the message. In the demurrer of defendant interposed to the indictment, the ground was assigned that sufficient facts were not charged to show that a public offense had been committed. In reviewing the ruling of the trial judge upon that question, it becomes necessary to examine the provisions of the section quoted, and to determine whether under the facts alleged the defendant is made to appear to be such a person as is punishable as therein declared.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The function of the courts in construing statutes is not restricted to a view which shall give literal effect to every word and phrase appearing by the letter of the law. In that analysis reason must have its just proportion, and the intent of the lawmakers is to be ascertained by taking into account several considerations, as the history of the legislation upon the subject treated, and concurrent legislation affecting the same or closely kindred subjects.

[2] The fact that the enforcement of a statute according to its literal import will have the effect of prohibiting otherwise necessary and useful acts may also furnish an entirely sufficient reason for concluding that the intent of its framers was not that it should so operate. Our Supreme Court, in Ex parte Lorenzen, 128 Cal. 431, 61 Pac. 68, 50 L. R. A. 55, 79 Am. St. Rep. 47, has declared the rule thus: "But for the more substantial objection that the ordinance by its terms would oppress and lead to the conviction of persons guilty of no fraudulent act it is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times have sought for the essence and spirit of the law and decided in accordance with them, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope." As an illustration, the old Bologna law, which provided in literal terms for the punishment of a person who should let blood in the streets and which was held not to apply to a barber performing the office of a surgeon, is given, among others. This expression of Mr. Justice Field, used in U. S. v. Kirby, 7 Wall. 482, 19 L. Ed. 278, is also quoted: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the Legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

[3] With this preface we may proceed to examine the statute before us. Section 619 of the Penal Code, which we have quoted, is followed by two sections which deal with the same subject, and which provide as follows:

"Sec. 620. Every person who willfully alters the purport, effect, or meaning of a telegraphic or telephonic message to the injury of another, is punishable as provided in the preceding section.

"Sec. 621. Every person not connected with any telegraph or telephone office who, without the authority or consent of the person to whom the same may be directed, willfully opens any sealed envelope inclosing a telegraphic or telephonic message, addressed to another person, with the purpose of learning the contents of such message, or who fraudulently represents another person and thereby procures to be delivered to himself any telegraphic or telephonic message addressed to such other person, with the intent to use, destroy, or detain the same from the person entitled to receive such message, is punishable as provided in section six hundred and nineteen."

It will be noted that section 621 expressly provides that "every person not connected with any telegraph or telephone company" who, without authority in the way and for the purpose described, opens a telephonic or telegraphic message, is made punishable. It may be noted, also, that by this last section it is not made a crime for such a person to divulge the contents of a message so unlawfully opened. His offense consists in opening for the purpose of learning the contents of a telephonic or telegraphic message. If section 619 is to be given the effect which its language literally imports, then the sender of the message who discloses its contents, either before or after sending, and every person to whom he so discloses it, might in turn be guilty and subject to punishment by fine or imprisonment, or both. Taking the three sections to which we have referred alone, and considering the sense of the expressions used by the Legislature there in context, it appears very clear to us that the intent was, by the enactment of section 619, to preserve secrecy as to telegraphic messages only among all those who have a duty to perform with respect to the dispatch, transmission, or delivery thereof. Any other interpretation placed upon the provisions of that section would cause it to embrace every person who might obtain knowledge of the contents of any message, no matter how such contents might have been learned, or through however so many persons such information may have been communicated, as well as to include the sender of the message and the persons whom he might have informed of the contents of the message. To so hold, in our opinion, would be to give to the statute an unreasonable and absurd meaning. The history of the legislation upon the subject, as well as other sections of the Code, which we need not further refer to, support the view we have taken in our construction of the statute.

[4] Having reached the conclusion just expressed, we have then to examine the indictment to ascertain whether sufficient is there stated to constitute a good charge against the defendant. On this proposition it is urged on behalf of appellant that the charge is framed in the language of the statute, and that such form of pleading is sufficient under our practice. It is true that there are many decisions holding that a pleading in the language of the statute will be treated as a sufficient statement of the offense intended to be charged, but it is also true that to this holding there are exceptions. If the statute does not express fully the facts necessary to constitute a complete offense, then and in that case it will not be sufficient to frame the charge in the terms of the statute. We quote, as pertinent to this point from People v. Ammerman, 118 Cal. 23, 50 Pac. 15, where the writer of the decision says: "I do not understand that our court intends to hold that, where a fact must be stated in an information in order to charge an offense, it may be omitted from the information where the statute is silent as to that fact." We quote again from People v. Eppinger, 105 Cal. 36, 38 Pac. 538: "An indictment or information must contain matter which shows on its face that a crime has been committed by the accused. If the matters charged in the indictment or information are as consistent with the innocence of the accused as with his guilt, the presumption of his innocence will overcome the accusation of guilt, and the accused is not to be subjected to a trial of the charge." Again, it is stated in People v. Neil, 91 Cal. 465, 27 Pac. 760: "The information, as we have before stated, charges the offense in the language of the Code, and it is well settled under our system of pleading in criminal cases that this will generally be held to be sufficient; but, where the particular circumstances of the offense are necessary to constitute a complete offense, they should be stated and averred, and a failure to do so will vitiate the information or indictment." See, also, People v. McKenna, 81 Cal. 158, 22 Pac. 488; People v. Terrill, 127 Cal. 99, 59 Pac. 836; People v. Perales, 141 Cal. 581, 75 Pac. 170. In our opinion the demurrer to the indictment in this case was properly sustained.

[5] Some attention is given in the briefs to the subject of wireless telegraphy, and the question is argued as to whether any of the statutes found in the Penal Code touching the matter of transmission of telegraphic or telephonic messages are applicable to the operation of the wireless telegraph. We do not think that that question is properly in this case at all. It is not disclosed by the indictment that the message was a wireless message, and we are not of opinion that judicial notice can be taken of the fact, if it be a fact, that the only method of telegraphic communication between Catalina Island and the mainland is that afforded by the wireless system.

[6] The mere allegation that the message was transmitted by the Union Wireless Telegraph Company is not a statement of the means of transmission. For aught that appears, this company may have used or employed other than a wireless system as the means of transmission. While we are of the opinion that those statutes apply to every method of telegraphic communication, any extended discussion upon that subject, for the reason we have stated, would constitute dicta merely.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 79

BATES v. FERRIER. (Civ. 946.)

(District Court of Appeal, First District, California. May 17, 1912.)

1. JUSTICES OF THE PEACE (§ 36*)—JURISDICTION—ACTIONS INVOLVING LAND TITLE.

An action to recover a deposit made under a contract to purchase land, based on claimed invalidity of the vendor's title, is an action involving title to land of which the superior court, and not the justice court, has original jurisdiction, under Const. art. 6, § 5.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 83–97; Dec. Dig. § 36.*]

2. JUSTICES OF THE PEACE (§ 141*)—APPEAL—JURISDICTION.

Under Const. art. 6, § 5, which gives the superior court original jurisdiction of actions involving title to land, that court does not acquire jurisdiction to try such an action on its merits on an appeal from a justice court, though the appeal be "upon questions of both law and fact."

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467–476; Dec. Dig. § 141.*]

3. JUSTICES OF THE PEACE (§ 141*)—JURISDICTION—OBJECTIONS.

Where want of jurisdiction of a justice court appears upon the record on appeal from such court, objection to the appellate court's jurisdiction should be sustained, if seasonably made.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 467–476; Dec. Dig. § 141.*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by C. R. Bates against Francis Ferrier. Judgment for plaintiff, and defendant appeals. Reversed, with directions to dismiss.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

J. Rollin Fitch, for appellant. Gibson, Woolner & Conklin, for respondent.

HALL, J. This is an appeal from a judgment for plaintiff for the sum of $233.80, and was taken according to the method prescribed by sections 941a and 941b of the Code of Civil Procedure.

The action was originally brought in the justice's court of the town of Berkeley, and by it the plaintiff, as appears from his complaint, sought to recover the sum of $200, and interest thereon, paid by him to defendant as a deposit on the purchase of a lot of land, under an agreement that the same should be repaid to plaintiff if the title to the land proved to be invalid. It is alleged in the complaint that the title to the land was not good and valid, in that the title of defendant thereto is burdened with certain building restrictions, which are set forth in the complaint. Defendant demurred to the complaint upon the grounds that the justice's court had no jurisdiction over the subject-matter of the action, and that the complaint did not state a cause of action. This demurrer was overruled, and defendant filed an answer and cross-complaint. In his answer defendant admitted that the land was subject to the building restrictions as alleged in the complaint, but that plaintiff at the time of entering into the contract in writing to purchase said land did orally waive said restrictions as constituting a cloud upon the title to said land, and further denied that said title to said property was not good or valid by reason of said building restrictions or otherwise. By his cross-complaint defendant sought to recover of plaintiff $200 as damages for plaintiff's refusal to complete the purchase of the land. The pleadings were not verified. The trial before the justice of the peace resulted in a judgment for plaintiff for the amount sued for, and that defendant take nothing by reason of his cross-complaint. From this judgment defendant in due time took an appeal to the superior court "on questions of both law and fact."

Upon the calling of the action for trial in the superior court, defendant by his counsel gave notice that he appeared specially at the trial of said action, and objected to the court hearing or determining the action upon its merits, and moved the court to remand the cause to the justice's court with directions to sustain defendant's demurrer to the complaint without leave to amend. The objection and motion were made upon the grounds that the justice's court had no jurisdiction of the action, and that, therefore, the superior court acquired no appellate jurisdiction over the subject-matter of the action, and had no original jurisdiction over the person of the defendant. The objections and motion of defendant were denied, and exception taken by defendant, and the court proceeded to try the action upon its merits, and made findings and rendered judgment for plaintiff.

It is now contended that the judgment of the superior court must be reversed for want of jurisdiction to try the action upon its merits.

[1] As preliminary to a consideration of the question as to the jurisdiction of the superior court to try the action upon its merits, counsel on both sides have devoted considerable space in their briefs to a discussion of the question as to whether or not the action involved any question of title to real estate. Where, as in this case, the plaintiff founds his right of action upon an allegation that title to land agreed to be purchased by him is invalid, and according to his own pleadings seeks the return of a purchase deposit upon the ground of such invalidity, it is certain that title to land is necessarily involved in the action (Holman v. Taylor, 31 Cal. 338; Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Boyd v. Southern Cal. Ry. Co., 126 Cal. 572, 58 Pac. 1046; Hart v. Carnall-Hopkins Co., 103 Cal. 133, 37 Pac. 196; Dungan v. Clark, 159 Cal. 30, 112 Pac. 718), in which case, of course, original jurisdiction of the subject-matter of the action is in the superior court and not in the justice court (article 6, § 5, Const. Cal.). Copertini v. Oppermann, supra, was an action to recover a purchase deposit of $200. The right to recover was founded, as in this action, upon the alleged defective title to the land, but the action was brought in the superior court. The jurisdiction of the superior court was attacked by demurrer to the complaint, and it was held that such court had original jurisdiction of the action. The case is decisive of the question of the original jurisdiction of an action such as is set forth in the complaint in the case at bar being in the superior court and not in the justice court.

[2] Respondent insists, however, that, even if the cause of action set forth in the complaint was not within the jurisdiction of the justice court, the superior court obtained jurisdiction to try the action upon its merits, because the defendant appealed to said court upon both questions of law and fact. In support of this contention, respondent cites a number of cases in which the right of the superior court to try a case, upon the merits, appealed to it, upon questions of law and fact, from a justice court which had no jurisdiction of the subject-matter of the action, has been sustained. The only ones that are at all pertinent are City of Santa Barbara v. Eldred, 95 Cal. 381, 30 Pac. 562; Hart v. Carnall-Hopkins Co., 101 Cal. 160, 35 Pac. 633; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 Pac. 196; De Jarnatt v. Marquez, 132 Cal. 701, 64 Pac.

1090; Armantage v. Superior Court, 1 Cal. App. 130, 81 Pac. 1033; Van Dyke v. Rule, 49 Ohio St. 530, 31 N. E. 882, and Birks v. Houston, 63 Ill. 77, and cases cited therein.

In Armantage v. Superior Court it was not claimed that the justice court did not have jurisdiction of the subject-matter of the action, and the case is not therefore in point upon the question in the case at bar. In none of the other cases cited did the appellant make any objection to the superior court trying the cause upon its merits, or in any way raise the question as to its jurisdiction so to do until after judgment in such court, except in the case of Hart v. Carnall-Hopkins Co., and in that case it did not appear from the record transmitted upon appeal to the superior court from the justice court that any question of possession or title to real property arose or was presented in the justice court, but for aught that the record showed such issue first arose upon the trial in the superior court, all of which is clearly pointed out in the opinion in the case reported in 103 Cal. 140, 141, 37 Pac. 196. In each of the other cases cited it is pointed out that the case was tried in the superior court upon its merits without objection by the appellant, and stress is laid upon such fact.

[3] Upon the other hand, the authorities are abundant, and, we believe, substantially uniform to the effect that, where the want of jurisdiction of the justice court appears upon the record transmitted from such court to the appellate court, an objection made by the appellant to the appellate court trying the case upon the merits is good if seasonably made. The following are but a few of such authorities: Poyser v. Murray, 6 Ind. 35; Darrell v. Biscoe, 94 Md. 684, 51 Atl. 410; Elder v. Dwight Co., 4 Gray (Mass.) 201; Berroth v. McElvain, 41 Kan. 269, 20 Pac. 850; Hope v. Hurt, 59 Miss. 174; Barnett v. Railroad Co., 68 Mo. 56, 65, 30 Am. Rep. 773; Ball v. Biggam, 43 Kan. 327, 23 Pac. 565; Shea v. Regan, 29 Mont. 309, 74 Pac. 737; Southern Ry. Co. v. Born Steel Range Co., 122 Ga. 658, 50 S. E. 488; McHenry v. Mays, 110 Ga. 299, 34 S. E. 1010; Missoula E. L. Co. v. Morgan, 13 Mont. 397, 34 Pac. 488. In Ballerino v. Bigelow, 90 Cal. 500, 27 Pac. 372, the complaint set forth a cause of action not within the jurisdiction of the justice court, and defendant appealed to the superior court upon questions of law and fact, where a trial de novo was had, resulting in judgment for plaintiff. The Supreme Court reversed the judgment and ordered "cause dismissed in the lower court for want of jurisdiction." The same course was pursued in Hoban v. Ryan, 130 Cal. 97, 62 Pac. 296, upon the authority of Ballerino v. Bigelow, supra, the complaint showing a want of jurisdiction in the justice court, which was raised by demurrer filed in the superior court. In the still later case of Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440, the justice court had no jurisdiction, but "the cause was appealed to, and heard de novo in, the superior court without objection to the jurisdiction." The court said: "The judgment cannot now be questioned. De Jarnatt v. Marquez, 132 Cal. 700 [64 Pac. 1090]. In Hoban v. Ryan, 130 Cal. 96 [62 Pac. 296], relied on by appellants, there was a demurrer filed and urged in the superior court on the ground of want of jurisdiction. Had defendants in the present case done likewise Hoban v. Ryan would apply."

In the case at bar the defendant substantially did all that the defendant did in Hoban v. Ryan, and more, for he not only urged in an appropriate way before the superior court its want of jurisdiction because of the want of jurisdiction in the justice court, but he had raised the same question by his demurrer, filed in the justice court, to the complaint, and upon the superior court overruling his objection declined to put in evidence as to the facts (a matter which we have not heretofore mentioned). The rule laid down in Hoban v. Ryan should therefore control, and the superior court, when objection was made to its jurisdiction to try the cause, should have sustained such objection and dismissed the cause for want of jurisdiction. See, also, to the same effect, Null v. Superior Court, 4 Cal. App. 207, 87 Pac. 392, and Shealor v. Sup. Ct., 70 Cal. 564, 11 Pac. 653.

The judgment is reversed, and the superior court is directed to dismiss the action for want of jurisdiction.

We concur: LENNON, P. J.; KERRIGAN, J.

163 Cal. 272

HARDY v. SCHIRMER. (L. A. 2,880.)

(Supreme Court of California. July 3, 1912.)

1. APPEAL AND ERROR (§ 499*)—RULINGS ON EVIDENCE — RECORD — GROUNDS OF OBJECTION.

An objection to the admission of evidence cannot be reviewed, where the record does not show the grounds of the objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295–2299; Dec. Dig. § 499.*]

2. TRIAL (§ 118*)— ARGUMENT OF COUNSEL.

Where, in an action for assault, it appeared that defendant struck plaintiff with a hammer and inflicted serious injury, and on the trial claimed he acted in self-defense, a statement by plaintiff's attorney that defendant had a powerful motive for stating that he struck in self-defense, because if he admitted that his act was not justified or in self-defense he would be liable to be prosecuted for a felony, which would be a penitentiary offense, was proper argument, and not objectionable as charging that defendant was in fact guilty of a felony.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 290–293; Dec. Dig. § 118.*]

3. ASSAULT AND BATTERY (§ 40*)—EXCESSIVENESS—PERSONAL INJURIES—ASSAULT.

Defendant assaulted plaintiff by striking him twice with a hammer. Plaintiff's physician testified that his skull was fractured, and that other very severe injuries had been sustained. At the time of the trial, plaintiff, as the result of defendant's blows, was suffering from dizzy spells, which might affect him for a long period. *Held*, that a verdict for plaintiff for $1,900 was not excessive.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.*]

4. ASSAULT AND BATTERY (§ 35*)—EVIDENCE.

In an action for assault, evidence *held* to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 51; Dec. Dig. § 35.*]

5. TRIAL (§ 203*)—INSTRUCTIONS—BURDEN OF PROOF—MATTERS ADMITTED.

Where defendant's answer admitted that he struck plaintiff as alleged, there was no necessity for giving, at defendant's request, a charge that before plaintiff could recover it was necessary for him to prove by a preponderance of the evidence all the material allegations of the complaint, that the defendant without any cause whatever, assaulted plaintiff and injured him by beating him.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 477–479; Dec. Dig. § 203.*]

6. ASSAULT AND BATTERY (§ 26*)—BURDEN OF PROOF—SELF-DEFENSE.

Where defendant admitted striking plaintiff and pleaded self-defense, the burden was on defendant to establish such defense; there being no presumption that bodily injury is justified or justifiable.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 36; Dec. Dig. § 26.*]

7. TRIAL (§ 255*)—INSTRUCTIONS—DUTY TO REQUEST.

It was not error for the court to omit to charge as to what constituted a preponderance of the evidence, in the absence of a request therefor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627–641; Dec. Dig. § 255.*]

8. APPEAL AND ERROR (§ 216*) — OBJECTIONS NOT RAISED AT TRIAL.

Defendant cannot take advantage of the court's failure to give an instruction, defining a preponderance of the evidence, for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216.*]

9. APPEAL AND ERROR (§ 1066*) — HARMLESS ERROR — INSTRUCTIONS — APPLICABILITY TO CASE.

In an action for assault and battery, an instruction practically in the language of Civ. Code, § 3294, that the jury might give exemplary damages if defendant was "guilty of oppression, fraud, or malice," was not substantial error, as inapplicable to the evidence, since it was abstract, in so far as the word "fraud" was concerned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by B. W. Hardy against R. I. Schirmer. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Herald and W. W. Wideman, for appellant. W. J. Wood and Frank Karr (Charles Lantz, of counsel), for respondent.

MELVIN, J. This was an action brought by plaintiff for damages for personal injuries. Originally the wife of defendant was made a party to the action; but at the close of the testimony for the plaintiff the court granted defendant's motion for nonsuit as to her. The jury rendered a verdict for plaintiff in the sum of $1,900, and from the judgment entered thereon, as well as the order denying defendant's motion for a new trial, this appeal is taken.

The trouble resulting in the injuries to plaintiff occurred in a lodging house owned by defendant, who had just served on plaintiff's brother a notice to pay rent, or to vacate the premises within three days. After service of the notice, defendant went downstairs, secured a hammer, and, returning, was about to tack up in the hallway some cards containing the rules of the apartment house. Before this, however, he had some words with plaintiff's brother, who was in the kitchen, and the latter shut the door between the kitchen and the hall. At that moment, according to plaintiff's testimony, defendant applied a vile name to plaintiff's brother; whereupon plaintiff said: "There are others in the house." At that, as he testified, defendant turned and struck him with the hammer. He called for help; his brother and the latter's wife came to his assistance, and finally defendant was disarmed, but not until he had again struck plaintiff with the hammer. Defendant's account of the affair differed greatly from that given by plaintiff. He testified that both brothers set upon him, and that he only struck in self-defense.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Defendant assigns as error the ruling of the court, whereby C. S. Hardy was permitted to testify regarding a conversation had with defendant's wife two or three weeks before the assault. According to C. S. Hardy's statement, Mr. Schirmer had called witness downstairs to the apartments occupied by defendant and his wife, and in her presence had asked Hardy if he knew who had caused his (Schirmer's) arrest for maintaining a cesspool. Then Mrs. Schirmer had said: "We are going to find out who had us arrested, and we will have revenge, if it takes 10 years." This was followed by further testimony that defendant subsequently expressed a strong belief that plaintiff had caused his arrest. The ruling admitting this testimony cannot be disturbed, because the record before us does not show the grounds for defendant's objection to its introduction. The record merely reveals the fact that objection was made to the admission of the testimony, and was by the court overruled. In the absence of specification of the grounds of objection, we cannot say that the ruling was injurious. Hughes v. Wheeler, 76 Cal. 234, 18 Pac. 386; Frank v. Pennie, 117 Cal. 256, 49 Pac. 208.

[2] Appellant also assigns as error the conduct of the court in failing to instruct the jury to disregard certain remarks made by plaintiff's attorney. But the remarks of which complaint was made were not improper. There was a sharp conflict of testimony, and it became important to know who was telling the truth. In his argument to the jury, Mr. Karr said: "This defendant has a powerful motive for stating that he struck the plaintiff in self-defense; for if he should admit that he struck the plaintiff with a hammer, and it was not justified, or in self-defense, he would be liable to be prosecuted for a felony, and it would be a penitentiary offense." This was not a declaration (as defendant insists it was), that Schirmer was actually guilty of a felony. It was a statement—and a correct one—of facts that might make one guilty of a felony; but it did not, by any means, amount to a declaration that defendant was a felon. There was no error in refusing to strike out the language of the attorney for plaintiff.

Nor was there any error in permitting the reading to the jury, before their retirement, of a portion of the testimony of plaintiff. No objection was made to the re-reading of this testimony, and it is too late to specify error here for the first time.

[3] The damages allowed were not excessive. Plaintiff's physician testified that his patient's skull was fractured, and that other very severe injuries had been inflicted upon plaintiff. At the time of the trial, plaintiff, as a result of defendant's blows, was suffering from dizzy spells, which might afflict him for a long time. Under these circumstances, we cannot say that the amount awarded by way of damages was unreasonable.

[4] The verdict is sustained by the evidence. The jurors doubtless believed the testimony of plaintiff; and that testimony certainly showed a wanton and vengeful attack upon plaintiff.

[5-8] Appellant complains because the judge failed to instruct the jury, at appellant's request, as follows: "Before the plaintiff can recover, it is necessary for him to prove by a preponderance of the evidence all of the material allegations contained in his complaint, that the defendant, without any cause whatever, assaulted plaintiff and injured him by beating him." There was no reason for the giving of such an instruction in this case, because the defendant, by his answer, admitted striking plaintiff. The injury having been admitted, and the special defense of self-defense having been interposed, it became necessary for defendant to establish such defense by a preponderance of the evidence. There is no presumption that bodily injury is justified or justifiable. He who asserts the justification must prove it by a preponderance of evidence. Marriott v. Williams, 152 Cal. 710, 93 Pac. 875, 125 Am. St. Rep. 87. Appellant also complains that there was no instruction as to what constituted a preponderance of evidence. If such an instruction had been desired by defendant, it should have been presented to the court; but the record does not show that such a course was followed. Appellant cannot here, for the first time, take advantage of the court's failure to give such an instruction. People v. Northey, 77 Cal. 632, 19 Pac. 865, 20 Pac. 129.

[9] The court instructed the jurors practically in the language of the Civil Code (section 3294) that they might give exemplary damages if defendant was guilty of "oppression, fraud, or malice." It is argued that, as no fraud was shown, the instruction was not applicable. We do not see, however, how appellant was injured by this ruling. The leaving of the word "fraud" in the instruction did not constitute material error. An instruction upon a mere abstract proposition of law, not entirely applicable to the circumstances of the particular case, will not warrant reversal, where it is apparent that no injury resulted to the appellant therefrom. People v. Romero, 143 Cal. 459, 77 Pac. 163. The issues in this case were so simple that we cannot see how any juror could have harbored the idea that possible fraud was an element to be considered. No other alleged errors require notice.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

163 Cal. 160

DAHLER v. ALL PERSONS, etc. (S. F. 5,622.)

(Supreme Court of California. June 22, 1912.)

1. Evidence (§ 183*)—Secondary Evidence—Abstract of Title—Execution of Deed.

Code Civ. Proc. § 1951, authorizing admission in evidence of the original record of an instrument affecting land, or a certified copy of such record, does not permit admission of an abstract of title to show execution of a deed, where the original record is destroyed, without proof of loss or destruction of or inability to produce the original deed.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 605–637; Dec. Dig. § 183.*]

2. Evidence (§ 183*)—Secondary Evidence—Execution of Deed.

Testimony is inadmissible to show the contents of a deed without proof of loss or destruction of the original.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 183.*]

3. Evidence (§ 343*)—Secondary Evidence—Execution of Deed.

Under the direct provisions of Code Civ. Proc. § 1855a, an abstract of title is not admissible to show execution of a deed on destruction of the public records, unless issued in the ordinary course of business before such destruction.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 343.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Isabella Dahler against all persons claiming any interest in or lien upon certain land. Judgment for plaintiff, and Carrie E. Bridge and others appeal. Affirmed.

Thos. E. Haven, for appellants. Alfred B. Weiler and Albert B. Harris, for respondent.

SLOSS, J. A hearing in bank was ordered after judgment of affirmance in department. After further consideration, we are entirely satisfied of the correctness of the views expressed by the department, and adopt the opinion of Henshaw, J., reading in substance as follows:

"This is an action to quiet title under the provisions of the McEnerney act. Plaintiff claimed title through her husband, who, in turn, deraigned title from the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company. Appellants' contention in effect is that Henry M. G. Dahler, husband of plaintiff, had reconveyed the land in controversy to the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company, and that, by mesne conveyance from the latter, title to this property vested in appellant Carrie E. Bridge. Henry M. G. Dahler testified that he had never made any deed of this property to the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company. The point in controversy was whether in fact such a deed had been made by him subsequent to his taking the deed from the corporation and prior to the conveyance by him to his wife. Appellants sought to show by the record that such conveyance had been made, and it was conceded that, if the evidence offered by the appellants to this end were admissible, it would show that the record title to the property stood in appellants.

"To this end appellants showed that there was preserved from the conflagration of April 18, 1906, a general index book, an official record of the recorder's office, showing a deed from H. M. G. Dahler and wife to the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company of October 26, 1894. The index, however, did not contain any description of the property affected by the deed. Harry Strehl was then called and testified that he was a searcher of records; that each day's duty was to abreviate the documents recorded in the recorder's office and to furnish this breviate to Mr. Edwards, publisher of a paper known as 'Edwards Abstracts from Records'; and that he did so furnish correct breviates to Edwards for the latter's publication. He did not know whether the publications were or were not correct copies of the notes which he furnished, but did know that his notes or breviates were correct. Mr. Edwards, in turn, secretary and manager of the Edwards Publishing Company, testified to the reception of these breviates from Mr. Strehl and the publication of them by this company; that he read the proof in each instance, and saw that the publication was a correct reproduction of the notes furnished by Mr. Strehl. He was then asked, referring to his publication, 'whether or not on October 25, 1894, a deed was recorded in the office of the recorder of the city and county of San Francisco from H. M. G. Dahler and his wife to the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company.' Objection was made and overruled, and the witness answered, 'Yes.' Other questions to the same purport were asked and the answers admitted over objection.

"H. P. Platt testified that he was the cashier of the California Title Insurance & Trust Company, which company had been in the business of examining titles, preparing abstracts, and issuing title insurance since 1884; that he was familiar with the records kept by that company; and that such company had an abstract which was prepared before the fire of April, 1906, showing the condition of the record title of the property in dispute as it existed on April 18, 1906. This abstract was offered in evidence; the court examining the witness in detail as to the character of the abstract and the method of its preparation. Portions of this abstract were then read, showing the record of the deeds from Dahler and wife to the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company covering the property involved in the action. Subsequently the court struck out the testimony of Edwards and Platt and refused recognition of the abstracts as not being such as are contemplated by section 1855a of the Code of Civil Procedure, and gave judgment for plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"A preliminary objection interposed and insisted upon by respondent to the introduction of much of this evidence was that it was absolutely inadmissible without proof of the loss or destruction of or inability to produce the original deeds, and that no such proof was made or offered to be made; respondent contending that, if such deeds ever had existence, they were forgeries. Appellants argue that they were entitled to introduce this evidence without proof of the loss or destruction of the original instruments, basing their argument upon the provisions of section 1951 of the Code of Civil Procedure. That section declares in effect, (1) that every instrument affecting real property, duly acknowledged, may be read in evidence without further proof; (2) that the original record of such conveyance or instrument thus acknowledged may be so read in evidence without further proof; and (3) that a certified copy of the record of such conveyance or instrument may be so read in evidence with the like effect as the original instrument without further proof. The argument based upon this is that the Code recognizes three classes of evidence, each as primary, and each therefore as being entitled to consideration without proof of anything further in the background upon which it must lean for support. And, following the argument through its next step, as you may prove by secondary evidence the contents of a lost or destroyed instrument, because the instrument itself is the primary evidence, so, when the law has declared these three things to be primary evidence, you may prove the contents of any one of them by secondary evidence upon proof of the loss or destruction of the primary evidence; that, the recorded deeds being thus primary evidence of the second class above enumerated, one may make secondary proof of the contents of such an instrument after proof that the original record was destroyed, and that this proof was here made. This, we think, however, is carrying the language to an extreme that was never intended, for the same argument would make admissible secondary proof of the contents of a certified copy upon proof of the destruction of that certified copy, notwithstanding that the original instrument or the recorded instrument might still be in existence. The rule of section 1951 is itself a modification of the general rules of evidence requiring proof of loss or destruction or inability to produce.

[1] "It will not be unduly extended, and that the extension here claimed would be undue we think is manifest. As was said in Gloss v. Cessna, 207 Ill. 69, 69 N. E. 634: 'There was no evidence that the original deeds which appeared in the alleged abstract were lost or destroyed. * * * The act for registering title may be of a progressive nature, but not to the extent of abrogating the rules of evidence and permitting the introduction of abstracts without proper foundation being laid.' "

[2] It was proper to strike out the testimony of Edwards touching the making and existence of the deed from Dahler and wife to the Market & Stanyan Streets & Golden Gate Park Land & Improvement Company. Without regard to the validity of other objections interposed, this testimony was properly excluded on the ground that it purported to give the contents of deeds without proof of the loss or destruction of the originals.

"Platt's testimony and the abstracts which accompanied it were offered as evidence in conformity with section 1855a of the Code of Civil Procedure.

[3] "The purpose of section 1855a is to enable a person to prove the contents of a lost or destroyed document and to deraign his title to land through the secondary evidence afforded by certain transcripts or abstracts from the original recorded documents after proof made of the destruction of such documents. The abstracts of the California Title Insurance & Trust Company were compiled from the public records from day to day, and, since a part of the business of the company was the insurance of titles, it may be taken for granted that its compilations were made with the utmost exactitude and care. The presentation of such an abstract so made, before the calamity and showing the condition of any title at the time of the calamity, is secondary evidence of the highest dignity and character. The Legislature might well have made provision for its general admission to supply the hiatus caused by lost or destroyed records. It could well have done this without preliminary proof from the authors of the abstracts and breviates that they were correct transcriptions. It might well have permitted the introduction in evidence of an abstract made from such abstract after the calamity, and certified to after the calamity as being correct. These modifications of the general rules of evidence to meet the exigencies presented by such a disaster would not be regarded as unreasonable, but the Legislature has not seen fit to do this thing. It has made a much narrower departure from the general rules of evidence. In effect, it has declared that such an abstract only, if made, certified to, and issued before the destruction, shall be received in evidence without further proof than that it was prepared and made in the ordinary course of business prior to such loss or destruction. The abstracts here presented, we repeat, are of equal dignity with those which this section permits to be used in evidence, and, if anything, they are of even higher quality since they represent the

originals from which the abstract which is certified and issued to the client is prepared. They are thus one step nearer to the original documents themselves. But nevertheless the Legislature has seen fit to limit the introduction of such evidence only to abstracts certified to and issued in the ordinary course of business prior to the loss or destruction, and it is not for this court to extend the rule. Thus, not measuring up to the requirements of section 1855a, the court was right in excluding from consideration the evidence of Platt and of the abstracts, since first there was no proof of the loss or destruction or inability to produce the original documents which would justify the introduction of secondary evidence as to their contents, and, second, there was no evidence from the makers of the abstracts showing the correctness of their transcripts as the foundation for the admission of secondary evidence of their contents.

"Plaintiff showed sufficient possession of the property through her grantors. Botsford v. Eyraud, 148 Cal. 431 [83 Pac. 1008]."

It is suggested by the appellants that, since the filing of the opinion in department, section 1855a has been amended (Stats. Extra Session 1911, p. 64) in such manner as to authorize the introduction in evidence of the abstracts offered. Whether or not a judgment should be reversed for the exclusion of evidence which was inadmissible under the law in force at the time of trial is a question that need not be decided here, for the reason that the appellants would not be helped by a resort to the section as amended, assuming it to be applicable. The section in its present form provides that "no proof of the loss of the original document or instrument shall be required other than the fact that the same is not known to the party desiring to prove its contents to be in existence." This, in effect, requires the party undertaking, under section 1855a, to show the contents of an instrument by means of an abstract, to prove that he does not know of the existence of the original instrument. No such proof was offered here.

The order denying appellants' motion for a new trial is affirmed.

We concur: ANGELLOTTI, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

163 Cal. 813

DOWNING et al. v. McGRATH et al. (S. F. 5,457, 5,450, 5,455, 5,456, and 5,458.)

(Supreme Court of California. June 25, 1912. Rehearing Denied July 24, 1912.)

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Buck, Judge.

Action by one Downing and others, action by one Schoder and others, action by one Giffard, action by one Schaubel, and action by one Edwards, against one McGrath and others. On appeal. Reversed and remanded.

Norman H. Hurd and A. A. Sanderson, for appellants. William J. Herrin and W. S. Downing, for respondents.

PER CURIAM. These cases, one and all, present the same proposition decided in Dahler v. All Persons, S. F. No. 5,622, 124 Pac. 995, filed June 22, 1912. The so-called abstract of title and certificate thereto of date February 24, 1908, were improperly admitted for the reasons given in the Dahler Case.

Wherefore, in each of the above-entitled cases, the judgment and order refusing a new trial are reversed and the cause remanded.

163 Cal. 20

KNOCH et al. v. HAIZLIP et al. (L. A. 2,858.)

(Supreme Court of California. June 7, 1912.)

1. APPEAL AND ERROR (§ 612*) — RECORD — CERTIFICATION.

The new method of preparing records on appeal provided by Code Civ. Proc. §§ 953a, 953b, 953c, does not require or authorize the judge to certify to the correctness of any papers except such as form part of the transcript designed to take the place of a bill of exceptions, and hence a record is insufficient on appeal from the judgment, where the judgment roll and notice of appeal, which papers under the old method would not properly be part of the bill of exceptions, were not certified to by the clerk or the attorney, as provided by Code Civ. Proc. § 953.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694–2701; Dec. Dig. § 612.*]

2. APPEAL AND ERROR (§ 598*) — RECORD — TRANSCRIPT—ORIGINAL OR COPIES.

Originals of the judgment roll and notice of appeal should remain on file in the office of the clerk of the superior court, and not be sent up to the reviewing court; but, where a transcript of the testimony, certified by the judge, is used in place of a bill of exceptions, the original and not a copy should be sent up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2639–2644; Dec. Dig. § 598.*]

3. APPEAL AND ERROR (§ 616*)—RECORD—REVIEW.

Where all papers necessary to a consideration of an appeal from an order denying a new trial are contained in the transcript and certified to by the judge, the record, though not certified to by the clerk, is sufficient to authorize a determination on its merits of the appeal from such order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2714–2718; Dec. Dig. § 616.*]

Department 1. Appeal from Superior Court, Los Angeles County.

Action by Ulrich Knoch and another against John Haizlip and others. From judgment for defendants and order denying new trial, plaintiffs appeal. Leave given to present a proper record.

See, also, 124 Pac. 998.

Edward Judson Brown, for appellants. Hester, Merrill & Craig and Jones & Weller, for respondents.

PER CURIAM. Appeals by plaintiffs from the judgment and from an order denying their motion for a new trial were submitted for decision on April 18, 1912. The respondents in their brief ask that the appeals be dismissed for failure of the appellants to "furnish the requisite papers." Code Civ. Proc. § 954.

[1] There is on file a record, made up in compliance, or attempted compliance, with the new method provided by sections 953a, 953b, and 953c of the Code of Civil Procedure. It contains copies of the pleadings, the findings of fact and conclusions of law, the judgment, the notice of intention to move for a new trial, the order denying said motion, the notice of appeal from the judgment and order, as well as a transcript of the testimony taken at the trial, with copies of the exhibits. All of these papers are bound together in a single volume of typewritten matter, and are certified to be correct by the judge of the court below. There is no certification by the clerk.

The new method of preparing records on appeal does not require or authorize the judge to certify to the correctness of any papers except such as form part of a transcript designed to take the place of a bill of exceptions. Christensen Lumber Co. v. Seawell, 157 Cal. 405, 108 Pac. 276. It would seem to follow that papers which under the old method would not properly be a part of such bill are still to be certified by the clerk or the attorneys, as provided by section 953.

[2] Such papers include, on an appeal from the judgment, the judgment roll and the notice of appeal. Section 950. With respect to these papers, the main effect of the new method seems to be to permit the use of typewritten, instead of printed, copies. Section 953c. We fully agree with the view expressed by the District Court of Appeal in Waterbury v. Temescal Water Co., 11 Cal. App. 632, 105 Pac. 940, that the originals of this class of papers should remain on file in the office of the clerk of the superior court, and not be sent up to the reviewing court.

[3] Different considerations apply to the transcript of testimony, etc., prepared in lieu of a bill of exceptions, and certified by the judge. The statute evidently contemplates that the original, rather than a copy, of such transcript, should be transmitted to the court in which the appeal is to be heard, and the only certification required is that of the judge. Where the order appealed from is not included in a judgment roll (as, for example, an order granting or denying a motion for new trial), the parties may have inserted in the transcript any of the pleadings, papers, records, and files in the cause and the same when so incorporated shall be "deemed fully authentic for use on said appeal." Inasmuch as the appellants have had inserted in the transcript all the papers necessary to a consideration of their appeal from the order denying a new trial, the record filed authorizes a determination of this appeal on the merits.

There is, however, no sufficient record on the appeal from the judgment. Many of the points raised by appellants are not available on an appeal from the order, but may be considered on the appeal from the judgment alone. As the record now stands, a decision of the cause would require us to disregard or to dismiss the appeal from the judgment. This we think should not be done. There has been much uncertainty and doubt among the members of the bar concerning the procedure under the new sections, and the correct practice can hardly be said to have been settled by our decisions heretofore. It would, therefore, work an unjustifiable hardship to deprive an appellant of the benefit of an appeal where, as here, he has, in evident good faith, attempted to comply with the statute. Furthermore, it may be questioned whether under section 953c, the duty of transmitting a proper record is not, where the new method is followed, imposed, in the first instance, upon the clerk of the court below.

Under these circumstances, we shall not, at this time, dismiss the appeal from the judgment. The record being incomplete, the appellants are granted leave to withdraw the transcript from the files, and to refile such transcript, with copies of the judgment roll and the notice of appeal from the judgment, duly certified by the clerk of the superior court, or by the attorneys, within 30 days. In the event of a failure to thus present a proper record, the appeal from the judgment will be dismissed, and the appeal from the order denying a new trial disposed of on its merits.

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163 Cal. 146

KNOCH et al. v. HAIZLIP et al.

(L. A. 2,858.)

(Supreme Court of California. June 18, 1912.)

1. Husband and Wife (§ 138*)—Wife's Separate Property—Agency of Husband.

A deed to their daughter by the owner of a lot, in which the owner's husband joined, wherein the grantors reserved "the right to the use, control and proceeds of the property during their lives, or the life of either of them," did not authorize the husband during the lifetime of his wife, and without her consent, to bind her by an agreement to leave vacant for light a strip off one side of the lot.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 524–537; Dec. Dig. § 138.*]

2. Principal and Agent (§ 136*)—Agent's Lack of Authority—Liability of Agent.

Where the professed agent of the owners of a lot, contracted in his own name and for "parties interested with him" with an adjoining owner that a strip would be left vacant on one side of the lot for light, he was personally liable for a breach of such contract, though he was not authorized by the owners of the lot to make such agreement.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 447–450, 476–491; Dec. Dig. § 136.*]

3. EASEMENTS (§ 12*)—CONTRACT—VALIDITY.

An agreement respecting adjoining lots that each of the parties should give a certain frontage for the purpose of light was not so vague and indefinite, nor so insufficient for want of designation of the grantee, that it could not be the basis of an action for its breach.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35–38, 41; Dec. Dig. § 12.*]

4. APPEAL AND ERROR (§ 173*)—REVIEW—FINDING—ISSUES.

A finding that there is no consideration for a contract for an easement will be disregarded on appeal, where the issue of consideration is not raised below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1089, 1091–1093, 1095–1098, 1101–1120; Dec. Dig. § 173.*]

5. CONTRACTS (§ 57*)—CONSIDERATION—MUTUAL PROMISES.

Where two parties agreed that two adjoining strips off the sides of adjoining lots should be left vacant for light, their mutual covenants afforded a consideration sufficient to bind both.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 345, 352, 353; Dec. Dig. § 57.*]

6. CONTRACTS (§ 52*)—CONSIDERATION—"DETRIMENT."

To bind the party who breached the contract, it was a sufficient consideration for a contract to leave two adjoining strips vacant for light that the other parties to the contract constructed a building in accordance with it in such manner as to render valueless the strip left by them; this being a detriment which they were not "lawfully bound to suffer," within the meaning of Civ. Code, § 1605, providing what shall be a good consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 223, 224; Dec. Dig. § 52.*

For other definitions, see Words and Phrases, vol. 3, p. 2041.]

7. DAMAGES (§ 9*)—NOMINAL—RIGHT OF RECOVERY.

Nominal damages should be allowed for breach of a contract, though no actual damages are suffered.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 7–15; Dec. Dig. § 9.*]

8. TRIAL (§ 397*)—FINDINGS—NECESSITY.

Where, in an action for breach of a contract, the amount of damages was put in issue and was material, failure to find thereon is error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

9. NEW TRIAL (§ 128*)—MOTION—SPECIFICATION OF ERRORS.

The specification in a notice of intention to move for a new trial that the decision was against law was sufficiently specific to present a particular objection for review.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 257–262; Dec. Dig. § 128.*]

10. EASEMENTS (§ 12*) — CONTRACT — ACTION FOR BREACH—DEFENSE.

In an action for breach of a contract that two adjoining narrow strips of land should be left vacant for the purpose of light, it was no defense that the contracting plaintiff was not the legal owner of the lot as to which he contracted where he owned an equity and the owner of the legal title joined him as plaintiff.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35–38, 41; Dec. Dig. § 12.*]

11. ESTOPPEL (§ 78*)—EQUITABLE ESTOPPEL—RECITAL IN CONTRACT.

Under Code Civ. Proc. § 1962, subd. 2, providing that the presumption of the truth of the facts recited in an agreement is conclusive between the parties thereto, a party to a contract to leave strips off lots vacant for light was estopped, in an action for its breach to deny the truth of a recital in the contract that the other contracting party was owner of "adjoining lots."

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 204–210; Dec. Dig. § 78.*]

12. DAMAGES (§ 120*)—CONTRACT—BREACH—MEASURE.

Where one of the parties to a contract to leave adjoining strips off lots vacant for light breached the contract, the measure of damages to the other party, under Civ. Code, § 3300, providing that the measure of damages for the breach of a contract shall be such amount as will compensate the party aggrieved, was the difference between the value of their adjoining property if the agreement had been performed and its value under the existing conditions.

[Ed. Note.—For other cases, see Damages. Cent. Dig. §§ 291–305; Dec. Dig. § 120.*]

Department 1. Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by Ulrich Knoch and another against John Haizlip and others. From a judgment for defendants and an order denying a new trial, plaintiffs appeal. Reversed in part, and affirmed in part.

See, also, 124 Pac. 997.

Hester, Merrill & Craig, for appellants. Edward Judson Brown (Jones & Weller, of counsel), for respondents.

SLOSS, J. Plaintiffs appeal from the judgment and from an order denying their motion for a new trial.

The complaint presents two counts, one for the breach of an agreement under which, as the plaintiffs claim, they became entitled to an easement for light over the lands of the defendants, and the second to recover damages from the defendants for alleged fraud in connection with the making of said agreement. The findings of the court were against the allegations of fraud, and, as these findings are fully sustained by the evidence, there is no occasion to further consider this cause of action.

Most of the allegations of the first count are sustained by the findings of the court which are substantially as follows: On the 29th day of January, 1910, plaintiff Hooper owned the legal title to lots 5 and 6 in block 2 of the Orchard tract in the city of Los Angeles, and plaintiff Knoch held an equity in said lands under an agreement with Hooper for the purchase thereof. The plaintiffs were preparing to erect a three-story brick business block upon said lots 5 and 6 to be occupied by Knoch as a printing house.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On the day mentioned Knoch and the defendant John Haizlip executed a writing reading as follows:

"Ulrich Knoch agrees to give one foot frontage extending on the east side of his lots 5 and 6, in block two (2), in the Orchard tract in the city and county of Los Angeles, state of California, for purposes of light, providing that John Haizlip or parties interested with him in the ownership of the adjoining property on the east, will give two and one-half feet of land for the same purpose. Los Angeles, Calif., January 29, 1910. [Signed] Ulrich Knoch.

"John Haizlip and parties interested with him agree to give two and one-half feet of land on the west side of lot A, blk. 2 in the Orchard tract, in the city and county of Los Angeles, state of California, for the purpose of light, providing that Ulrich Knoch, owner of adjoining lots, give one foot of land for the same purpose. Los Angeles, Calif., January 29, 1910. [Signed] John Haizlip."

On said January 29, 1910, the defendant Laura C. Janes had the legal title to said lot A of block 2 of the Orchard tract under a deed of conveyance thereof to her by Laura Ann Haizlip executed and recorded more than five years theretofore by which deed it was provided that said Laura Ann Haizlip reserved the right to the use and occupation of said lot during her lifetime. It was found that on January 29, 1910, Laura Ann Haizlip was not the legal owner of said lot, and that neither the defendant John Haizlip nor the defendant Loren L. Janes had any title to or interest in the said lot, except as husbands, respectively, of Mrs. Haizlip and Mrs. Janes. It is found that defendant John Haizlip was not at any time authorized by any of the codefendants to execute said writing in their behalf. About the 24th day of February, 1910, the plaintiff Knoch commenced the erection of a three-story brick building upon said lots 5 and 6, setting the eastern wall thereof one foot westerly from the eastern line of said lots, and placed windows and a door therein for the purposes of light and air to said building, and afterwards completed said building. About April 11, 1910, defendant Laura C. Janes began and afterwards completed the erection of a two-story brick building on said lot A, setting the westerly wall thereof in and along the line between said lot A and plaintiffs' lots 5 and 6, but not 2½ feet therefrom. It is found that the westerly wall of said building on said lot A obstructs to some degree the light of the first and second floors of the plaintiffs' building, that the value of said lots 5 and 6 and of the said building thereon has been materially diminished by the erection of said building on said lot A, and the said one foot of ground upon and along the easterly side of lots 5 and 6 has been thereby rendered valueless. There is also a finding to the effect that the defendant John Haizlip did not receive any consideration for the execution of the writing by him.

[1] Since the defendants other than Haizlip did not join in the making of the agreement, it is apparent that the plaintiff could have no cause of action against them without establishing that they had authorized Haizlip to make the agreement on their behalf. The finding is that there was no such authority, and this finding is not included among those specified by plaintiffs as unsupported by the evidence. The appellants seek, however, to overthrow it indirectly by an attack upon the further finding that John Haizlip had no title to or interest in the lot other than as husband of Laura Ann Haizlip. It is claimed that this latter finding is contrary to a stipulation, made during the trial, to the effect that in 1903 Laura Ann Haizlip, who was then the owner of the lot, joined with her husband in a deed to their daughter Laura C. Haizlip (now Laura C. Janes, one of the defendants herein), which deed contained a proviso reserving to the grantors "the right to the use, control and proceeds of the property during their lives or the life of either of them." We are unable to see any inconsistency between these two findings. Whether the latter one, relating to Haizlip's want of title, be right or wrong, the finding that he had no authority to bind the other defendants would still stand as an insupportable obstacle to any recovery against them. Furthermore, even if the court had made a finding in the exact words of the stipulation, such finding would have afforded no support for a judgment against any one but John Haizlip. Assuming that the reservation was valid in favor of John Haizlip, who was a stranger to the title, it could not vest in him the power to affect any interest but his own. It did not authorize him during the lifetime of his wife, and without her consent, to execute any writing which would create a lien or an easement as against her interest. If the clause reserving the right to the "control of the property" could be construed so broadly as to permit the making of an agreement like the one here in question, such right was reserved to Haizlip and his wife jointly, and neither was thereby vested with the power of acting for the other. The appellant can point to nothing in the record, beyond the stipulation referred to, to overcome the finding that Haizlip was without authority to bind his codefendants. As we have seen, the stipulation cannot be given such effect, and the judgment in favor of the codefendants must accordingly stand.

[2] But Haizlip himself is not relieved from liability upon his own undertaking merely because the codefendants for whom he assumed to act were not bound. "If the professed agent contracts in his own name

he is, of course, personally liable upon the contract." Tiffany on Agency, 369.

[3] One of the points strongly relied upon by the respondents is that the agreement itself is too vague and indefinite to afford a basis for recovery. By the agreement each of the parties agrees to "give" a certain frontage "for the purpose of light." It is argued that this constitutes an undertaking to make grants of real property, and, as such, is insufficient for want of designation of a grantee. But we think this objection is not tenable. The writing is not the product of a skilled draughtsman's pen. But, though not worded with technical accuracy, it still, when read in the light of the surrounding circumstances, plainly discloses the intent of the parties. The two parcels of land affected were adjoining lots fronting upon the same street. Their dividing line ran north and south, constituting the east line of lots 5 and 6 and the west line of lot A. The plaintiffs were contemplating the erection of a building. Under these circumstances, the expression that each of the parties would give, respectively, "one foot frontage extending on the east side of lots 5 and 6" and "two and one-half feet of land on the west side of lot A" (in each instance for purposes of light), would, according to the ordinary significance of the words, be taken to mean just what the appellants contend it means; that is, that the space thus to be "given" by each of the parties was to be left vacant to the end that mutual easements of light for the two parcels should exist in the 3½ feet thus to be left uncovered by any building. There can be no serious doubt as to the identity of the land described by the expression "one foot frontage extending on the east side of his lots 5 and 6." Clearly this designates the strip of land one foot in width along the length of the said east side, and a similar meaning is the natural one to be attributed to the words "two and one-half feet of land on the west side of lot A" used in the second part of the agreement. If, then, the plaintiffs had a contract binding upon the defendant John Haizlip whereby, in consideration of plaintiffs' leaving unoccupied one foot of their land, they were to have an easement of light over two and one-half feet of the adjoining lot, it would seem obvious, even without any finding to that effect, that damage would ensue to the plaintiffs from a breach of such agreement. But here the court did make an express finding as above stated, that the value of said lots 5 and 6 and of the building thereon has been materially diminished by the erection of said building on lot A and that the one foot of ground left vacant by plaintiffs has been thereby rendered valueless. The plaintiffs having complied with the agreement on their part, and said agreement having been broken to the damage of plaintiffs, we are unable to see why a judgment for such damages as may have been suffered should not be rendered against the defendant John Haizlip.

[4-6] The only finding which would seem to authorize the judgment in favor of this defendant is one that he "did not receive any consideration for the execution of said writing so executed by him." This finding must be disregarded as entirely without the issues. Besides, it is in conflict with the undisputed evidence. The mutual covenants on the part of Knoch and Haizlip to grant the respective easements afforded a consideration sufficient to bind both. Also the construction by plaintiffs of their building in accordance with the agreement in such manner as to render valueless one foot of their ground was certainly a detriment which they were not "lawfully bound to suffer" and this constituted an ample consideration for any promise based thereon. Civ. Code, § 1605.

[7] While the court found that the plaintiffs had suffered damage, it failed to find the amount of the damage. Even without any finding of the amount, the plaintiffs were entitled to nominal damages, and the conclusions of law and judgment in favor of Haizlip were erroneous in this respect.

[8] Furthermore, it was error to fail to find the amount of damage. This was put in issue by the pleadings, and the issue thus raised was clearly material. A failure to find on material issues renders the decision one "against law." Knight v. Roche, 56 Cal. 15; Swift v. O. M. Co., 141 Cal. 161, 74 Pac. 700; Kaiser v. Dalto, 140 Cal. 167, 73 Pac. 828, and cases cited.

[9] This was one of the grounds stated in the notice of intention to move for a new trial. It is said, in Kaiser v. Dalto, supra, that the moving party must, in some form, specify the particular issues on which findings were omitted. But this declaration was not necessary to the decision, and is based upon the citation of an authority (Haight v. Tryon, 112 Cal. 6, 44 Pac. 318) which does not support it. All that was held in Haight v. Tryon was that a party relying upon a failure to find must make his motion for new trial on the ground that the decision is "against law." We find nothing in the Code requiring any further specification. Where a finding is assailed as unsupported by the evidence, there must be specifications of insufficiency (Code Civ. Proc., §§ 648, 659), and, where a motion for new trial is made on a statement (section 659, subd. 3), or on the minutes of the court (section 659, subd. 4), errors of law relied upon must be specified. In the absence of any similar provision regarding a claim that the decision is "against law," we see no ground for holding that any specification of issues not found is called for.

[10, 11] The respondent Haizlip contends that there should be no judgment against

him because Knoch was not the owner of the legal title to lots 5 and 6, and therefore could not carry out any agreement to create an easement in said lots. Civ. Code, § 804. But it is found that Knoch did own an equity, and the complaint alleges that Hooper, the owner of the legal title, authorized the making of the contract in his behalf. Even if there had been no antecedent authority, Hooper, by joining as plaintiff in the action, has clearly ratified the agreement. Furthermore, it is found that the plaintiffs (i. e., Knoch and Hooper) did erect a building on lots 5 and 6 in compliance with the agreement. The benefit for which Haizlip contracted has, therefore, been conferred on lot A, and it does not lie in this defendant's mouth to say that the agreement was one which Knoch could not carry out. A further answer to the point is that the agreement signed by Haizlip describes Knoch as "owner of adjoining lots." This is a recital which, in an action between the parties to the agreement, Haizlip is estopped to deny. Code Civ. Proc., § 1962, subd. 2.

[12] It may be well, as guide to further proceedings in the court below, to indicate our view of the proper measure of damages. The court below seems, after some discussion, to have taken the position that the damages, if the plaintiffs had a right to recover, were to be measured by the difference between the value of their property if the agreement had been performed and its value under the existing conditions. This conclusion we think is correct and in accordance with the rule declared in section 3300 of the Civil Code. If the action against John Haizlip be viewed as one for the breach of an implied warranty of authority, the measure of damages would be the same. Tiffany on Agency, p. 573.

Under the views expressed, it becomes unnecessary to consider any other points made by the appellants.

The judgment and the order denying the motion for new trial are reversed, so far as they are in favor of the defendant John Haizlip; so far as they affect the other defendants, they are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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163 Cal. 225

RIMPAU et al. v. BALDWIN et al. (L. A. 2,568.)

(Supreme Court of California. June 28, 1912. Rehearing Denied July 27, 1912.)

APPEAL AND ERROR (§ 1011*) — VERDICT — CONFLICTING EVIDENCE.

A verdict based on conflicting evidence, will not be reversed on appeal as against the preponderance of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

In Bank. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Theodore Rimpau and others against E. J. Baldwin and others. From a judgment for defendants, and from an order denying plaintiffs' motion for a new trial, they appeal. Affirmed.

Munson & Barclay, for appellants. Bradner W. Lee and Hatch & Lloyd, for respondents.

SHAW, J. The plaintiffs sued to quiet their title to 18.29 acres of land. The defendants, in their answer, denied plaintiffs' title and alleged that E. J. Baldwin is the owner in fee of the land. The defense of the statute of limitations was also pleaded. As a further defense, the defendants averred facts showing that the dispute concerning the land is in fact a dispute in regard to the location of the boundary line between plaintiffs' land and Baldwin's land adjoining plaintiffs on the south, and that more than 20 years before the action was begun said division line was established and located on the ground by the respective owners; that each party had ever since claimed and occupied up to the line so established; that plaintiffs had ever since acquiesced in the line so established; and that, according to this location, the land in controversy was not claimed by plaintiffs, and did not belong to them. The court found in favor of the defendants on all the issues, including a finding that Baldwin had acquired title to the land by adverse possession. Judgment was given accordingly. Baldwin having died, his representatives have been substituted as parties.

The plaintiffs have appealed from the judgment, and from an order denying their motion for a new trial. It is conceded that the answer states good defenses, and that the findings support the judgment. As grounds for reversal, the plaintiffs rely solely on the claim that the evidence does not support the findings.

The question presented for determination was the location of the southern boundary line of plaintiffs' land. They claim that it is, by law and in fact, situated far enough to the south of the location claimed by defendants to include between their side lines the 18.29 acres in controversy. It concerns the location of the common boundary line of the rancho Las Cienagas on the north, of which plaintiffs' land is a part, and the rancho La Cienega O'Paso de la Tijera on the south; the latter ranch being owned by Baldwin. The most that can be said in favor of the appellants is that the evidence is conflicting upon each issue. If there is enough evidence to justify the finding as to any one of the defenses alleged, the judgment and order would be affirmed, although it might be insufficient to support some one, or any, of the others. We cannot weigh conflicting evidence and determine according to the preponderance. That function devolves upon the trial court alone. A perusal of the record shows that there is sufficient evidence to sustain each finding. No benefit can be derived from recording here a discussion of it in detail. The appeal cannot be sustained.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; MELVIN, J.; SLOSS, J.; HENSHAW, J.

163 Cal. 240

O'MEARA v. HABLES. (S. F. 5,995.)

(Supreme Court of California. June 29, 1912.)

1. Appeal and Error (§ 44*)—Jurisdiction—Supreme Court—Possession of Realty.

The Supreme Court had no jurisdiction of an appeal from a superior court judgment rendered on appeal from justice court in an action for rent money, and not involving the possession of real estate, though the complaint unnecessarily alleged possession in the defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 166–171; Dec. Dig. § 44.*]

2. Appeal and Error (§ 44*)—Jurisdiction—Real Property—"Possession."

The word "possession," as used in Const. art. 6, §§ 4, 5, conferring original jurisdiction upon the superior court in all cases at law which involve the possession of real property, in Code Civ. Proc. § 964, providing for a taking of appeal from a superior court judgment in all cases involving the possession of real property, and in Code Civ. Proc. § 838, providing that in actions in justice court no evidence should be given upon any question which involves possession of real property, means such a possession as has relation to title, or is necessary to the enforcement or defeat of the cause of action asserted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 166–171; Dec. Dig. § 44.*

For other definitions, see Words and Phrases, vol. 6, pp. 5464–5470; vol. 8, pp. 7757, 7758.]

3. Landlord and Tenant (§ 230*)—Jurisdiction—Possession of Land—Pleadings.

An allegation that the tenant had occupied or had possession of the leased premises during the period when rent accrued was not necessary to the statement of a cause of action for rent under a lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 904–925; Dec. Dig. § 230.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by Joanna O'Meara against Sam Hables. From judgment for plaintiff, defendant appeals. Appeal dismissed.

P. L. Benjamin, for appellant. Stafford & Stafford, for respondent.

PER CURIAM. In the justices' court of the city and county of San Francisco, plaintiff sued defendant to recover the sum of $210, which, it was alleged, was due for rental of certain premises. The complaint charged in several counts. In the first, it was alleged that defendant has "occupied said premises for several years past, and has paid no rent to said plaintiff since May 1, 1909." In the third count, it was charged that defendant was the assignee of a lease of the premises made by plaintiff to one John Doe Creely, and that said defendant entered under the assigned lease, and "has had possession of said premises ever since said time."

Trial was had in the justices' court, and resulted in a judgment in favor of defendant, from which judgment he appealed to the superior court of the city and county of San Francisco upon questions both of law and of fact. The trial de novo in the superior court resulted in a judgment for plaintiff in the amount sued named. Defendant has taken an appeal from that judgment to this court. Respondent here moves to dismiss it for lack of jurisdiction in this court to entertain it.

[1, 2] The motion must be granted. The Constitution (article 6, § 5) declares that the "superior court shall have original jurisdiction in all cases of equity and in all cases at law which involve the title or possession of real property." By section 4 of the same article, it is declared that this court "shall have appellate jurisdiction on appeal from the superior courts in all cases of equity, except such as arise in the justices' courts; also in all cases of law which involve the title or possession of real estate." Section 964 of the Code of Civil Procedure provides for the taking of an appeal from a judgment of the superior court rendered on an appeal from the justices' courts "in all cases involving the title or possession of real property."

The Legislature has made no attempt to confer jurisdiction upon justices' courts in actions involving the *possession* of real property (Code Civ. Proc. § 112), but, to the contrary, has provided that parties to an action in a justices' court cannot give evidence upon any question which involves the title or possession of real property. Code Civ. Proc. § 838. But this means, under all the decisions of this court, and from the association of words in the constitutional provision, such a *possession* of real property as has relation to title, or is necessary to the enforcement or defeat of the cause of action asserted. These propositions are illustrated by such cases as Holman v. Taylor, 31 Cal. 338; Copertini v. Oppermann, 76 Cal. 185, 18 Pac. 256; Hart v. Carnall-Hopkins Co., 101 Cal. 162, 35 Pac. 633; Boyd v. Southern California Ry. Co., 126 Cal. 573, 58 Pac. 1046. From these and like cases, the meaning of the Constitution and of the Code sections may readily be discovered. The possession here contemplated is, as we have said, either a possession akin to title, as in ejectment, trespass, or title by adverse possession, where possession is of the essence of the right sought to be established, or it is a possession which, for some other good reason, becomes a direct and material fact and issue in the case, "upon which the plaintiff relies for a recovery, or the defendant for a defense." Holman v. Taylor, supra.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[3] This action is an action at law to recover a specific sum of money as rent under a lease. The allegation that defendant had occupied the premises or had possession of them during the period when the rent accrued was unnecessary to the cause of action. No right of possession is here involved, and no possession is made the foundation for the establishment of any other right.

It follows therefrom, as above said, that the motion is well taken, and is therefore granted.

The appeal is dismissed.

BEATTY, C. J., does not participate in the foregoing.

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163 Cal. 256

BRAY v. LOWERY. (S. F. 5,773.)

(Supreme Court of California. June 29, 1912. Rehearing Denied July 29, 1912.)

1. SALES (§ 481*)—CONDITIONAL SALE—BUYER'S DEFAULT—RIGHTS OF SELLER.

A defaulting buyer in a contract for a conditional sale of personal property may not usually demand the return of the moneys paid on account of the sale when the seller repossesses himself of the property because of the buyer's default.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1451; Dec. Dig. § 481.*]

2. SALES (§ 481*)—CONDITIONAL SALES—CONTRACT—BREACH—"FAILURE OF CONSIDERATION."

Where a conditional seller of automobiles resumed possession for the buyer's alleged failure to pay the installments required, but in fact before the buyer was in default under the contract, the seller's act constituted a repudiation of the agreement, amounting to a failure of consideration within Civ. Code, § 1689, providing that a party may rescind a contract for failure of consideration either in whole or in part.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449–1455; Dec. Dig. § 481.*

For other definitions, see Words and Phrases, vol. 3. p. 2647.]

3. PLEADING (§ 252*)—AMENDMENT—COMPLAINT.

Where a demurrer to a complaint was sustained, and an amended complaint filed on which the case was tried, the original complaint passed out of the case, and could not be considered for any purpose.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 736–743; Dec. Dig. § 252.*]

4. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Any error in the sustaining of an objection to a question to plaintiff on cross-examination whether he kept accurate books of account was cured by the court permitting counsel to examine plaintiff at length regarding his expenditures, so that whether the books were correct or not must have been developed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

5. SALES (§ 481*)—CONDITIONAL SALE—RECOVERY OF CONSIDERATION.

Where defendant by seizing certain automobiles conditionally sold to plaintiff, when plaintiff was not in default, under a claim that he was in default, thereby treated the contract as abandoned and annulled, a formal rescission on plaintiff's part was not necessary to entitle plaintiff to recover the money paid under the contract in an action for money received, and this though the failure of consideration was only partial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449–1455; Dec. Dig. § 481.*]

6. SALES (§ 481*)—CONDITIONAL SALE—REMEDIES OF BUYER.

Where defendant wrongfully terminated a contract for the conditional sale of automobiles, whereupon plaintiff sued for the amount already paid as money received by defendant to plaintiff's use, defendant was entitled to credit for the profit, if any, realized by defendant from the use of the cars.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1449–1455; Dec. Dig. § 481.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by R. R. Bray against George W. Lowery. Judgment for plaintiff, and defendant appeals. Affirmed.

S. C. Wright and William P. Hubbard, for appellant. Otto Irving Wise, Hugo K. Asher, and Henry J. Brodsky, for respondent.

MELVIN, J. The defendant appeals from a judgment against him for $5,750, and from the order denying his motion for a new trial. The action was one for money had and received, and grew out of a transaction connected with an attempted conditional sale of three automobiles to plaintiff Bray by defendant Lowery. Plaintiff's theory of the case was that by the conduct of defendant the contract had ceased to exist, and that he was entitled to the return of all of the money paid on the purchase price of the automobiles. Defendant by his answer denied all indebtedness, and by cross-complaint demanded judgment for $275 which he alleged had been paid for the use and benefit of plaintiff. On May 18, 1907, the parties to this action entered into an executory contract which was in writing, whereby the plaintiff, R. R. Bray, was to have possession of, and was eventually to become the owner of, three certain automobiles upon consideration of certain payments which were to aggregate $8,250. It was understood and agreed that these automobiles were to be used by Bray for the purposes of public hiring. The title to the automobiles was to remain in the defendant George W. Lowery until the whole sum of $8,250 should be paid. Pursuant to the terms of the contract, the sum of $3,000 was paid at the time of the delivery of the cars and $2,000 subsequently. The contract provided, generally speaking, that thereafter payments should be made at the rate of $500 per month, although there was a provision that, if the machines ran less than five hours a day, there was to be a certain reduction in the amount of the monthly installments. The sum of $6,000 was paid, one installment of $500 having been received and accepted by appellant Lowery on September 20, 1907, 10 days after it became due. On October 18th another installment became due. It was not paid, and on November 18th a similar sum was payable under the terms of the contract, but as to the latter payment the court ruled, and so instructed the jury, that, owing to the legal holidays proclaimed by the Governor of the state of California for every day of the month of November, 1907, the respondent, Bray, was not bound to make his payment during that month. About the 20th of November, by mutual consent of the parties to the agreement of conditional sale, one of the automobiles was sold to a third person for $1,100. Of this amount the sum of $250 was, by mutual consent, applied to the payment of a debt owed by Bray for repairs on the automobiles, and the balance, $850, was credited on account of the purchase money. It will thus be seen that about November 20th plaintiff's account was credited with $6,850, with approximately $1,400 still due to defendant. According to the testimony of plaintiff the other two cars were taken by Lowery, against plaintiff's protest and objection. This, he said, occurred on the 6th and 7th of November, 1907, and that after that time he never had the use of these automobiles in the rental service, although upon one occasion he was permitted on a written order of Lowery to take one of them out of a garage for purposes of demonstration. On December 31st, according to Bray's testimony, he demanded that these cars should be returned to him, and then was informed that they had been sold at public auction, in accordance with the terms of their contract, that Lowery had bought them in and that Bray had no further interest in them. Bray testified that he had never received notice of any intended auction sale of the property in question. It was in evidence that the sale at auction was made on December 26, 1907, after advertisement in a newspaper, and that Lowery was the only bidder. At the trial the court instructed the jury that in no event could they give judgment for the $1,100 realized from the sale of the machine on November 20th. They were also told that the amount demanded by the cross-complaint, according to the court's understanding, was that portion of the $1,100 realized from the sale of one of the automobiles which had been expended on a bill for repairs. The court also instructed the jury as follows: "This is an action for money had and received; that is to say, an action to recover money which it is claimed that, in equity and good conscience, the defendant should not retain. I have held that, in the very nature of this action, the defendant was entitled to show what profit, if any, the plaintiff made from the operation of the machines during the time they were in his custody. Upon that subject you have heard a great deal of evidence. If you find the plaintiff is entitled to recover, and you should find that he had made a profit out of the use of those machines during the time that he had them, then the defendant is entitled to have that amount, whatever you may find, if you find such an amount, deducted from the amount you find due the plaintiff."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] Appellant takes the position that his act, in possessing himself of the automobiles, was not a breach of the contract because the respondent had defaulted in the payments due. Unquestionably a defaulting vendee in a contract of this sort may not usually demand the return of the moneys paid on account of the sale. That rule is well established by such cases as Glock v. Howard & Wilson Colony Co., 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17; Liver v. Mills, 155 Cal. 459, 101 Pac. 299; Muncy v. Brain, 158 Cal. 300, 110 Pac. 945.

[2] But respondent insists that there was no default on his part, and that the retaking of the automobiles by appellant constituted a repudiation of the agreement which amounted to a failure of consideration, giving respondent the right to institute this sort of action. This was doubtless the view of the case which the jury took under the instructions of the court. The contract contained this provision: "In the event that said second party shall not be able to operate said cars by careful, prudent, industrious application to said work, then the balance of said sum shall be payable within two months from the date of the last payment as herein provided." It will thus be seen that the vendee was to have 60 days from the date of his last payment in case he should be unable to operate the cars. As appellant took them on or about November 7, 1907, and sold them on December 31st of that year, the respondent could not operate them during that period. He had, therefore, 60 days following November 10th, when ordinarily the full installment of $500 would be due, in which to make that payment. By his own act appellant created this condition. This case therefore comes within the rule stated in Richter v. Union Land & Stock Co., 129 Cal. 372, 62 Pac. 40, as follows: "In all executory contracts the several obligations of the parties constitute to each, reciprocally, the consideration of the contract; and a failure to perform constitutes a failure of consideration—either partial or total, as the case may be—within the meaning of section 1689 of the Civil Code." See, also, Sterling

v. Gregory, 149 Cal. 121, 85 Pac. 305, and Cleary v. Folger, 84 Cal. 316, 24 Pac. 280, 18 Am. St. Rep. 187.

[3] Appellant calls our attention to the fact that the original complaint contained a count in which plaintiff prayed damages for breach of contract. This, he says, was an admission on the part of respondent that the contract was a subsisting agreement. But the demurrer to the original complaint was sustained, and the cause was tried upon a complaint stating a cause of action only for money had and received. The original complaint may not be considered by us for any purpose.

[4] Appellant assigns as error the sustaining by the court of objections to questions directed to plaintiff Bray on cross-examination, in which he was asked if he kept accurate books of account. If these rulings were erroneous, they were cured by subsequent happenings, because, as counsel were permitted to examine the witness quite at length regarding his expenditures, it must have appeared to the jury whether he kept correct books or not.

Appellant's next point is based upon the assertion that an action for money had and received in a case like this may not be maintained unless the contract has become of no effect from a total failure of consideration, that a partial failure is not sufficient, and his counsel call our attention to section 1691 of the Civil Code, providing for prompt rescission, and the restoration of everything of value received under a contract. They quote the following language from Richter v. Union Land & Stock Co., supra: "Nor where the failure of the consideration is total—which implies, of course, that nothing of value has been received under the contract by the party seeking to rescind—is it necessary that a formal rescission be made before bringing suit. In such cases a suit may always be maintained for the recovery of the consideration paid. Santa Clara, etc., Fuel Co. v. Tuck, 53 Cal. 304; Rose v. Foord, 96 Cal. 154 [30 Pac. 1114]; Hayes v. Los Angeles County, 99 Cal. 79 [33 Pac. 766]; 1 Chitty on Pleading, 362, note z; Russ, etc., Co. v. Muscupiabe, etc., Co., 120 Cal. 521 [52 Pac. 995, 65 Am. St. Rep. 186]." They insist that under the foregoing authority and cases of like type, where partial failure of consideration is depended upon, there must be a formal rescission of the contract before suit for the money paid may be instituted. To this contention respondent makes several answers. He says that, in view of the jury's conclusion that there was a total failure of consideration (for the verdict was for the entire amount paid minus the $1,100 for which one of the cars sold and to which plaintiff formally disclaimed title), the decision does not conflict with appellant's theory.

[5] His counsel insist, however, that the right to maintain an action for money had and received exists whether the failure of consideration be partial or entire. They do not pretend that rescission on the part of respondent has taken place. They depend, they say, upon appellant's election to treat the contract as terminated. This position is entirely correct. By his seizure of the cars upon the claim that respondent was in default and by his refusal to return the property, appellant treated the contract as abandoned and annulled by respondent. Formal rescission on the part of the latter was, therefore, not necessary. Drew v. Pedlar, 87 Cal. 443, 25 Pac. 749, 22 Am. St. Rep. 257. In Russ, etc., Co. v. Muscupiabe, etc., Co., 120 Cal. 529, 52 Pac. 998, 65 Am. St. Rep. 186, the rule was thus stated: "It is contended by respondent that it does not appear that the irrigation company has at any time been without assets so that its promise was without value, or that its obligations may not be ultimately fulfilled and that it may have assets out of which its debts may be paid or payment enforced, and therefore concludes that the failure to fulfill the contract was only partial, and that a partial failure without rescission would not be a defense. * * * But a failure of consideration, either total or partial, may be pleaded as a defense to an action upon a promissory note, either wholly or pro tanto. See Drew v. Towle, 27 N. H. 424, 59 Am. Dec. 380, and numerous authorities there cited; 2 Am. & Eng. Ency. of Law, 369, and notes; Tillotson v. Grapes, 4 N. H. 444." In Phelps v. Brown, 95 Cal. 576, 30 S. W. 774, it was held that the voluntary abandonment of a contract by vendors left the money of the vendee in their hands subject to suit for its recovery.

[6] In such a suit as this the right to recover by the respondent would of course be subject to the credit for the profit, if any, realized from the use of the cars. This was emphatically stated to the jury in an instruction which is quoted herein. Upon the testimony the jury found, in effect, that there had been no such profit.

Appellant assigns as error the sustaining of an objection to the following question addressed to the plaintiff: "You took in a large amount of money, did you not, by the operation of those cars during that period of time?" While the question would have been proper if addressed to appellant's own witness, it was not proper upon cross-examination of the respondent.

The instructions were drafted substantially in accordance with the views herein expressed. It is unnecessary to review them in detail. It is sufficient to say that they correctly stated the law to the jury.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

163 Cal. 249

DEETS v. HALL. (L. A. 2,675.)

(Supreme Court of California. June 29, 1912. Rehearing Denied July 29, 1912.)

1. TAXATION (§ 734*)—LEVY—FUNDS—CLERICAL ERROR—ESTIMATE OF AUDITOR—ESTABLISHMENT OF LEVY.

A sale of land to the state for delinquent taxes was not void because, in making the tax levy, there was a clerical omission to apportion a part of the tax to a particular fund, as required by Pol. Code, § 3714; the order fixing the levy having adopted the auditor's report, which designated the various funds, correctly specifying the amounts required for each and the rate necessary to procure the same.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470–1473; Dec. Dig. § 734.*]

2. TAXATION (§ 762*)—TAX SALES—DEEDS—REQUISITES—TIME OF REDEMPTION.

Pol. Code, § 3785, prescribes the recitals to be contained in tax deeds from the tax collector to the state, among which is a statement of the time when the right of redemption expired. *Held* that, where land was sold for taxes July 1, 1903, and the time to redeem expired with the end of July 1, 1908, a recital in deeds to land sold to the state for such taxes that the time for redeeming the property expired July 2, 1908, and that no redemption had been had, did not invalidate the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1514–1516; Dec. Dig. § 762.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Jackson Deets against J. W. Hall. From a judgment for plaintiff, and from an order denying defendant's motion for a new trial, he appeals. Reversed.

George H. Moore, for appellant. O. B. Carter and F. A. Knight, for respondent.

LORIGAN, J. This is an action to quiet title to two lots in the city of Long Beach, Los Angeles county. Plaintiff had judgment, and defendant appealed from it, and from an order denying his motion for a new trial.

The judgment was affirmed by the District Court of Appeal for the Second Appellate District, and subsequently a further hearing was granted in this court.

Against the ownership of plaintiff, defendant asserted title to the property under two tax deeds to him from the state. It was stipulated on the trial that plaintiff was the owner of the lots, unless defendant could sustain title thereto "under and by virtue of tax proceedings, sales, and tax deeds upon which he relied." The judgment in favor of the plaintiff was based upon the conclusion of the trial court that the tax deeds upon which defendant relied were void. In support of the judgment and order, and against the attack made on them by the appellant it is insisted by respondent that the tax deeds from the state, upon which appellant relied, are invalid for two reasons: First, it is claimed that in the tax levy for the year 1902, upon which the sales to the state of the two lots in payment for taxes were based, a portion of the taxes levied (to wit, 5 cents on the $100) was not levied for any specific purpose, and was not apportioned to any particular fund; hence it is claimed that that portion of the tax was illegal and the whole levy void, and the sales and deeds made thereunder invalid. Second, and independent of this, that the tax deeds to the state are void upon their face, because they do not recite, as required by law, the correct date when the period of redemption expired.

[1] As to the first point. The Political Code requires the board of supervisors to levy the state and county rate upon the taxable property of the county, "designating the number of cents on each one hundred dollars of property levied for each fund." Section 3714. The claim of respondent is that this was not done; that as to 5 cents on the $100 levied by the board it was not levied for any specific fund. While there is some slight ground for this claim, it will be found on a fair examination of the face of the levy itself, particularly when taken in consideration with the estimate of the auditor, to which it refers, that it is based upon a clerical error occurring, in one instance, in the levy with reference to the rate fixed to provide $60,000 for the Temple Street jail fund. The report of the county auditor, filed with the board pursuant to section 3737 of the Political Code, contained an estimate of the amount of money necessary to be raised by taxes, for the support of the county government for the fiscal year 1902–03. It designated the 12 separate funds of the county, among which was the Temple Street jail fund, and specified the amount necessary for each particular fund and the special rate to be levied to procure the particular amount for each fund. The aggregate amount to be raised for the funds was totaled in the column as $886,035, and the aggregate tax rate to produce it .8180; the net valuation of the taxable property in the county being estimated at $112,276,055. The report set forth that as to one of the 12 funds—the Temple Street jail fund—it was necessary to raise $60,000, and the rate on each $100 of taxable property necessary to produce that amount was designated at .0535. The board of supervisors, in the preamble to their order fixing the tax levy, adopted this report of the county auditor specifying the different funds, amounts required, and particular rates under which the amounts were to be raised exactly as contained in the estimate of the auditor. The order of the board then proceeded to fix the general tax rate for county purposes at .8180, being the aggregate of the special fund rates as reported by the auditor and mentioned in the preamble, with a further rate of .60 for road purposes and the state tax of .3820.

It then declared that the said .8180 cents levied for county purposes should be apportioned to the funds, setting them forth in columns with respect to names, amounts, and special rates just as they appeared in the estimate of the auditor, as that estimate had been in effect adopted by the board, with the exception that the rate for the Temple Street jail fund was specified therein at .0035, instead of .0535, on the $100 of assessable property. It is from this that respondent claims that 5 cents on each $100 of the taxable property of the county was not levied for any special purpose or appropriated to any specific fund. It is quite clear, however, that this insertion of .0035 as the special rate for the Temple Street jail fund found in this apportionment column, instead of .0535, was clearly a clerical error; and it is apparent from a consideration of the various amounts contained in the order of the board itself where this error is contained. In the preamble to the order for the tax levy, the board recited it appears that .0535 was the rate necessary to be fixed to raise the amount required for the Temple Street jail fund. That special rate, with the other special rates fixed to supply the amounts for the other funds, and concerning the accuracy of which there is no question, makes up exactly the total rate of .8180 fixed for county purposes. This column of special rates, in which the rate of .0035 is inserted, is totaled on the face of the order itself as amounting to .8180, which is exactly the aggregate rate fixed for county purposes. This, of itself, shows that the insertion of this lower rate was a clerical error, because a correct addition of the various rates, with the rate for the Temple Street jail fund at .0035, would make the county tax rate .7680, instead of .8180, with the result that this rate of .7680 applied to the assessed valuation of the property of the county would produce only $862,280 for county purposes; while it is clearly apparent all through the recitals in the order that $886,035 was required, which amount would be procured with the rate fixed at .8180. Supplementing this with the further fact that it equally appears all through that $60,000 was required for the Temple Street jail fund, and that .0535 would produce that amount, and .0035 would produce but a little over $3,900, we have additional confirmation that the insertion of the lower rate was purely a clerical error.

Counsel for appellant seems to have had no difficulty in discovering on the face of the order for the levy just where this error arose, but contends that the error is fatal to the levy; that the rule of strict construction in tax matters applies. But, in so far as the rule is applicable here, it only means that the validity of the levy must be determined from a consideration of the language of the board, used in making it, without resort to extraneous evidence to prove its intention. Here, however, there is no resort to extraneous evidence. The intention of the board is derived solely from a consideration of the order itself making the levy. It clearly appears therefrom, as we have pointed out, that the intention of the board was to levy for the Temple Street jail fund .0535 on the $100 of taxable property in the county, and that the insertion of .0035 in one of the columns of rates for that particular fund was clearly a clerical mistake. There is no question in this case but that the board had the power to levy a rate of .0535 to procure that fund. The only question is, Was this evidently its intention? We are satisfied that there can be no doubt on that point, when the actual order is considered, and, this being true, the intention must prevail, the error disregarded, and the validity of the levy sustained as properly made in compliance with section 3714 of the Political Code.

In this same connection, it is insisted by respondent that the levy is further void, because the county tax rate is referred to in the order of the board as sometimes .8180 and .8120. But it is equally clear that, as with the rate for the Temple Street jail fund, this is also a clerical mistake. The rate of .8180 is the rate in the preamble of the order of the board containing the estimate of the auditor necessary to produce the total amount of $886,035 required for the various funds, is the actual footing as made by the auditor in his report of the aggregate of the various rates necessary to provide the amount for the funds, as it is also in the column where the error as to the Temple Street jail fund appears; and in the final summarization of the rates that amount of .8180 is fixed as the county rate which, with the state rate of .3820 and the general and special rate tax of 60 cents, makes the total tax declared to be levied and stated in the order at $1.80.

The attack on the levy was not considered in the opinion of the District Court of Appeal; that court holding the deeds invalid on the other ground of attack made on them by respondent, namely, that the date on which the period of redemption expired was not correctly stated in the deeds to the state.

[2] These deeds contained the recital: "And whereas, the certificate of sale stated that unless the said real estate was redeemed within five years from the date of sale to the state, the purchaser thereof would be entitled to a deed therefor on the 2d day of July, 1908; that said certificate of sale bears the date of the first day of July, 1903, the day of said sale; and whereas, the time, to wit, five years, for redeeming said property expired on the 2d day of July, 1908, and the same had not been redeemed or any part thereof," etc.

Section 3785 of the Political Code prescribes what recitals should be contained in deeds from the tax collector to the state, and, among other matters, requires that there shall be recited therein "the time when the right of redemption had expired." It was held by the District Court of Appeal that, as the sales to the state were made on July 1, 1903, and the redemption expired with the last minute of July 1, 1908, the deeds made to the state should have recited this latter date as the time when the right of redemption expired, and, having incorrectly stated that time as on July 2, 1908, the deeds were void. Respondent, on the hearing here, insists that this view is correct; reliance being placed on Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, and Stanton v. Hotchkiss, 157 Cal. 652, 108 Pac. 864, the same cases referred to in the opinion of the District Court of Appeal in support of its determination. Baird v. Monroe did not decide any question as to whether a date given in the deed there was correctly stated or not. There the deed contained no recital of any date at all; and whether it was void on that ground the court was not called on to decide, and did not decide, as it sustained the validity of the deed under the curative act of 1903.

In Stanton v. Hotchkiss, the deed recited the date of sale as June 24, 1898, and that the time of redemption expired on June 24, 1903. The deed to the state was made June 25, 1903. One point made on the appeal there was that the date when redemption had expired was not correctly recited, and that the date recited should have been June 25th. In sustaining the validity of the deed, this court said: "The recital in the deed made June 25, 1903, * * * was correct. June 24, 1903, was certainly the last day on which redemption could be effected within five years from the date of sale." In that case the validity of the deed was sustained. It was not held, however, that the recital of any other date as the time when the right of redemption had expired would have been incorrect.

And it by no means follows that, because of the decision in Stanton v. Hotchkiss, the date named in the deed in the present case is erroneous. All that the statute requires is a declaration of the time when the right of redemption had expired. As pointed out in Baird v. Monroe, 150 Cal. 560, 89 Pac. 352, this requirement is of no possible value to the property owner, and the requirement of the statute was fully complied with by the date designated, in this instance, in the deeds in question, which was perfectly correct, in that it named a date after the redemption had in fact expired.

The judgment and order appealed from are reversed.

We concur: HENSHAW, J.; MELVIN, J.

SHAW, J. I concur on the ground that the expiration of the redemption period was at the infinitely small space of time between the two days, and that therefore the naming of either the last day of the period, or the first day of the time succeeding it, will be good, under the peculiar wording of the statute. I do not say that the recital of any later or earlier day would be sufficiently accurate to make the deed valid.

We concur: ANGELLOTTI, J.; SLOSS, J.

PER CURIAM. The judgment and order appealed from in the above-entitled case are declared to be affirmed. By clerical misprision, manifestly appearing upon the face of the judgment, "affirmed" is erroneously used where "reversed" was intended and meant. It is therefore ordered that the judgment in the above-entitled case, filed June 29, 1912, is amended and corrected by substituting in the last line thereof the word "reversed" for the word "affirmed."

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163 Cal. 235

GARRISON et al. v. NORTH PASADENA LAND & WATER CO. (L. A. 2,910.)

(Supreme Court of California. June 29, 1912.)

1. WATERS AND WATER COURSES (§ 201*)—PRIVATE CORPORATIONS—DUTY TO SUPPLY WATER TO NONSTOCKHOLDERS.

Where a private corporation was organized to supply water to stockholders only, the fact that it furnished surplus water to another corporation as an accommodation did not confer on the customers of the latter the right to enjoin a discontinuance of the supply, on the theory that defendant thereby became a public service corporation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

2. WATERS AND WATER COURSES (§ 201*)—CORPORATIONS—SUPPLYING WATER—DISTRIBUTION.

Where a private corporation was organized to furnish water to its stockholders, it was authorized to limit the right to receive water to such stockholders; and waters so distributed by it were not necessarily dedicated to public use.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 275; Dec. Dig. § 201.*]

3. APPEAL AND ERROR (§ 1008*)—APPEAL ON JUDGMENT ROLL—PRESUMPTIONS—FINDINGS—CONCLUSIVENESS.

On an appeal on the judgment roll alone, all intendments are in favor of the regularity of the judgment; and the findings of the court are conclusive as to facts found.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3969; Dec. Dig. § 1008.*]

4. ESTOPPEL (§ 88*)—EQUITABLE ESTOPPEL—GROUNDS.

Where a committee appointed by complainants, in order to obtain surplus water from defendant water company, circulated a waiver, in which they agreed that if defendants furnished such surplus water complainants should be deemed mere licensees, and should have no right to enforce a continuance of the supply, complainants were thereby estopped from asserting that defendant was under any obligation to continue supplying the water.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 235–241; Dec. Dig. § 88.*]

Department 2. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Suit by Arizona Garrison and others against the North Pasadena Land & Water Company. From a judgment for defendant, plaintiffs appeal on the judgment roll alone. Affirmed.

Philaletha S. Michelsen, for appellants. Porter & Sutton and Lee, Chase, Overton & Valentine, for respondent.

MELVIN, J. This was an action for an injunction to prevent respondent from cutting off a certain water supply, to which appellants asserted a right, as consumers, upon the tender of the proper compensation therefor. The appeal is upon the judgment roll alone from a judgment adverse to plaintiffs, who take the position that the findings do not support the judgment.

The court found that defendant was not a public service corporation, within the meaning of the Constitution and statutes of the state of California, but that at all times since its incorporation it has been a private mutual corporation, organized for the purpose of supplying water to its stockholders, and not to the general public; that, under the articles of incorporation and rules of said defendant, the water to be distributed by it was to be used upon the Painter & Ball tract in Los Angeles county, containing about 1,800 acres; and that the applicants for use of such water should hold such proportion of the stock of the company as the acreage to be supplied might bear to the whole tract. It was also found that in sales of land in said tract it was customary to value and sell the land and stock together; that none of the plaintiffs owned any of said stock; that in 1892 the Cottonwood Canyon Water Company laid pipes and began, and ever since has been engaged in, the business of supplying water to the residents of block A. San Pasqual tract (in which plaintiffs and those in whose behalf they bring this suit are residents); and "that, in the year 1905, said Cottonwood Canyon Water Company induced said defendant to supply said Cottonwood Canyon Water Company with water, through a five-eighths inch meter; that said water was supplied as a matter of temporary accommodation, and with the express understanding and agreement that said Cottonwood Canyon Water Company was not to acquire any right to the continued supply of water, but that said defendant could cut off said supply at any time." The court further found that the portion of block A, San Pasqual tract, on which plaintiffs and those in whose behalf they brought this action are residents, formerly had appurtenant thereto a certain portion of the waters of the Arroyo Seco, and was entitled to be supplied with water by the Lake Vineyard Land & Water Association, and its successor, Lake Vineyard Land & Water Company, but that the predecessors in interest of those here seeking relief had sold and conveyed said water for use on other lands; that said waters so sold and conveyed were derived from the same source from which defendant gets its water supply; that in July, 1909, a committee representing plaintiffs and those for whom they sue, requested the board of directors of defendant to furnish water to said residents of block A, "but that said board of directors did not vote to supply said residents * * * with water, but did instruct the superintendent of defendant to furnish more water to the Cottonwood Canyon Water Company, provided each consumer of said Cottonwood Canyon Water Company would sign an agreement in the form set out in paragraph X of plaintiffs' said complaint; that said water committee, to wit, the plaintiffs in this action, thereupon circulated copies of said instrument, set out in paragraph X of plaintiffs' said complaint, and procured the same to be signed by all the residents of said portion of block A, San Pasqual tract, to wit, by the persons named in paragraph X of plaintiffs' said complaint, and thereafter returned said instrument to said defendant, duly signed; that said instrument is not void, and was not known by defendant to be void, and was not obtained by said defendant with intent to defraud said residents, and said residents were not induced to sign said instrument fraudulently, or under any misapprehension of its full import and effect; that said defendant made no misrepresentations as to the character or status of defendant as a mutual water company, or otherwise, but disclosed to said plaintiffs the provisions of its articles of incorporation and by-laws at and prior to the time that said plaintiffs circulated said written instrument and obtained the signatures thereto; and that the said instrument is, and at all times since its circulation and signatures, as aforesaid, has been, valid." The instrument mentioned in the last finding was in form as follows:

"Pasadena, Cal., 1909.

"To the Secretary of the North Pasadena Land & Water Co.—Dear sir: I, the undersigned, residing outside of the limits of the lands specified and prescribed in the articles of incorporation and in the by-laws of your corporation as the lands upon which only the waters of said corporation can be used and so not being legally or equitably entitled to be supplied with waters from its water systems; but nevertheless, through courtesy and under revocable license having been in the past occasionally permitted to be so supplied with water during periods when your company had a surplus on hand; hereby respectfully request your company for my temporary accommodation that it permit me to be supplied from its system with water for domestic purpose out of any surplus which it may have from time to time, not claimed by its stockholders, and upon such terms and subject to such rules as its board of directors or officers may from time to time establish. In making this request and in order to induce your company to accede to the same, I acknowledge and agree with said North Pasadena Land & Water Company that I have not, by reason of any privileges heretofore extended to me by it, in the use of its waters acquired any legal or equitable right to the use of or to purchase or to be furnished with any of the waters, owned or controlled by it; and that should said company accede to my request and permit me to be furnished with its waters as above stated, I will not at any time claim to have, by reason of said permission, or use of its waters, any right whatever in or to the same, or to the use thereof, or to purchase, or to be furnished with any of said waters, and that said company has and shall continue to have full and absolute right to discontinue said privileges and to cease to furnish me with water whenever in its judgment it shall deem it for the best interest of its said stockholders so to do. Very respectfully."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found, also, that in August, 1909, the defendant, relying upon the instrument which had been circulated and signed, took out the five-eighths inch meter through which it had formerly supplied some water to the Cottonwood Canyon Water Company and replaced said meter with three one-inch meters, and thereafter, until February 11, 1910, from time to time furnished water to the Cottonwood Canyon Water Company through these meters as said water was needed by that company, and this water was mingled with other waters owned by the last-named company, and was by said company distributed to its consumers, including plaintiffs and those represented by them; that the Cottonwood Canyon Water Company had never been the agent of defendant, nor had the defendant ever entered into any arrangement with the Cottonwood Canyon Water Company for the use of the latter's pipes; that in February, 1910, the plaintiffs, on their own behalf and that of others whom they represent, notified the Cottonwood Canyon Water Company that they would no longer purchase water from it, and said company thereafter requested defendant to discontinue furnishing it with water, and to disconnect defendant's distributing system from that of said Cottonwood Canyon Water Company; that almost immediately thereafter this request was complied with; that, while defendant has more water than its stockholders need in the winter time, such is not the case in the summer, and that no substantial quantity of water is permitted to go to waste in the summer; and that the complaining residents of block A, San Pasqual tract, could obtain a partial supply of water from the Cottonwood Canyon Water Company, and could sink a well and make up the necessary amount of water for their properties at "substantially no more expense than the defendant would have to incur, in order to supply them with water from its system."

[1-4] Appellants contend that the existence of the five-eighths inch meter connecting the system of respondent with that of the Cottonwood Canyon Water Company made the North Pasadena Land & Water Company a public service corporation. Upon this theory, they tendered a month's rent to that corporation, and, upon the refusal of its officers to accept their offer, began the present action. They cite numerous authorities to the effect that a corporation thus doing a public business may not refuse to furnish water, if it have a sufficient supply, to those whom it has previously served. Respondent concedes this to be the law, but insists that the mere accommodation of another company with some of its surplus water did not constitute those supplied by such company respondent's customers. This is the proper view of the matter. The findings bring respondent clearly within that class of corporations recognized by such cases as Hildreth v. Montecito Creek Water Co., 139 Cal. 25, 72 Pac. 395; Barton v. Riverside Water Co., 155 Cal. 518, 101 Pac. 790, 23 L. R. A. (N. S.) 331; Burr v. Maclay Rancho Water Co., 160 Cal. 280, 116 Pac. 715. Such corporations may limit the right to receive water to their stockholders; and waters distributed by such corporations are not necessarily dedicated to public use. Even if we were to consider the water furnished to the Cottonwood Canyon Water Company through the small meter sufficient to create for defendant the status of a public corporation, that would not improve the position of plaintiffs and the other signers of the solemn waiver of all rights, whether existent or prospective, to the use of water furnished by defendant. In the absence of fraud, such a waiver was perfectly good, and the court found that no fraud had been practiced. Appellants' counsel seem to think that the mere signing of such a waiver indicates that it must have been obtained by trick, device, "and a subtle form of duress," but in an appeal upon the judgment roll alone all intendments are in favor of the regularity of the judgment. The findings of the court are conclusive as to the facts found. Lane v. Tanner, 156 Cal. 138, 103 Pac. 846; Sather Banking Co. v. Briggs Co., 138 Cal. 726, 72 Pac. 352. The waiver was circulated according to the findings, not by the defend-

ant, but by the committee appointed by the very persons who are seeking relief in this action. Having admitted their position as mere licensees, the signers of that document are estopped from asserting that defendant is under any obligation to continue pouring water for their use into the distributing system of the Cottonwood Canyon Water Company.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

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163 Cal. 262

SHAW v. BERNAL. (Sac. 1,958.)

(Supreme Court of California. July 2, 1912.)

1. Husband and Wife (§ 49½*)—Wife's Separate Estate — Property Conveyed to Wife—Gift from Husband—Presumptions.

Under Civ. Code, § 164, providing that, when any property is conveyed to a married woman by an instrument in writing, it will be presumed that title is vested in her as of her separate property, where a gift by a husband to wife is essential to a theory that property conveyed to the wife was her separate property, such a gift on the part of the husband will be presumed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 249–255; Dec. Dig. § 49½.*]

2. Husband and Wife (§ 141*)—Separate Property of Wife—Improvements.

Where improvements were placed on real estate, the separate property of a wife, with funds which were either community property or the husband's separate earnings, the improvements followed the title, and became the separate property of the wife.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 538–540; Dec. Dig. § 141.*]

3. Husband and Wife (§ 14*)—Conveyance to Both—Tenants in Common—Statutes.

Civ. Code, § 164, provides that where land is conveyed to a married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the instrument. *Held*, that such presumption was only a prima facie one, except where a purchaser or incumbrancer in good faith and for a valuable consideration was concerned, and that it did not apply where it appeared that the property was purchased with the wife's funds by the husband acting as her agent, and that he procured the conveyance to himself and her without her knowledge or consent.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 71–89; Dec. Dig. § 14.*]

4. Trusts (§ 81*)—Trustee—Husband and Wife — Purchase of Land with Wife's Funds.

Where a husband purchased real property with his wife's funds and procured the conveyance to be made in the name of both, in the absence of proof of intention on her part to make a gift to him, the husband will be regarded as a trustee of his interest in the deed for the wife's benefit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 115–118; Dec. Dig. § 81.*]

5. Husband and Wife (§ 49¾*)—Wife's Separate Property—Gift to Husband—Presumptions.

Where a husband purchased property with his wife's funds, and caused the conveyance to be made in the name of both, the fact that he acquired possession and subsequently managed and controlled the property with his wife's consent was insufficient to show an intent on her part to make a gift of the property to him, or to change its status from her separate property to community property, or to change his relation as trustee of an undivided half thereof for her benefit.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 256–260; Dec. Dig. § 49¾.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Mary J. Shaw, administratrix of J. W. Shaw, deceased, against Charles Bernal, as executor of the will of Mary J. W. Shaw, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

L. G. Harrier and T. T. C. Gregory, for appellant. Frank R. Devlin and Vincent Surr, for respondent.

ANGELLOTTI, J. This action, in the nature of an action to quiet title, was brought by J. W. Shaw against the executor of the will of his deceased wife, Mary J. W. Shaw, to obtain a decree that he is the sole owner of certain real property in the city of Vallejo, being lot 5 in block 265, and the west 18 feet 4 inches of lot 6 in the same block, according to the official map of said city, with the improvements thereon; the theory of the complaint being that the same was the community property of the spouses, and that under the provisions of section 1401 of the Civil Code, he became the absolute owner thereof on the death of the wife. By his answer defendant denied the allegations of the complaint, and alleged that said property was the separate property of the wife at the time of her death. J. W. Shaw having died before decision in the lower court, Mary J. Shaw, administratrix of his estate, was substituted as plaintiff. The findings were in favor of defendant; the court expressly finding, among other things, that the property was purchased by Mrs. Shaw with her own separate funds, and also that J. W. Shaw and Mrs. Shaw did not acquire the property as community property, and that Mary J. W. Shaw was at the time of her death the sole and exclusive owner in fee of the whole of said property. Judgment was given decreeing plaintiff to be without any interest or estate in the property, and that the whole of said property at the time of her death was the separate property of Mary J. W. Shaw, and that defendant is entitled to the sole and exclusive possession thereof for all purposes of administration. This is an appeal by plaintiff from such judgment. The question presented on this appeal is whether the evidence is legally sufficient to support the findings.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

J. W. Shaw and Mary J. W. Shaw were married in the year 1887, at which time Mrs. Shaw was a widow with four children, to three of whom she left all her property by will dated October 6, 1908. She died in the year 1909. The property involved in this action was purchased from F. E. Allen and wife in the year 1905, the deed therefor being dated January 4, 1905, and running to J. W. Shaw and Mary J. W. Shaw, his wife, as grantees. This property was generally referred to in the evidence as the "York street property." The consideration specified in the deed of this property was $10, and the actual consideration was $2,300 or $2,350. The evidence was clearly sufficient to support the conclusion that this consideration was wholly paid from the separate property of Mrs. Shaw. Mr. Shaw himself testified that he bought this property with the $2,350 received on the sale of lot 6 in block 250, Vallejo, with the improvements thereon. A deed evidencing such sale, dated January 3, 1905, from John W. Shaw and Mary J. W. Shaw, his wife, to John Johnson and Annie Johnson, his wife, was introduced in evidence. The actual consideration therefor, according to Mr. Shaw, was $2,350, and this $2,350 was the whole price paid for the York street property. Said lot 6 in block 250 was purchased in 1897. Mr. Shaw testified that "I bought it from Timothy Healey," and paid for it "$500 with my wife's money that she received from France." He further testified that she received about $2,000 from Dr. Cells, her brother-in-law in France, that he "handled about $1,200 of it," and that he "bought lot 6 with $500 of that." He had no knowledge of the reason for the sending of this money to his wife, and only knew that it "came from Dr. Cells in France." We deem it unimportant to determine the question elaborately discussed by counsel whether this $2,000 received by Mrs. Shaw from France must be deemed to have been community property, in view of the prima facie presumptions in favor of community property as to all property acquired by a spouse after marriage. The deed given on such purchase presumably executed according to the directions of Mr. Shaw, for according to his testimony he appears to have conducted all the negotiations, was introduced in evidence as one of his exhibits. It was dated November 10, 1897, and ran from Timothy Healey and Bridget Healey, his wife, as grantors, to Mary J. W. Shaw, as sole grantee. At the time of the execution of this deed, section 164, Civil Code, after declaring substantially that all property acquired after marriage by either husband or wife, except that acquired by either spouse by gift, bequest, devise, or descent, with the rents, issues and profits thereof, is community property, provided, as it does now, as follows: "But whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property."

[1] It is settled that, under this statutory provision, where a gift by the husband to the wife is essential to the theory that the property conveyed to the wife is the separate property of the wife, such a gift on the part of the husband will be presumed. See Alferitz v. Arrivillaga, 143 Cal. 646, 77 Pac. 657; Fanning v. Green, 156 Cal. 279, 282, 104 Pac. 308. So here, if we assume that the evidence was not such as to warrant a conclusion that the $2,000 received by Mrs. Shaw from France was her separate property, which by no means do we concede, and if, in fact, the money paid for said lot 6, block 250, was community property, nevertheless the fact that the deed was caused by Mr. Shaw to be made to Mrs. Shaw as sole grantee gave rise to the presumption that Mr. Shaw intended a gift of the property to his wife as her separate property. This, it is true, was only a prima facie presumption as between husband and wife, but there was certainly nothing in the evidence requiring a conclusion that this presumption had been controverted. No explanation to show a contrary intention was even attempted by Mr. Shaw, and the facts shown were not such as to compel a conclusion contrary to that of the lower court. The case in this respect is not as strong in favor of the husband as was that of Fanning v. Green, 156 Cal. 279, 104 Pac. 308, relied on by appellant, where the court in upholding the finding of the trial court in favor of the husband intimated very strongly that a contrary conclusion on the part of the trial court on the question of intent to make a gift would have been held to be sufficiently supported by the testimony. Hammond v. McCollough, 159 Cal. 639, 115 Pac. 216, relied on by appellant, was also a case where the finding of the lower court was in favor of the husband, and this court simply held that there was sufficient legal support in the evidence for such finding.

[2] Mr. Shaw thereafter built a house on said lot 6, block 250, using therefor $700 of "the money that came from France," and, he claimed, about $700 more of his own earnings. If we assume that all the money expended in constructing the house on this land was community property, it still remains that both the land and the building constructed thereon constituted separate property of the wife. A similar question was early decided by this court. The conveyance of land purchased with community funds had been by express direction of the husband, made to the wife, with the intent on his part to make to her a gift of the property. Subsequently the husband from community funds constructed a dwelling house

thereon. The court said: "The question is, who was the owner of the house when it was built under those circumstances. It admits of only one answer—the owner of the lot was also the owner of the house. It formed a part of the real estate, and the title to the home is necessarily included in the title to the lot on which it is erected, in the absence of an agreement sufficient to pass the title to the house alone. Peck v. Brummagim, 31 Cal. 441, 448, 89 Am. Dec. 195. This holding is in accord with the general rule stated in 21 Cyc. 1648, as follows: "Improvements made during marriage on the separate property of either husband or wife, although with community funds, will as a general rule belong to the spouse owning the separate property." An agreement between the parties may produce a different result as is implied in the above quotation from Peck v. Brummagim, supra, creditors of the husband may perhaps establish a claim to improvements so constructed where they can show that the expenditure therefor was a fraud upon them (see Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567), the wife might reach as community property a building erected by the husband from community funds on his separate property, for the very purpose of fraudulently depriving her of her interest therein (see Smith v. Smith, 12 Cal. 216, 73 Am. Dec. 533), but it is clearly the rule that where a husband deliberately constructs from community funds a building upon the separate property of his wife, in the absence of any sufficient agreement or undertaking to the contrary, as between him and her, the title to the building follows the title to the land and is separate property of the wife, and neither he nor the marital partnership has any title to any portion of the property, either land or building. The authorities hold that the most that the marital partnership may acquire under such circumstances, if anything, is a right to reimbursement to the extent of the value added to the property by the improvements. Whether the right to reimbursement exists in such cases is a question not at all involved in this proceeding and we express no opinion thereon. In support of the views we have expressed are the following authorities, in addition to those already cited: McKay on Community Property, § 249; Ballinger on Community Property, note to section 19; 6 American and English Encyclopedia of Law (2d Ed.) 324; Rice v. Rice, 21 Tex. 58; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033, 50 S. W. 567; Humphreys v. Newman, 51 Me. 40. The only expression of opinion that we have found that may be claimed to be in any way opposed to the views we have stated is in Collins v. Bryan, 40 Tex. Civ. App. 88, 88 S. W. 432, a case decided by the Civil Court of Appeals of Texas. There was absolutely nothing in the evidence relative to this property to take the case from the effect of the rule we have discussed. The disposition of the rents received from the house constructed on said lot, viz., their collection by Mr. Shaw and the placing of the same by him in the bank to his credit, is immaterial in the determination of the question we have been discussing.

As we have said, the deed for the York street property, the property here involved, ran to both Mr. and Mrs. Shaw, as grantees. Mr. Shaw said that he bought this property, conducted the negotiations, and gave the instructions "to the agent." We have thus a case where real property was purchased by the husband, wholly with money belonging to the wife as her separate property, and the conveyance therefor, presumably by the direction of the husband, was made to both husband and wife. The evidence is not such as to compel the conclusion that Mrs. Shaw was ever made acquainted with the fact that Mr. Shaw was named as a cograntee with her in this deed, or that there was any understanding between him and her prior to or at the time of the purchase that he should be so named. The testimony of Mr. Shaw contains no such claim on his part. There was a small house upon the property, which Mr. Shaw moved to the rear of the lot and repaired at a cost of some $900. This was the residence of the family to 1907. Mr. and Mrs. Shaw then constructed four flats on the property at a cost of some $5,700, which they borrowed, executing a mortgage to secure their note for that amount to one Margaret J. Best. This mortgage covered the property here involved, and also a lot purchased by Mr. Shaw with community funds on February 15, 1895 (lot 5, block 250, Vallejo). From about the year 1895, Mr. Shaw was employed as a machinist at the Mare Island Navy Yard, receiving from $4.16 to $4.48 per day. He collected the rentals from the flats, as to which his wife had full knowledge, and deposited both rentals and wages in the bank to his own credit, and the fund thus created was drawn on for all necessary expenses, including household expenses, repairs of the property, and payments on account of the mortgage debt. On July 19, 1907, he sold lot 5 in block 250 for $3,000, and they built two additional flats on the property in controversy at a cost of some $3,600 or $3,700. New mortgages covering the property in controversy, given by both husband and wife to secure their notes, one dated July 19, 1907, for $4,200, and one dated March 1, 1908, for $5,000 were shown. After the building of the two new flats, Mr. and Mrs. Shaw lived in one of the flats. The present value of the whole property is about $12,000. The foregoing matters were shown by the testimony of Mr. Shaw.

In view of what we have said as to the rule applicable where a husband voluntarily constructs with community funds buildings upon the separate property of the wife, there is nothing in the foregoing testimony to compel a conclusion that any part of the property here involved, land or improvements, was community property at the date of death of Mrs. Shaw. Even if we assume all the money put into the buildings constructed on this property to have been community property, the court was nevertheless warranted in concluding that none of such property (land or buildings) was community property, if indeed it was not compelled to so conclude. There was nothing requiring a conclusion bringing the case within the operation of the rule referred to in Title Ins. & Trust Co. v. Ingersoll, 153 Cal. 1, 94 Pac. 94, as to a transmutation by agreement of separate property of the wife into community property, even if such an agreement as to real property constituting such separate property could be effectual if not in writing. See Yoakam v. Kingery, 126 Cal. 30, 33, 58 Pac. 324. And the mere fact that both Mr. and Mrs. Shaw were named as the grantees in the conveyance could not operate to require a conclusion that the property purchased was community property. Section 164, Civ. Code. So that we know of no theory upon which it can be held that the conclusion of the trial court that none of this property was community property is not sustained by the evidence.

[3] There remains for consideration but one other claim of plaintiff, a claim not presented by the complaint, which went entirely upon the theory that all of the property was community property, but which is made in the briefs, and is involved in the claim of defendant that all of the property was the separate property of Mrs. Shaw at the time of her death. This was found and adjudged by the trial court. The claim is that one-half of the property was the separate property of Mr. Shaw. This claim has for its basis the fact that the conveyance of the property was to both Mr. and Mrs. Shaw as grantees. Section 164 of the Civil Code, after providing as we have already set forth, declares: "And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument." This presumption, like the one declared in favor of the wife where the conveyance is to her as sole grantee, is simply a prima facie presumption, except where a purchaser or incumbrancer in good faith and for a valuable consideration is concerned. It has been said that under this provision the legal presumption arising upon the face of such a deed as this "is that the grantees took the land as tenants in common, each one-half as his or her separate estate." Yoakam v. Kingery, 126 Cal. 32, 58 Pac. 324. Assuming that such a presumption exists in favor of the husband, as it is established that the purchase was made by the husband wholly with money in his possession constituting the separate property of the wife, we are satisfied that the trial court was warranted in concluding upon the evidence before it, as we must assume that it did conclude, that any presumption arising under such section was sufficiently controverted, and that the husband acquired no beneficial interest in the property so purchased.

[4] There was nothing in the evidence to require a conclusion that Mrs. Shaw had ever done more in relation to the money derived from the sale of her lot 6 in block 250 than to intrust it to the custody and control of her husband. As in Title Insurance Co. v. Ingersoll, 158 Cal. 483, 111 Pac. 364, "the relation of the parties and their conduct with respect to her money justified the court in preferring the inference that the understanding was that he was to act as trustee for her in the management and disposition of it." It is well settled that "if a husband purchase lands with the separate estate of his wife in his hands, * * * or money put into his hands to invest for his wife, and take the title in his own name, a trust results to the wife" (1 Perry on Trusts, § 127), in the absence of a clear understanding to the contrary, had at the time of the purchase. (Id. § 140). See, also, 3 Pomeroy, Eq. Jur. § 1049; Heinrich v. Heinrich, 2 Cal. App. 479, 483, 84 Pac. 326.

[5] It was substantially said in Title Insurance Co. v. Ingersoll, 153 Cal. 1, 5, 94 Pac. 94, that it is well settled that the mere acquirement of the possession of a wife's separate property by the husband, and his subsequent management and control of the same, all with her consent, do not show any intent on the part of the wife to make a gift of the property to the husband or to change its status from separate to community property, that the presumption in such a case is that the property continues to be the separate property of the wife and that the husband holds it in trust for her, and that under such circumstances it devolves on the trustee claiming a gift or change in the status of the property to show the same. The utmost that can here be claimed for Mr. Shaw in this regard is that he held the dry legal title to an undivided one-half of the property, as trustee for his wife, who was the sole beneficial owner thereof and entitled to have the same conveyed to her. If we assume this to be the situation, there is no practical necessity for a reversal or for any modification of the judgment.

The judgment is affirmed.

We concur; SHAW, J.; SLOSS, J.

163 Cal. 243

McKAY v. GESFORD. (Sac. 1,836.)

(Supreme Court of California. June 29, 1912.)

1. Trial (§ 395*)—Findings—Construction.

Where, in ejectment, the court made a finding of the ultimate facts from the probative facts previously found, such ultimate finding could not be sustained, unless supported by the specific facts found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934, 939; Dec. Dig. § 395.*]

2. Homestead (§ 35*)—Declaration—Use of Building.

Where husband and wife occupied a six-room building, erected on her separate property, for a hotel and boarding house, occupying no portion of the building permanently, but shifting from one room to another as the exigencies of their business demanded, such use did not deprive the premises of their homestead character, so as to deprive the wife of the right to file a homestead declaration thereon.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 50–55; Dec. Dig. § 35.*]

3. Homestead (§ 35*) — Use of Property — Paramount Purpose.

Where premises are bona fide used as the home of the owners, such use will be regarded as the paramount purpose, and the fact that they are also used for some business in order to afford a means of livelihood to the occupants will not prevent the property being subject to a homestead exemption.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 50–55; Dec. Dig. § 35.*]

In Bank. Appeal from Superior Court, Modoc County; John E. Raker, Judge.

Action by Rose McKay, as special executrix of Julia D. Ferguson, deceased, against Frances Helen Gesford. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

J. H. Stewart, for appellant. N. A. Cornish, for respondent.

PER CURIAM. This action is in ejectment. It was brought by plaintiff as special administratrix of the estate of Julia D. Ferguson, deceased, claiming that certain real property belonged to the estate of her intestate.

Defendant admitted that the property in question had originally been the separate property of Julia D. Ferguson, but averred and showed that Julia D. Ferguson, while the wife of A. H. Ferguson and while she with her husband was residing in the house upon the land in controversy, filed her declaration of homestead for the joint benefit of herself and her husband. Julia D. Ferguson having died, it is conceded that the property passed to the surviving husband (Civ. Code, §§ 1263, 1265; Code Civ. Proc. §§ 1474, 1475), if at the time of her death there was, under her homestead declaration, a valid subsisting homestead upon the property. Defendant and appellant is the grantee of the husband, claiming title by deed executed by him after the death of his wife. The court made voluminous findings, and from them reached the conclusion that in law the homestead declaration was invalid. Judgment passed for plaintiff, and from that judgment and upon the judgment roll defendant appeals, contending that the findings do not support the judgment.

The findings are that in 1884 Julia D. Ferguson, then Julia D. Edwards, a spinster, owned the land in controversy, and in 1884 constructed a building thereon consisting of four rooms "as and for a hotel, and to keep boarders and lodgers as she could accommodate." In 1888 she married A. H. Ferguson. At the time of her marriage she was residing "on said premises in the hotel building thereon, and continued to keep such boarders and lodgers as could be accommodated in said hotel building, and to run said hotel and hotel business with all the customers, boarders and lodgers that could be obtained." In 1891 or 1892 she "built two additional rooms onto said hotel building." She continued thus in occupancy, and use of the premises until her death. After her marriage with her husband in 1888 she with her husband continuously resided upon the premises and "in the hotel building thereon," and this was their sole and only home and residence. She was so residing with her husband upon the premises, when in 1894 she made the homestead declaration in due and regular form, claiming the premises as a homestead for the joint benefit of herself and her husband. This homestead declaration was duly acknowledged and recorded. "From the time of the erection of said hotel building on said premises described in the complaint, in the year 1884 and up to the 1st day of January, 1895, the said Julia D. Ferguson conducted a hotel on said premises, and her residence upon said premises and in said building was but incidental to the running of said hotel, and that the said building and premises were used primarily and principally as and for a hotel, and not otherwise." During all of this time "Julia D. Ferguson performed the principal labor necessary to keep the said hotel, did the cooking and waiting on table, and otherwise attended to the wants of her boarders and lodgers; but at times hired a cook and waiter girls, and other help, when necessary to run said hotel, and, after her marriage to the said A. H. Ferguson, the said A. H. Ferguson when not otherwise engaged would give his help and assistance to his wife in and about the said hotel in doing the work and in conducting the same. * * * Said hotel building was not dedicated to residence purposes primarily, and was actually used by said Julia D. Ferguson and was occupied for business purposes for the accommodation of the public. * * * No particular room or rooms on the premises were reserved for the exclusive use of said Julia D. Ferguson and her husband, or either of them, but that she and her husband used any of them for themselves as was convenient, when not needed to be used by their boarders and lodgers, and that no particular portion of the premises was used exclusively, primarily, or principally for a home by either of them. * * * A sign bearing the words 'Star Hotel' was continually kept on the building from the time of its construction, and a bell was rung at regular intervals at meal hours to call persons to meals; that occasionally advertisements of the Star Hotel were published in a newspaper by the said Julia D. Ferguson, and that Julia D. Ferguson solicited many of the business men of the town to send her patronage to her hotel." At no time were the premises of a greater value than $1,000. The residence of Julia D. Ferguson before her marriage and of herself and her husband after their marriage upon the premises in question "had been and was but incidental to the running of the hotel business and conducting of a hotel business thereon; and the said building on said premises was used and occupied by said Julia D. Ferguson and by said Julia D. Ferguson and said A. H. Ferguson, at all the times herein specified and found in these findings, primarily and principally and chiefly as and for a hotel to accommodate the public, and not otherwise." Finding 20: "That said lands and premises, together with the building thereon known as the Star Hotel, being occupied and used as hereinbefore found, primarily and principally and chiefly as and for a hotel and doing a hotel business, and the residence of the said Julia D. Ferguson and A. H. Ferguson in said hotel and on said lands and premises being but incidental at all times to the running of said hotel and not primarily and principally as a home, said house known as the Star Hotel, and the land and premises which it occupied, being the lands and premises described in the complaint, was not, nor was any part thereof, impressed as a homestead and with the homestead character as homestead property, and was not a valid homestead. And said building known as the Star Hotel, and the premises being occupied and used as hereinbefore found, could not be impressed with the title and character of a valid homestead interest, nor was it thus impressed, and it did not exist as a valid or any homestead of said Fergusons, or of either of them."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] All of the above quotations are from the findings, and by finding 20 quoted in extenso it will be seen that the court there makes its ultimate finding of fact from the probative facts previously found. It is, of course, well settled that a general and ultimate finding such as that declared in finding 20 which is drawn as a conclusion from facts previously found cannot stand if the specific facts upon which it is based do not support it. Sav. & Loan Socy. v. Burnett, 106 Cal. 540, 39 Pac. 922; McDonald v. Randall, 139 Cal. 254, 72 Pac. 997.

[2] The question, then, before us is whether the ultimate finding of the court, namely, that by reason of the facts previously found the property could not be impressed with the homestead characteristic is or is not supported. It was recognized at a very early day that questions of difficulty would arise under our homestead law touching the character of the property sought to be exempted under its provisions. Ackley v. Chamberlain, 16 Cal. 181, 76 Am. Dec. 516. It is there said "that the question whether property devoted chiefly to business purposes can be subjected to a homestead claim is full of embarrassment." But, when it is borne in mind that the homestead law is a beneficent law calling for liberal construction (Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404), we think all difficulty will be removed and all doubt resolved by the following suggestion: If under these identical circumstances of ownership of the property, of the construction of the building thereon, and of the use of that building Mrs. Ferguson, instead of being a married woman with a husband, had been a widow with minor children to support, and an attack had been made upon a declaration of homestead which she had duly made and recorded upon the property, would any court say, or would any one say. that, notwithstanding that it was the residence and sole and only home of herself and babies, it could not be impressed with the homestead characteristics because the principal purpose and use of the premises was its conduct by her as a hotel or boarding house in order that she might thus support herself and babies and give them a home? But the law is no different if you substitute a husband for the babies. The dominant and controlling fact still remains that this was the residence and home of the family, that it was suitable for the purpose, and was used for the purpose. We are not in this case embarrassed by difficulties which have arisen in other cases where the character of the business maintained is one entirely foreign to the conception of a home, if not repugnant to it—such a case, for example, as is instanced by Chief Justice Field in Ackley v. Chamberlain, supra, of an effort to impress a gas factory with homestead characteristics because the owner lived in it. Here the very business which was carried on was conducted for the purpose of maintaining the home, for, if this be not so, then it must follow that any widow seeking to support herself and perhaps her children by taking boarders or lodgers under circumstances where it can be truly said that the principal business conducted upon the premises is that of a lodging house or a boarding house cannot have a homestead, although she is conducting this very business so as to maintain herself and her offspring in a home. Each case

of this character stands by itself and is to be governed by its own facts. Our own cases have passed recently under review in Estate of Levy, 141 Cal. 646, 75 Pac. 301, 99 Am.St. Rep. 92. Without again reviewing them, it is sufficient to refer to this case. Therein, after extended consideration of our decisions, and amongst them Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404, where it is said, "Using a building partly or even chiefly for business purposes, or renting part of it, is not inconsistent with the right of homestead, provided it is and continues to be the bona fide residence of the family" this court said: "These cases are all authority for the proposition that, if a building is the actual bona fide residence of a party, he may legally select it and the land on which it is situated as a homestead, even though, incidentally, a part thereof, no matter how large, may be used by him for other purposes than those of family residence. There is no decision of this court in conflict with this view."

[3] Under the rule of liberal construction which it has been repeatedly declared should be extended to homestead laws, in every permissible case where the premises are the bona fide home of the parties, it should be held that the business conducted within the premises is not the paramount and principal purpose, but the incidental and subordinate purpose; that the home is the main thing, not the business; that the business is conducted to enable the parties to maintain a home, and not that the parties are incidentally inhabiting the premises for the purpose of maintaining the business. Especially is this true in such a case as the one at bar, where it appears from the findings that the parties during all their married life never had any other home than their six-room hotel. Nor is it of determinative import that they occupied one or another of these six rooms or shifted themselves about as the exigencies of their business demanded. In some cases the actual occupancy of a room or rooms in a building has become important as evidence showing residence. These were cases like Skinner v. Hall, 69 Cal. 195, 10 Pac. 406, and Heathman v. Holmes, 94 Cal. 291, 29 Pac. 404, but in this case the permanent occupancy of one or another room is of no material significance, since it is shown that these spouses either lived and made their home and residence upon the premises in controversy, or they lived and made their home and residence nowhere.

It follows from the foregoing that the ultimate finding of the court to the effect that the property could not be impressed with the characteristics of a homestead is not supported by the specific facts upon which the finding is based, and that the judgment itself is therefore unsupported by the findings.

Wherefore the judgment appealed from is reversed and the cause remanded, with directions to the trial court to enter its judgment for the appellant.

BEATTY, C. J., does not participate in the foregoing.

(163 Cal. 227)

FLEMING v. LAW. (S. F. 5,786.)

(Supreme Court of California. June 29, 1912. Rehearing Denied July 29, 1912.)

1. ASSIGNMENTS (§ 58*)—CONSENT—SALES.

Where one who had contracted to furnish marble for the construction of a building assigned his contract, and the assignee requested the owner of the building to consent to the assignment, to which the owner replied by letter refusing to consent, but agreeing to acknowledge receipt of notice of assignment and to pay the assignee on the assignor's order any money which became due to the assignor, the owner did not thereby consent to the assignment so as to substitute the assignee for the assignor in the contract.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 121–123; Dec. Dig. § 58.*]

2. ASSIGNMENTS (§ 109*)—CONTRACT—LIABILITY OF ASSIGNEE.

Where, without the consent of the owner, an assignee is substituted for the original contractor for marble for a building, a prior written modification of the contract made by the owner and the contractor is binding on the assignee, though he has no knowledge of such modification at the time of the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 188; Dec. Dig. § 109.*]

3. SALES (§ 89*)—CONTRACT—CONSTRUCTION—MODIFICATION.

A modification providing that payments made on a contract to buy marble were to be approximate only and that the actual marble to be paid for would be measured as set in the building, was contemplated by a provision of the original contract that a "square foot agreement will be substituted for a lump sum contract * * * to be drawn and entered into as soon as sufficient drawings have been completed."

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 251, 252, 259; Dec. Dig. § 89.*]

4. EVIDENCE (§ 413*)—CONTRACTS — ORAL EVIDENCE.

In the absence of fraud, coercion, or mutual mistake, a witness cannot by the mere declaration of his understanding of a written contract overthrow its plain language.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1855–1857; Dec. Dig. § 413.*]

Department 2. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by T. J. Fleming, Trustee, against Herbert E. Law. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Edgar C. Chapman, for appellant. Milton T. U'Ren, for respondent.

HENSHAW, J. This action was brought to enforce the payment of a sum of money alleged to be due on a contract for furnishing marble to the Monadnock Building in San Francisco owned by the defendant. The cause was tried before a jury and plaintiff received a verdict in the sum of $6,170.61, the full amount sued for, with interest. Judgment was rendered in accordance with the verdict. Defendant appeals from that judgment and from the order denying his motion for a new trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

So little dispute is there over the facts that it may be said that they are presented without conflict. The controversy arises over the legal conclusions to be drawn from the admitted facts. The latter are the following: In 1904 defendant Law contemplated the construction of an office building in San Francisco known as the Monadnock Building. W. A. Perrin, a marble man, entered into a contract with Law to furnish the marble proposed to be used in the construction of this building. The contract was in writing. It set forth the various prices for the marbles and the condition in which they were to be shipped f. o. b. cars, Colton, Cal. This contract was known as the "square foot" agreement, and concluded as follows: "If my quotations are accepted, it is understood that this per square foot agreement will be substituted for a lump sum contract, this contract to be drawn and entered into as soon as sufficient drawings have been completed to enable us to do so." It is unquestioned that the true meaning of this was that the lump sum contract was to be substituted for the temporary square foot agreement. The drawings and specifications were not at that time sufficiently complete to enable the parties to know just how much marble and of what character would be required in the building.

In the square foot agreement the provision for payment was the following: "On arrival and checking of marble in San Francisco in carload lots 90% of the amount due will be paid on presentation of architect's certificate. The balance of 10% will be due twenty-five days after the marble is set in the building complete." Perrin entered upon the delivery of the marble. Because of his immediate need for money to pay his labor and because of the delay in procuring the architect's certificates Perrin testifies, and it is without dispute, that the mode of payment was modified. The presentation of the architect's certificate was waived, and Law permitted Perrin to draw upon him for 90 per cent. of the contract price of the marble as soon as it was placed on the cars at Colton. Meanwhile the drawings, plans, and specifications had been completed, and Law from time to time requested Perrin to enter into the "lump sum" agreement which was to take the place of the "square foot" agreement with the result that on February 23, 1906, Perrin executed the following writing: "San Francisco, California. Mr. Herbert E. Law, Rialto Building, City—Dear Sir: It is agreed that payments for marble on contract dated September 6, 1904, for marble in Monadnock Building are approximate only and that the actual marble to be paid for by you will be measured set in building; the owner taking no responsibility as to size or condition, etc., delivered. Yours very truly [Signed] W. A. Perrin. Dated this 23rd day of February, 1906." Perrin had fallen into financial difficulties, and was unable to pay his laborers. On or about the date of the letter above quoted he entered into an agreement with T. J. Fleming, plaintiff herein, which declared that he assigned and transferred his contract with Law to Fleming as trustee in trust for the purpose of carrying out and fulfilling its provisions. The "trust" thus declared was to fulfill the contract by the performance of its terms and to pay to Perrin's creditors, a list of whom was given, the moneys due to them. Upon the completion of the contract any excess of the moneys over and above the amount due the creditors was to be paid to Perrin. It was fully understood and agreed "that said T. J. Fleming assumes no personal liability under said contract, and the only responsibility assumed by him is the fulfillment of the trust referred to in this assignment." Fleming was to have full management and control of Perrin's marble plant.

Following these writings, and upon March 6, 1906, Fleming presented the following letter to the defendant: "March 6, 1906. Herbert E. Law, San Francisco, California—Dear Sir: I beg to hand you herewith two copies of the assignment of the contract Mr. W. A. Perrin has with you for furnishing the marble to be used in the Bishop Building (Monadnock) in San Francisco. I understand that Perrin has been in San Francisco and advised you of this assignment, and that it is agreeable to you. If this is correct I would be pleased if you would designate your acceptance on one of the copies and return it to me at your earliest convenience. I understand there will be a carload of marble ready to be shipped in a few days. Thanking you for your prompt attention to this matter, I am very truly yours, [Signed] T. J. Fleming, Trustee." To this letter he received this response: "San Francisco, Cal., March 8, 1906. Mr. T. J. Fleming, California Portland Cement Co., 401–3 Trust Building, Calif. —Dear Mr. Fleming: I have your favor of the 6th inst. It will be quite apparent to you that I cannot consider the transfer of my contract to a number of persons of whom I know nothing, and of whose responsibility and ability to carry out the contract I do not know. Mr. Perrin, I think, is a responsible man and that he will carry it out. These gentlemen are perhaps responsible, I do not know anything about them. It seems to me, Mr. Fleming, that a transfer on my part is not necessary anyhow. Mr. Perrin will give you an order on me for the money that falls due from time to time, and I will pay it to you. That is all there will be to it. Just as soon as you have served me with notice of assignment, I will acknowledge receipt and whatever money becomes due to Mr. Perrin, I will pay on his order. It seems that this would accomplish your desire without requiring any other assignment than the arrangement that may be made between the men, Mr. Perrin and yourself. Very truly yours, [Signed] Herbert E. Law."

It appears that the suggestion in Mr. Law's letter outlined the course which was actually pursued for Perrin did give a written order to Mr. Law to "pay to T. J. Fleming, trustee, all moneys now due or that may become due me on that certain contract for furnishing marble," etc. Much marble had been delivered under this contract at the time of the earthquake and fire of April, 1906. The Monadnock Building was injured in this calamity. In May, 1906, inspection was had and measurements were made of the marble saved from the disaster. A detailed list of the kinds and quantity of marble thus saved was prepared by Perrin and his son who had the contract for setting the marble in the building. It was shown that in value $7,404.35 had been saved. Work was taken up for the completion of the building and more marble was shipped and placed therein. It is shown that up to within a few days before the April disaster there had been shipped for use in the Monadnock Building marble of the contract value of $32,588.29. Upon this Law had paid $29,815.50, leaving a balance unpaid of $2,738.78. After the disaster marble of the value of $34,747.23 was shipped. Upon this Law had paid $31,315.40, leaving the value of the marble unpaid $3,431.83. These two items of $2,738.78 and $3,431.83 represent the sums sued for by plaintiff for which he obtained judgment.

Appellant, however, contends, and it is without dispute, that the contract price for all the marble actually set in the building and measured therein upon its completion amounted to the sum of $33,908.45; that it is equally without dispute that $7,404.35 of this amount was marble saved from the disaster; that, deducting this latter sum from the former, there is left $26,504.10 as the contract price of the marble shipped after the disaster and actually set in the building. Appellant shows, further, that there was an excess of marble shipped over that used in the building amounting to $8,243.13. It is by all parties conceded that Law was not in the business of buying marble, and that under his contract he needed and was required to take only the marble called for by the specifications for the Monadnock Building, and, so far as the evidence on behalf of the plaintiff is concerned, it is all to the effect that it was intended to cut and ship no more marble than was called for by the plans and specifications. Nevertheless, there was shipped this excess in value of $8,243.13. The explanation probably is that after the disaster the plaintiff did not make an allowance for the $7,404.35 of marble saved therefrom, but duplicated the original quantity called for by the contract.

Appellant still further argues and shows that immediately after the disaster there was a balance unpaid upon the marble shipped of $2,730.78; that there was marble saved to the value of $7,404.35. Deducting from this the sum of $2,730.78, which was owing, $4,665.57 had been paid upon the marble saved from the disaster and placed in the building. Upon the shipment of marble made after the disaster, there has admittedly been paid $31,315.40, making a total payment for the marble actually set in the building of $35,980.97. But (so runs appellant's argument) the value of all marble set in the building, measured by its contract price, was only $33,908.45, from which results the inevitable conclusion that appellant, instead of being indebted to plaintiff, has made payments in excess of the full contract price, and for the excess marble, wherever it is or whatever it may be, appellant disclaims all liability and responsibility. Respondent, in effect, concedes this to be true if his rights are to be measured by the contract between Perrin and Law embodied in the written communications above set forth, and in particular, if his rights are to be affected by Perrin's letter of February 23, 1906, where the declaration is made over Perrin's signature that Law is to pay only for the actual marble set in the building, and there measured. To avoid the effect of this, respondent contends that Law assented to and accepted the assignment made by Perrin to Fleming; that at the time this assignment was so made and assented to he, Fleming, did not know of the modification of the contract contained in the letter of the 23d of February, and that, therefore, he is not bound by it; and that the legal conclusions which necessarily follow from this are that Law agreed to pay the full contract price for the marble shipped, 90 per cent. of that contract price when the marble was f. o. b. cars at Colton, and 10 per cent. upon delivery, and that any excess marble belongs to Law and should be paid for by him.

[1, 2] Thus it will be seen that the legal controversy between these parties revolves around two propositions: (1) Did Law assent to Perrin's assignment of his contract to Fleming to the extent that Fleming became substituted for Perrin therein? (2) Was this assent to the assignment, if given, given under such circumstances as to relieve Fleming from the operation of the modification contained in Perrin's letter to Law of February 23d? Without hesitation both of these questions must be answered in the negative. As to the first, Law's response to Fleming's letter is a distinct refusal to recognize the assignment and to relieve Perrin from his responsibility thereunder. He was willing to go no further, and did go no further, than to declare that he would recognize in favor of

Fleming such orders for the payment of moneys due to Perrin arising under the contract as Perrin might give. Such an order was actually given and was honored by Law. Upon the second proposition, it is, of course, beyond argument that, if Fleming had not been substituted for Perrin as assignee under the contract with the acceptance of Law, Law and Perrin were at perfect liberty to make such modifications and changes in their contract as they saw fit.

[3] The modification evidenced by the letter of February 23d, however respondent may argue against the unreasonableness of it, was precisely such a modification as was contemplated in the original "square foot" contract where it is said: "It is understood that this per square foot agreement will be substituted for a lump sum contract, this contract to be drawn and entered into as soon as sufficient drawings have been completed to enable us to do so." Perrin himself testified: "He sent me a paper [meaning the letter of February 23d which Perrin signed], and asked me to do as I had agreed to and sign that paper, and I did so. Q. You had agreed to sign such a paper a year before? A. Yes, sir. Q. And had put it off from month to month until February 23, 1906, when you signed the paper? A. Yes, sir. Q. Whereby the amount of money that you were to receive was to depend upon the actual measurement of marble in the building set up? A. Yes, sir."

We do not perceive in Perrin's testimony anything at variance with the modification of the contract and the explanation of it just quoted.

[4] Nor, if there were, in the absence of fraud, coercion, or mutual mistake, nothing of which is here asserted, could a witness be permitted, by a mere declaration of his concept of a written contract, to overthrow its plain, unmistakable, and unambiguous language.

It necessarily follows herefrom that under his contract with Perrin Law was responsible only for the contract price of the marble set and measured in the building, and it was the duty of the trial court to have so instructed the jury as matter of law. It was error for the court to leave to the jury, under the circumstances here shown, the determination of the question as to whether or not plaintiff could recover under the original square foot contract unmodified by the letter of February 23d.

Under the conclusion thus reached, no other propositions advanced by appellant require consideration.

For the foregoing reasons, the judgment and order are reversed, and the cause remanded.

We concur: MELVIN, J.; LORIGAN, J.

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19 Cal. App. 132

CHAPMAN v. ZOBELEIN. (Civ. 1,098.)

(District Court of Appeal, Second District, California. May 20, 1912. Rehearing Denied by Supreme Court July 19, 1912.)

1. TAXATION (§ 49*)—TAX SALES—CONSTITUTIONAL LAW.

A proceeding by which an owner is divested of title through a sale by the state for $166 of land bought by the state for delinquent taxes, that amount being $149.81 in excess of the amount of taxes, interest, and costs on payment of which the owner might have redeemed, does not infringe Const. art. 13, which requires all property to be taxed in proportion to its value.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 115–124; Dec. Dig. § 49.*]

2. CONSTITUTIONAL LAW (§§ 229, 285*)—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAW.

Nor does such proceeding violate Const. U. S. Amend. 14, prohibiting deprivation of property without due process of law, or the denial of the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 685, 897–903; Dec. Dig. §§ 229, 285.*]

3. EMINENT DOMAIN (§ 2*)—COMPENSATION—NECESSITY.

Nor does such proceeding violate Const. art. 1, § 14, forbidding that private property be taken for public use without just compensation.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 3–12; Dec. Dig. § 2.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by William Chapman against George Zobelein. From an order in defendant's favor, plaintiff appeals. Affirmed.

Charles Lantz, for appellant. Edward F. Wehrle, for respondent.

SHAW, J. Action to quiet title. The complaint is in the usual form, alleging ownership in plaintiff. Defendant's title is based upon a tax sale to the state, followed by a deed to the state and a conveyance to him from the state. All the points raised appear to have been determined adversely to appellant on a former appeal as herein entitled, reported in 152 Cal. 216, 92 Pac. 188.

As we understand appellant, he admits that all the proceedings whereby title to the property was vested in defendant were duly had and taken pursuant to the laws of California. His contention is that, conceding the lot was sold to the state for the delinquent tax of 1898, and no redemption thereof made within the time fixed therefor by law, by reason whereof the legal title to the lot was conveyed to the state, nevertheless the state had no power to sell and convey title to the entire lot for an amount in excess of that upon payment of which the owner of the lot was entitled to redeem the same before such sale made by the state. At the date of the sale to defendant, the amount of the taxes, interest, and penalties against the lot was $16.19. The state, however, in the manner provided by law, sold the entire lot for $166, and the sum of $149.81 in excess of the $16.19 accrued for taxes, interest, and costs, and upon payment of which at any time before the sale plaintiff might have redeemed the lot (section 3785a, Pol. Code), was paid into the public treasury, and the owner of the lot received no compensation for that part of his lot which it is claimed was unnecessary to be sold in order to collect the amount due on the property. Plaintiff alleged, and at the trial offered evidence tending to prove, that, on the date of the sale made by the state to defendant, the lot was reasonably worth $500, and that the witness would willingly have paid the $16.19, covering interest, penalties, and taxes thereon, for a part thereof consisting of the easterly or northerly 10 feet thereof, thus leaving the remainder of the lot to the owner. This evidence was excluded, and the ruling is assigned as error.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The points now presented are: (1) That the proceeding under which the owner of the lot was divested of title thereto, and which resulted in a sale of the whole property for $166, when the proceeds from a sale of a less quantity would have sufficed to pay the amount of $16.19 due to the state, is unconstitutional by reason of being obnoxious to section 1 of article 13 of the Constitution of the state of California, which provides that "all property in the state * * * shall be taxed in proportion to its value, to be ascertained as provided by law." (2) That the proceeding constituted a taking of plaintiff's property without due process of law, in violation of the fourteenth amendment to the Constitution of the United States which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person * * * of property without due process of law." (3) That the sale of the whole property to the person who would pay the largest sum of money therefor was in violation of that portion of the fourteenth amendment to the Constitution of the United States which provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws; and likewise in violation of that portion of the fifth amendment to the Constitution of the United States which provides that "no person shall * * * be deprived of * * * property without due process of law, nor shall private property be taken for public use without just compensation," and also in violation of the provision of section 14 of article 1 of the Constitution of the state of California which provides that private property shall not be taken for public use without just compensation having been first made to or paid into court for the owner.

On the former appeal of this case, reported in 152 Cal., at page 221, 92 Pac., at page 190, the Supreme Court said: "The question of the power of the state to provide that the sale of its title, after the expiration of the redemption period of five years, shall be made for the highest price offered regardless of the amount that may have accrued against the property for taxes, penalties, interest, and costs, was fully considered in the case of Fox v. Wright, 152 Cal. 60, 91 Pac. 1005, and it was there held that the state had such power." In the case of Young v. Patterson, 9 Cal. App. 471, 99 Pac. 553, this court said: "The sale vests the equitable, and the deed the legal, title of the land in the state. Santa Barbara v. Savings Socy., 137 Cal. 463 [70 Pac. 457]. As against the state, the property owner at the end of five years has forfeited all rights in the property, except the privilege accorded him by the statute, of redeeming it at any time before the state actually enters, sells, or disposes of it. Baird v. Monroe, 150 Cal. 560 [89 Pac. 352]." Section 3785a, Pol. Code. In discussing the constitutionality of the statutory proceedings under consideration, the Supreme Court, in Fox v. Wright, supra, says: "We are unable to discover any constitutional objection which interposes and invalidates the state's title, and none has been pointed out. We are unable to see why the state may not obtain a title free from all equities in the former owner at the expiration of five years as may a private citizen after foreclosure upon the mortgage when the period of redemption following such foreclosure has passed."

Whatever conclusion the higher courts may reach in considering the matter, this court deems itself bound by the authorities cited, and it is therefore unnecessary to enter upon any extended discussion of the constitutional question presented by appellant. So holding, it follows there was no error in the ruling of the trial court in excluding the evidence offered.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 36

O'CONNELL v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 942.)

(District Court of Appeal, Third District, California. May 11, 1912. On Petition for Rehearing, June 10, 1912. Rehearing Denied by Supreme Court July 10, 1912.)

1. Trial (§ 356*)—Special Verdict—Answers to Special Questions.

Where the court in the exercise of its discretionary power under Code Civ. Proc. § 625, as amended by St. 1909, p. 193, submits particular questions of fact to the jury, it is its duty to require answers to such questions, or, if the jury cannot agree on answers, to refuse to accept a general verdict if it cannot stand without proof of the facts submitted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 849–854; Dec. Dig. § 356.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. JUDGMENT (§ 250*)—INJURIES TO SERVANT —COMPLAINT—CAUSE OF ACTION.

In an action by the plaintiff, who was injured by a fall from a car on which he was trolley tender, the complaint charged that plaintiff was employed by defendant as a messenger boy, and was directed by his superior to board a construction car and act under the orders of the motorman, that the trolley pole used on the car was defective, and the defect might have been discovered by defendant by reasonable care, that plaintiff was instructed to do hazardous work, which was known to defendant and unknown to plaintiff, that plaintiff was unfamiliar with the operation of cars and machinery, and that, pursuant to the orders of the motorman, he attempted to pull down the trolley pole which broke, and caused him to lose his balance, and fall in front of the car where he was injured. *Held*, that the theory of the complaint was not that the injury solely resulted from the company's negligence in failing to discover the defect in the trolley pole, but was also based on the company's negligence in ordering plaintiff into a dangerous situation without warning, and the recovery might be had on that ground, though the injury would not have resulted if the trolley pole had not been defective.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 436; Dec. Dig. § 250.*]

3. TRIAL (§ 356*) — SPECIAL VERDICT — ANSWERS TO QUESTIONS.

In the above case, where the jury rendered a general verdict for plaintiff their disagreement as to answers to special questions, whether the trolley pole was out of repair, and whether the condition of the pole was known to plaintiff, or might have been discovered by reasonable care, did not invalidate the general verdict, which could be supported on the theory of defendant's negligence in failing to warn plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 849–854; Dec. Dig. § 356.*]

4. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—WARNING.

Where the master employs a servant in dangerous work or on dangerous machinery, and the servant, from youth or inexperience, fails to appreciate the danger, the master must give him suitable warning and complete instructions, even though the servant consents to the employment; and so a master who failed to warn a young boy, who was ordered to act as a trolley tender and to handle dangerous appliances, is guilty of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 314–317; Dec. Dig. § 153.*]

5. MASTER AND SERVANT (§ 297*)—VERDICT—CONFLICT WITH INSTRUCTIONS.

In an action against a master for injuries received by plaintiff, a trolley tender, whose complaint relied, not only on the master's negligence in furnishing a defective trolley pole, but on its negligence in ordering him to unundertake that hazardous employment without warning, a general verdict in favor of plaintiff will not be set aside as in conflict with an instruction that the defendant would not be liable for any injury to plaintiff by reason of the defective condition of a pole, if it did not know, or could not have known by reasonable care, of such defect, even though the jury failed to agree on the question of the negligence as regards the pole.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1195–1198; Dec. Dig. § 297.*]

6. TRIAL (§ 260*) — INSTRUCTIONS — REFUSAL OF REQUEST.

A request covered by the charge as given is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

7. APPEAL AND ERROR (§ 1068*)—REVIEW—HARMLESS ERROR.

In an action against a master, where the plaintiff relied, not only on the master's negligence in furnishing a defective appliance, but on its negligence in failing to warn him, and the jury, while returning the general verdict for plaitiff, failed to agree on a special question as to the master's negligence in furnishing the appliance, the refusal of an instruction that there could be no recovery for the master's negligence, unless it was a probable cause of the injury, was harmless, in so far as it referred to the furnishing of the defective appliance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225–4228, 4230; Dec. Dig. § 1068.*]

8. MASTER AND SERVANT (§ 189*)—INJURIES TO SERVANT—FELLOW SERVANTS—WHO ARE.

Where the general foreman of construction of a street railway company ordered a messenger boy who had been sent to him to act under his orders to serve as a trolley tender, and told him to act under the orders of the motorman, not only was the foreman a vice principal as to the boy, but so was the motorman, and in neither case would his right to recover for injuries be lost because of the negligence of either of those; their negligence being that of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 427–435, 437–448; Dec. Dig. § 189.*]

9. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Instructions should not be submitted on issues not raised by the evidence, and hence, in a personal injury action by a servant who had been ordered to act under the orders of another servant, an instruction that if he had two ways to perform his duties, one safe and the other hazardous, he would be guilty of contributory negligence if he adopted the hazardous method, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

10. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR.

In a personal injury action by a servant who relied, not only on the master's furnishing a defective appliance, but on its negligence in failing to warn him of dangers where the verdict eliminated from consideration the negligence in regard to the appliance, the exclusion of evidence showing the master's care in the selection of appliances was not prejudicial to the master.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193; Dec. Dig. § 1056.*]

On Petition for Rehearing.

11. STATUTES (§ 255*)—ENACTMENT—TIME OF EFFECT.

As the amendment (St. 1909, p. 193) to Code Civ. Proc. § 625, which was approved on March 6, 1909, fixed no time for its going into effect, it did not, under the provisions of Pol. Code, § 323, go into effect until the sixtieth day after its passage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 336; Dec. Dig. § 255.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

12. Master and Servant (§ 129*)—Proximate Cause of Injury—Independent Intervening Cause.

One originally negligent cannot escape liability for the proximate results of his negligence merely because of the manner of the accident, and hence where a master negligently failed to warn a servant of the dangers incident to acting as a trolley tender, and the servant because of his ignorance was injured by the breaking of a trolley pole, the master cannot escape because the accident was caused by the defective pole or because the servant, without knowledge of the dangers, consented to act in that capacity; neither being an independent intervening cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. §§ 129.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by John O. O'Connell by Lawrence O'Connell, his guardian ad litem, against the United Railroads of San Francisco. From judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

A. A. Moore, Stanley Moore, and Wm. M. Cannon, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

HART, J. This is an action for personal injuries. The cause was tried by a jury and a verdict returned in favor of the plaintiff for the sum of $6,000; the plaintiff having asked for $30,000. Judgment was given and entered in accordance with the terms of the verdict so returned, and this appeal is by the defendant from said judgment and the order denying it a new trial.

There is no dispute as to the circumstances under which the accident and consequent injuries to the plaintiff occurred. The principal point of controversy is whether, under the averments of the complaint, the general verdict may be sustained in view of the failure of the jury to return answers to certain particular questions of fact submitted to them by the court on motion of the defendant. There are other points made on the instructions and the rulings of the court on the evidence, but the disposition of these will hinge largely upon the result reached as to the main point above referred to. The defendant, a corporation, is engaged in the business of "running and maintaining and operating certain lines of street railway in the city and county of San Francisco over and upon certain streets" in said city, and at the time the plaintiff sustained the injuries complained of, and from time to time prior thereto, was engaged in constructing, altering, and repairing certain portions of its railway system. For that purpose it operated, by means of electricity and trolley poles, cars for carrying dirt from certain points on its said lines of railway to other points on said lines.

It appears that in the year 1902, when the plaintiff was a lad of about the age of 14 years, he left school for the purpose of seeking and procuring work, and that he was given employment by the defendant. At first he was put to work carrying and distributing drinking water to and among the workmen engaged in construction work on the defendant's railway lines. He performed this service for a period of about six months, when the defendant put him to work as a messenger, whose duties were to carry letters and requests for tools between the construction points and the railroad office. In the last-mentioned capacity he acted for about six months, having then been continuously in the employment of the company for about a year. He was discharged from the service of the company in May, 1903. Up to this time the plaintiff had never had any experience with or in the use of machinery of any kind or character, and had no knowledge of the manner of manipulating cars operated by electricity, nor did he know anything about the appliances or machinery by means of which such cars are operated. After his discharge from the service of the defendant, he obtained employment with the Key Route Railway Company in Oakland. While employed with that company he was put to "drilling holes in rails with a ratchet for the purpose of putting in bond wires between the rails." He continued in the service of the Key Route Company for about six months, when he secured employment involving the performance of similar duties with the Belt Railroad in the city of San Francisco, remaining with the latter until August 7, 1903, on which date he was again given employment by the defendant as a carrier of drinking water, as the same was required from time to time, to the laborers employed in construction work for the defendant. He was thus employed up to the noon hour of that day, after which, and on the same day, one Montague Graham, then general foreman of construction for the defendant, ordered him to take the position of "trolley tender" on one of the construction cars, and, in obedience to the order so given, he boarded said car, and proceeded to discharge the duties of the position to which he was thus assigned. Prior and up to the time he was put to work on said car as trolley tender, the plaintiff was still without experience in the use or manipulation of trolley poles, and possessed no knowledge of the manner of handling the mechanical appliances ordinarily employed in propelling cars operated by electricity by the trolley system. The car upon which he was assigned to duty was then in charge of one Kleupfer, the motorman, it being shown and admitted that construction cars were always in control of the motormen, and that the trolley tenders were subject to the orders of the former.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The plaintiff made several trips on the car prior to the time at which the accident occurred. It appears that the car was engaged in hauling dirt to a point on the defendant's railway system in the neighborhood of Golden Gate Park. Just before the accident, the car was standing on a bridge, where the dirt was being dumped from the car. There was but one track on the bridge. At either end of the bridge two tracks merged into the single track on the bridge. While the dirt from the car was being dumped therefrom on the afternoon of the 8th day of August—the day succeeding that on which the plaintiff was inducted into the position of trolley tender—two passenger cars, coming in opposite directions, approached either end of the bridge. It was the duty of the construction car to clear the track to enable the passenger cars to pass over the bridge, and, in order to do this, the motorman first ran his car to the south side of the bridge to let the north-bound car cross, after which he started across the bridge to the north side thereof to let the south-bound car cross. After the north-bound car had passed, the plaintiff jumped from the work car to the ground for the purpose of switching the trolley, and, as he was in the act of doing so, the motorman ordered him to jump on the "bumper" of the car. The plaintiff obeyed this order, took a position on the "bumper" in the front end of the car, and put the trolley back on the wire. The car then started across the bridge; the trolley being in the wrong direction. While the car was in motion and still on the bridge, the motorman, so the plaintiff testified, ordered him to "pull down the trolley," and, in pursuance of the order so given, he started to pull the trolley down when the trolley pole snapped about a foot from its base, with the result that plaintiff lost his balance, fell to the ground in front of the car, and received the injuries for which he is seeking damages through this action. The body of the plaintiff was jammed under the car in such manner as to require the use of a "jack" to raise the car in order to extricate him from his position. He sustained a number of bodily injuries, the most serious of which were a fractured leg, the break extending obliquely from a point just above the knee to a point on the thigh, a cut on the back part of his head, and a broken nose. He was confined to a hospital for over three months, the injured leg was left somewhat shorter than the other, the muscles on the outside of the foot had become atrophied and entirely lost their power, and the physician testified that the plaintiff would always suffer more or less pain from the injury to that limb.

The plaintiff testified that, when ordered by Graham to take the position of trolley tender, the latter made no inquiry of him as to whether he (plaintiff) had ever had any experience in that line of employment; that Graham did not explain to him at that or at any other time the character of the duties he was thus required to perform, nor did he warn plaintiff of any dangers that might be involved in the discharge of those duties.

Kleupfer, the motorman, testified that previously to the assignment of the plaintiff to the performance of the duties of trolley tender he said to Graham that he "would like to have a man tend this trolley, somebody that knows the wires and switches," as he could not do anything with the man who was then acting in that capacity. "With that," continued Kleupfer, "he [Graham] sent a boy over to me, and I looked at the boy [referring to plaintiff] when he climbed on the car, and I said: 'Mr. Graham, I don't want this boy. Can't you give me a man? * * *' He said: 'He knew all about the switches and the trolley, and is well enough versed. He has worked for the company before.' I said: 'I would like to have a man, because I don't know what will happen to this lad.' And he said, 'Go on and take him'; and I took the boy on the car and went away."

Graham, testifying for the defendant, admitted that previously to putting the plaintiff to work as a "trolley tender" he did not ask the boy whether he had ever acted in that capacity before, or whether he had ever had any experience in or with the operation of a car. He admitted that he did not even know the extent of Kleupfer's experience as a motorman or what Kleupfer's ability was as a motorman, although he testified, all that he said to the plaintiff when ordering him to take the position of conductor or "trolley tender" was that the motorman would tell him what to do, and where to go, and what switches to take. Graham further admitted that at no time did he explain to the plaintiff that there was any danger involved in the performance of the duties of a "trolley tender" or give plaintiff any warning that the trolley might fall or be pulled down. And upon this point the plaintiff testified that the motorman, prior to the accident, gave him no instructions as to his duties with the exception of telling him how to open and close the switches and to adjust the trolley to the wire; that he did not at any time warn the plaintiff of the dangerous character of the work to which he (plaintiff) had been assigned by Graham. There was evidence received to the effect that, when the plaintiff entered upon the discharge of the duties of "trolley tender" the trolley pole was in a defective condition, and that plaintiff had discovered and knew that the pole was bent or not in perfect condition after he had operated it for a short time.

As previously stated, there is practically no disagreement between counsel with respect to the circumstances under which the plaintiff was put to work as a conductor on the work car or of the circumstances attending the accident. But we have given a brief résumé of the facts as developed by the evidence in order to facilitate a clear apprehension of the principal point urged here against the soundness of the general verdict. But, to obtain a clear understanding of the main proposition contended for by the defendant with reference to the issues tendered by the complaint, it will also be necessary and at this time the more orderly to refer to and reproduce some of the averments of plaintiff's pleading.

Paragraph 7 of the complaint charges that the plaintiff, while employed as a messenger boy by the defendant, was ordered and directed by the latter to board the construction car heretofore referred to for the purpose of acting as conductor thereon, and that he was ordered and directed by the defendant, while so acting as conductor, to obey all orders given him by the motorman in charge of said car.

Paragraph 8 alleges that the trolley pole used on said car was, at the time the plaintiff was put to work as indicated, defective and out of repair, and that such condition of said pole was known to the defendant, "or, in the exercise of reasonable care, would have become known to said defendant, and was unknown to plaintiff."

Paragraphs 10, 11, 12, and 13 read as follows:

"(10) That at the time said plaintiff was given said instruction last aforesaid said work which plaintiff was instructed to do was dangerous and hazardous, all of which was known to said defendant and unknown to said plaintiff.

"(11) That at all of said times said plaintiff was unfamiliar with and inexperienced in the operation of said cars and the handling of said trolley poles, and at all of said times was unaware of the dangerous and hazardous character of the work which he was ordered to do, all of which was known to said defendant.

"(12) That pursuant to said order aforesaid, and while said car was proceeding in a northerly direction as aforesaid, and under the circumstances aforesaid, said trolley pole was pulled down by plaintiff, by means of said rope, for the purpose of switching it from said overhead wire, with which it was in contact, to said other wire. That as plaintiff pulled said trolley pole as aforesaid, by means of which said rope, below said wire, with which said trolley was in contact, said trolley pole, by reason of its being out of repair, and by reason of its being in a defective condition, suddenly broke, thereby causing plaintiff to lose his balance and fall from the place where he was standing, to wit, on said bumper located on the front of said car, to the ground.

"(13) Then and there, by reason of plaintiff's fall to the ground in front of said car, said car (then in motion) came into violent collision with plaintiff, and ran over him, then and there inflicting upon him the following injuries."

The complaint, as counsel for plaintiff contend, proceeds upon the theory that the defendant was guilty of two different and distinct acts of negligence, upon either of which, singly, or both operating concurrently to produce the injuries complained of, a recovery may be predicated.

On the other hand, the defendant first contends that (to use the language of its counsel) "although it is stated in paragraphs 10 and 11 of the complaint that this work which the plaintiff had been instructed to do was dangerous and hazardous, which was known to the defendant, but unknown to the plaintiff, and that the plaintiff had never been warned nor instructed concerning this danger, but was inexperienced in the operation of cars, and the knowledge of trolley poles, and unaware of the dangerous character of the work, all of which was known to the defendant, the plaintiff cannot recover on the basis of any of these allegations because it is not stated in the complaint that any of these matters caused or were responsible for the injuries received by the plaintiff. Having alleged what caused his injuries, the plaintiff is limited to that basis of recovery. Having stated that he was injured by reason of the trolley pole being out of repair and in a defective condition, and not having alleged that he was injured by reason of any other act or omission, he cannot predicate liability on any such act or omission, but is confined to the one theory that the defective condition of the trolley pole was the cause of his injuries, and his recovery must be based solely upon that ground."

The court submitted to the jury a number of special questions of fact involved in the issue of negligence attributed to the alleged omission of the defendant to maintain a trolley pole in perfectly sound and safe condition, and likewise submitted a number of particular questions of fact involved in the alleged act of negligence of the defendant in failing to properly instruct and warn the plaintiff that the duties to which it had assigned him were dangerous and hazardous.

The jury returned affirmative answers to the questions whether the trolley pole was out of repair at the time of the accident to plaintiff, and whether, at the same time, such condition of said pole was known to plaintiff. Upon the several other questions relating to the condition of the pole, calling for a direct decision of the propositions whether the pole was defective, whether such condition was known to the defendant at the time of the accident, and of whether the defendant, by the exercise of reasonable care, could have known of the condition of the pole as found by the jury, the jury could not agree, or, to be more explicit, the three-fourths of the number of the jury requisite to form and return answers, could not agree upon responses to said questions and so reported to the court. It is therefore contended by the defendant that, the jury having thus failed to return answers to the particular questions of fact involved in what it conceives to be the only and single issue of negligence submitted by the complaint, such failure was tantamount to a failure of the jury to agree upon the general verdict. In other words, it is the contention that the negligence alleged in paragraph 12 of the complaint being the only negligence upon which the plaintiff relies for a recovery, unless such negligence was proved, the general verdict could not stand, and that the failure of the jury to answer the particular questions of fact involved in that issue of negligence proved that the jury could not agree upon the facts essential to the support of the general verdict. Under these circumstances, it is further urged, it was the duty of the court not to accept the general verdict.

[1] At the time of the trial of this action, under the terms of section 625 of the Code of Civil Procedure, as said section was amended by the Legislature of 1909 (Stats. 1909, p. 193), it rested, as it does now, entirely in the discretion of the trial court whether particular questions of fact should be submitted to the jury in certain classes of cases. Prior to said amendment and under an amendment of said section by the Legislature of 1905 (Stats. 1905, p. 56), it was compulsory upon the court to submit such questions to the jury where they were requested and so framed as that answers thereto would have the effect of testing the validity of the general verdict; that is to say, of determining whether all the facts essential to the support of the general verdict were established to the satisfaction of the jury by the evidence. But it is no doubt the settled rule that where the court submits such particular questions to the jury and they in form and substance comply with the conditions laid down by the Chief Justice in Plyler v. Pac., etc., Cement Co., 152 Cal. 125, 134, 92 Pac. 56, it is as well the duty of the court where the matter of the submission of such questions rests solely in its discretion as it is or would be where such submission is compulsory to require answers to such questions, or, if the jury cannot agree upon answers thereto, to refuse to accept the general verdict. See Stein v. United Railroads, 159 Cal. 379, 113 Pac. 663; Clementson on Special Verdicts, p. 107. And it is, of course, very evident that, if, as in the Stein Case, supra, the unanswered questions above referred to called for answers as to facts without the proof of which the plaintiff could not support his action or a recovery, the effect of the failure by the jury to answer said questions would be to vitiate the general verdict.

[2] We are, however, not in accord with the defendant's construction of the complaint or of the scope and effect of the averments thereof, or, in other words, with its conception of the theory as to negligence upon which the complaint has proceeded, and are, therefore, of the opinion that the failure of the jury to return replies to the particular questions bearing upon the issue as to the defective condition of the trolley pole cannot justly be held to constitute or amount to a disagreement by the jury upon the general verdict. In other words, we do not assent to the proposition as contended for by the defendant that the plaintiff has in his pleading predicated his claim to relief solely upon the negligence involved in the alleged act of the defendant in suffering the trolley pole to be and to remain in a defective condition. Indeed, scrutinizing that pleading, in its entirety and viewing and construing the charging parts of its allegations together and as a whole, it cannot, with reason, be held that the plaintiff relies any more upon the negligence to be inferred from the averments concerning the defective condition of the pole than upon the negligence implied from the averments as to the omission of the defendant to instruct and warn the plaintiff respecting the dangerous and hazardous character of the work in which he was ordered by the defendant to engage. It will readily be perceived that neither the averments involving the charge that the pole was defective and out of repair, nor those setting out the failure of the defendant to warn the plaintiff of the dangerous character of the duties imposed upon him directly charge negligence. As to the alleged defectiveness of the trolley pole, the complaint, it will be noted, merely avers that "said trolley pole, by reason of its being in a defective condition, suddenly broke, thereby causing the plaintiff to lose his balance and fall from the place where he was standing," etc. This averment could and perhaps did speak the truth—that is, that plaintiff fell to the ground and sustained his injuries by the breaking of a defective trolley pole—yet it cannot in any degree impair or detract from the force of the averment from which it is to be inferred that the defendant was primarily at fault by its failure to do the very first duty it owed to the plaintiff, viz., to warn him of the fact, of which it possessed knowledge, that the work which it had directed him to perform was usually attended by hazard and danger to him who performed it. It may be suggested that, if the complaint had directly charged that the injuries to plaintiff were proximately occasioned by the negligence of the defendant in maintaining the defective trolley pole and no special or direct charge of negligence were alleged in connection with the averment that the defendant omitted to warn the plaintiff of the

dangerous character of the duties to which it had assigned him, then, perhaps, some ground for the defendant's position might exist, and a different question might, consequently, confront us. But, as we have shown, the complaint nowhere by direct language specifically charges negligence to the defendant, but relies solely upon a description of certain acts from either of which negligence must necessarily be inferred. It must be kept in mind that this is not one of those cases in which the question arises as to which of two distinct causes, produced by two separate persons, proximately occasioned the injuries. The two alleged wrongful acts here are laid at the door of the same person. It can make no difference which of those acts caused the injuries, or whether both, operating together, caused them. The result is the same, so far as fixing the liability upon the defendant is concerned. And clearly neither of said acts rests or is dependent upon the other for the statement of a case of culpable negligence.

[3] The real and only issues tendered by the complaint, then, are: Did the plaintiff receive the injuries as alleged in the complaint? If so, was it by and through the negligence of the defendant that such injuries were proximately produced? Manifestly, it was for the jury to decide these issues, and it was within their right and province under the issues as thus submitted, having found that the injuries had been received, to determine from the evidence whether the negligence of the defendant in producing them was in the alleged act of maintaining a defective trolley pole or in its alleged failure to properly or at all warn and instruct the plaintiff as to the danger and hazard lurking in the duties which it required him to perform and in the execution of which he sustained such injuries, or in both the alleged wrongful acts operating together. It follows, therefore, that, although the jury might have conceived themselves justified by the evidence in acquitting the defendant of culpability as to the matter of the alleged defective trolley pole, still they were authorized, if the evidence warranted such conclusion, in basing their verdict upon the negligence of the defendant in omitting to warn and instruct the plaintiff as to the hazards of the undertaking which it had directed him to assume. And this it is clearly manifest from the general verdict and the answers returned to certain of the particular questions of fact submitted to them is precisely what the jury did.

We have already seen that the jury could not agree upon responses to some of the essentially material particular questions of fact involved in the issue as to the alleged defect in the trolley pole. But, as before stated, they did agree upon and return answers to all the particular questions involved in the issue as to the negligence of the defendant in failing to instruct the plaintiff that the duties of trolley tender involved hazard and danger to an inexperienced person undertaking to discharge them. The answers so given involved express findings by the jury of these facts: That the defendant, as alleged in the complaint, ordered the plaintiff to take the position of conductor on one of its work cars; that the plaintiff was ordered by the defendant while on said car to obey all orders given by the motorman in charge of said car; that a short time before the accident the said motorman directed plaintiff to stand upon the bumper of said car, and that the danger of plaintiff's position on the bumper was not obvious to a person of his age, experience, and capacity; that the work of trolley tender upon the car upon which plaintiff was put to work was dangerous and hazardous; that the danger of such employment was unknown to plaintiff; that, before the accident, plaintiff was not given by the defendant sufficient instructions with regard to the performance of his duties as trolley tender; that, prior to the accident, the defendant did not warn the plaintiff concerning the danger or hazard of his work as trolley tender; that at the time of the accident the plaintiff was unfamiliar with, and inexperienced in, the operation of said car; that at that time plaintiff was unfamiliar with, and inexperienced in, the handling of said trolley pole; that the plaintiff, at the time of the accident, was not aware of the danger and hazard involved in the work which he was engaged in at that time. These findings, when considered in connection with the failure of the jury to return express findings upon the other issue of negligence made by the complaint, clearly show this: That while reaching the conclusion that the fact of plaintiff's admitted knowledge of the defective condition of the pole constituted contributory negligence, or, perhaps, more strictly, an assumption of risk on his part upon that issue, and that, therefore, the defendant should be held blameless for consequences flowing from the defectiveness of the pole, the jury were, nevertheless, satisfied from the evidence that the defendant negligently failed to instruct and warn the plaintiff—a mere boy, having no previous experience whatsoever in such employment—as to the hazardous nature of the duties which it had thus imposed upon him, and that, by reason of such negligence on the part of the defendant, the plaintiff was injured. And it cannot for a moment be doubted that the general verdict is consistent with and supported by the findings last referred to, and that, as before shown, the attitude of the jury on the other issue of negligence, as evidenced by its report to the court on the particular questions submitted to them thereon, does not conflict with nor in any manner or measure invalidate the general verdict.

[4] It will, of course, not be disputed that the settled rule is that, where the master employs a servant to do dangerous work or to do work necessarily requiring him to handle or move about machinery of a dangerous character, "who, from youth, inexperience, ignorance or want of capacity, may fail to appreciate the danger surrounding him, at such work, it is a breach of duty for the master to expose such servant, even with his own consent, to such danger, or to place him in a position where it shall become necessary for him to encounter the same without first giving him such full and complete instructions as will enable him to fully and completely comprehend them, and to do the work safely, and with proper care on the servant's part." From an instruction approved in Clark v. Tulare Lake Dredging Co., 14 Cal. App. 439, 112 Pac. 564, and founded upon the rule as laid down in Foley v. Cal. Horseshoe Co., 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

In the last-mentioned case the court points out certain conditions upon which a minor, employed about dangerous machinery, may himself be held responsible for any accident and consequent injury that might happen to him while engaged about or in operating such machinery, but, on the other hand, it unreservedly approves the general rule as to the employment of minors as it is thus enunciated in Turner v. Norfolk, etc., Ry. Co., 40 W. Va. 675, 22 S. E. 83: "A minor cannot be expected to set up his opinion, however mature, against the judgment and experience of those maturer and older to whom he is given in charge, but he is taught the lesson of obedience from his cradle, and he is required to respect the commands, and to pay deference to the judgment of his elders, until legally emancipated at the age of 21 years. And it would be an extreme case in which a minor should be guilty of contributory negligence in obeying the orders of his foreman, representing his master."

The brief reference we have made to the evidence is, we think, sufficient to disclose that the case here comes clearly within the doctrine invoked and applied in the cases above cited. Here we have a lad scarcely beyond the age of 14 years, who, when called to the employment in the execution of which he was injured, was acting as a mere messenger boy, without the slightest experience in the manipulation of the mechancial appliances usually used in the operation of trolley cars, and, without warning or instruction as to the character or hazard of such employment by the defendant or its agent, put to work as a trolley tender, and thus compelled to assume the responsibility of performing duties as to the performance of which, we are justified in saying, even an adult, for his own protection as well as that of the public, should first be given specific, clear, and definite instructions before he should be permitted to assume the responsibility of performing them. But, whether because of youth, inexperience, and ignorance the plaintiff was altogether unfitted for the performance of such duties, and unable to realize or appreciate the danger or hazard involved therein, and whether, under all the circumstances appearing, the defendant was guilty of that remissness, in the discharge of the duty it owed to the plaintiff, censurable in law, by failing to instruct the latter how to perform the duties to which it had assigned him and to warn him as to the hazards involved therein before he was put upon their performance, constituted questions whose solution was peculiarly a matter for the jury, and, as previously stated, we perceive no reason for doubting that upon that issue alone the jury founded their verdict and that their conclusion as thus expressed and as evidenced by their answers to the particular questions of fact involved in said issue, is amply supported by the proofs.

The defendant complains of a number of errors, which it claims were prejudicial to its rights, in the action of the court involving its charge to the jury. It will not be necessary to give all these assignments special notice. It may be remarked generally that the court instructed the jury clearly and fully upon all the issues upon which enlightenment as to principles of law pertinent thereto was essential to a just determination of the case as made by the pleadings and proof.

[5] What we have heretofore had to say concerning the issues as to negligence tendered by the complaint is substantially a reply to the contention that the general verdict is against law because it is in conflict with instruction No. 32, given by the court at the request of the defendant, and declaring that the defendant would not be liable for any injury suffered by the plaintiff by reason of the defective condition of the trolley if, finding said pole to be defective and out of repair, the defendant, at the time of the accident, did not know, and by the exercise of reasonable care could not have discovered, such condition of said pole. We need not, therefore, give the point thus advanced further consideration.

The above observation is equally pertinent to instructions Nos. 3 and 10, submitted to the jury on the motion of the plaintiff; the questions involved therein having already been examined and decided against the contention of the defendant with regard thereto. The first of these instructions merely announced to the jury that the plaintiff, in his complaint, relies, as to negligence, upon two separate and distinct theories. This we have held to be true, and therefore the second of said instructions pertinently, and we may add correctly, declared to the jury the rule as to the duty of the master toward his servant where the latter is required or directed by the former to perform duties of a dangerous character or in a dangerous place and such servant from youth, inexperience, ignorance, or want of general capacity may fail to appreciate the dangers of such duties or place.

[6, 7] Error is further predicated upon the court's refusal to allow some of the defendant's instructions, among which is instruction No. 50, which reads as follows: "Even if you find that the defendant was negligent, such negligence was not the proximate cause of the injury, unless the defendant, in the exercise of ordinary care, ought reasonably to have foreseen that injury might result therefrom, or unless such injury was the natural and probable consequence of the master's negligence." This instruction is so general in form that it is difficult to say to which theory of negligence relied on in the complaint it was intended that it should apply. If, however, it was addressed to the alleged negligence involved in the act of maintaining a defective trolley pole, the reply to the exceptions to the court's action in refusing it is twofold: (1) That the court in its charge fully covered the law as to such alleged negligence; (2) that, even if it were error to disallow it, the error is without prejudice, since the jury practically found in favor of the defendant on the issue of negligence as to the trolley pole, or, at any rate, eliminated that theory of negligence as an issue in the case by their failure to return answers to the particular questions of fact involved therein. If, on the other hand, the instruction was designed to bear upon the other theory of negligence, the failure to allow it was also without prejudice in view of the full exposition of the law upon that question embodied in the court's charge.

Instruction No. 51, relating to the issue as to the condition of the trolley pole, proposed by the defendant, was rejected and the action of the court in that respect, even if erroneous, which we do not decide, turned out to be without prejudice because (as suggested in the above observations on defendant's proposed instruction No. 50) the issue to which it was addressed became immaterial by reason of the action of the jury thereon. Lightner Mining Co. v. Lane et al. (Sup.) 120 Pac. 771; Lowe v. San Francisco, etc., Ry. Co., 154 Cal. 573, 578, 98 Pac. 678.

[8] It is next contended that the court erred in declining to allow certain instructions proposed by the defendant on the subject of negligence of a fellow servant. The court was, in our opinion, justified in rejecting said instructions. While the answer, as one of the defenses, pleads that the injuries of the plaintiff were occasioned solely through the negligence of a fellow servant, there was not offered by the defendant, nor is there in the record, any evidence supporting that defense. The undisputed evidence, on the contrary, shows that the plaintiff was ordered by the general foreman of construction of the defendant to take the position of conductor or trolley tender on one of its work or construction cars, that said car was in the immediate control of the motorman, and that the foreman of construction directed the plaintiff to take orders as to the manner of discharging his duties as trolley tender from the motorman, saying to plaintiff that the former would show him what to do and how to do the work to which he was assigned.

It is very clear from these facts that the motorman in his relation to the plaintiff as an employé of the defendant was more than a mere fellow servant in the sense that an employer is not legally liable for injuries sustained by one servant through the negligence of a fellow servant. Under the circumstances as revealed by the evidence, he was the agent of the defendant or its vice principal. It may be said to be true that in a general sense, or generally speaking, the motorman and conductor of an electric work car are fellow servants, but the books are full of cases showing where one fellow servant, in the discharge of a particular duty for his employer, may become, by reason of the peculiar nature of such duty, the master's agent so as to bind the latter for any damage resulting from its negligent execution. The rule is that, where the master owes a duty to his employé, he cannot escape responsibility for its proper performance, or liability for an injury to one servant occasioned by a failure to perform such duty, by delegating its performance to another servant. Tedford v. Los Angeles Elec. Co., 134 Cal. 79, 66 Pac. 76, 54 L. R. A. 85. It is said in that case "that the fellow servant to whom the performance of such duties is assigned becomes, with respect to that particular duty, the special representative of the employer—sometimes called a vice principal. In such case negligence of the servant is the negligence of the principal, for which the latter must answer. See Daves v. Southern Pac. Co., 98 Cal. 19 [32 Pac. 708, 35 Am. St. Rep. 133]; Callan v. Bull, 113 Cal. 593 [45 Pac. 1017]; Elledge v. National R. R. Co., 100 Cal. 282, [34 Pac. 720, 852, 38 Am. St. Rep. 290]; Nixon v. Selby, etc., Co., 102 Cal. 458 [36 Pac. 803]. * * * It is also one of these duties to give careful instructions, directions, and warnings to a youthful or inexperienced servant of unusual and hidden dangers, of which the employer is aware, and of which the servant, to the employer's knowledge, is ignorant." But there can be absolutely no doubt that the general foreman of construction, who ordered the boy to assume and discharge the duties of conductor, was in no sense a fellow servant of the plaintiff. The respective general duties of the two were altogether dissimilar. He exercised authority, in the service of the defendant, superior to that of the plaintiff. He in point of fact, among other duties, had the authority, if not to employ laborers, to assign them to particular duties in the work of construction, etc. Within the scope of his duties, he was, therefore, strictly a vice principal or agent of the defendant, and upon him rested the duty which the defendant owed to the plaintiff of so instructing and warning the latter as to the dangers of the duties of conductor as to enable him to fully realize and appreciate such dangers. Ingerman v. Moore, 90 Cal. 410, 27 Pac. 306, 25 Am. St. Rep. 138, and authorities cited; Ryan v. Los Angeles, etc., Co., 112 Cal. 244, 44 Pac. 471, 32 L. R. A. 524; Gibson v. Sterling Furniture Co., 113 Cal. 1, 45 Pac. 5; Verdelli v. Gray's Harbor, etc., Co., 115 Cal. 517, 47 Pac. 364, 778; Higgins v. Williams, 114 Cal. 176, 45 Pac. 1041; Mullin v. Cal. Horseshoe Co., 105 Cal. 77, 38 Pac. 535; Hanley v. California, etc., Co., 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597; Shea v. Pac. Power Co., 145 Cal. 680, 79 Pac. 373. His failure, therefore, to warn and instruct the plaintiff as to the hazards of the employment in which he was thus required to engage—hazards unusual to a youth without previous experience in such work—constituted the act of omission and consequent negligence of the defendant.

As before indicated, it is clear that all the evidence upon that question plainly and unmistakably shows that both the motorman and the general foreman of construction, in their transactions with the plaintiff as shown by such evidence, sustained the relation of vice principals to the defendant, and that, there having been introduced into the record no evidence showing or tending to show that they were fellow servants of the plaintiff in the sense that the defendant could not be held responsible for any act or acts of theirs resulting in injury to plaintiff, it follows that the rejection of the instructions here referred to did not constitute error.

[9] It is a proposition too obvious to require reference to authorities to prove it that a trial court is never required to submit to a jury the law upon an uncontroverted question of fact. However, the following cases expound the rule as thus stated: McNamara v. MacDonough, 102 Cal. 581, 583, 36 Pac. 941; Tompkins v. Mahoney, 32 Cal. 235; Terry v. Sickles, 13 Cal. 429; Caulfield v. Sanders, 17 Cal. 573; Pico v. Stevens, 18 Cal. 376; Robinson v. W. P. R. R. Co., 48 Cal. 424; Watson v. Damon, 54 Cal. 279; State v. Osborne, 45 Iowa, 425, 428; Brickwood-Sackett on Instructions, § 199.

The rejection of defendant's proposed instruction No. 55 cannot, under the circumstances, be held to have been prejudicial to the defendant. This instruction would have told the jury that if there were two ways, one safe and the other dangerous, by which the plaintiff could have performed the duties of conductor, and that plaintiff, having knowledge of those two ways, undertook to perform those duties in the dangerous rather than the safe way, and was thereby injured, he would be guilty of contributory negligence and the defendant absolved from liability. The sole act of negligence of the defendant, according to the jury's findings, was that of failing to warn the plaintiff of the dangerous character of his duties. The plaintiff was, according to an express finding of the jury, educed from sufficient evidence, ignorant of the manner of performing the duties of trolley tender, and was ordered by the general foreman of construction to obey the directions of the motorman with regard to the performance of those duties, and, in obedience to the order thus given, was only doing what the motorman told him to do when he met with the accident. "He had," as counsel for the respondent aptly suggest "no choice of two ways in performing his duty. His duty, as he saw it, and as he had been instructed by Graham, was to obey Kleupfer." The instruction would, therefore, have had no application to the particular act of negligence upon which the jury manifestly founded their verdict.

[10] There is discussed in the briefs but one of the rulings on the evidence to which exceptions were reserved. The defendant, for the purpose of showing reasonable care in the selection of the mechanical appliances used upon its cars, sought to prove the "advertised test" of the manufacturers of the trolley poles used by it. The court, under an objection, refused to permit the defendant to show by one of its witnesses what such advertised test disclosed in that respect. The court excluded the testimony on the ground that it was hearsay. But, without deciding whether the exclusion of the testimony on that ground was or was not erroneous, it is very clear that, since the issue as to the alleged negligence of the defendant by reason of the alleged defectiveness of the trolley pole was eliminated from the case by the jury, and therefore formed no part of the basis of the general verdict, the ruling was harmless.

We have now specially noticed all the principal points which we have felt required such consideration in this opinion, and our final conclusion is, as must be apparent from the foregoing discussion, that there has been shown to exist no just reason why the judgment and order should not stand.

Accordingly, the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for Rehearing.

HART, J. There are three propositions upon which a rehearing of this cause is asked of this court, viz.: (1) That we fell into error in the statement that the amendment by the Legislature of 1909 of section 625 of the Code of Civil Procedure, relating to the matter of the submission of particular questions of fact and special issues to juries, by which amendment trial courts are given discretion as to the matter of the submission of such questions and issues, was in force at the time of the trial of this action; (2) that this court is mistaken in the declaration "that there was no evidence which would warrant the submission to the jury of the defense as to negligence of a fellow servant"; (3) that this court ignored the proposition contended for by the defendant, that there is "no evidence sufficient to show any causal connection between the negligence found by the jury to exist and the plaintiff's injuries," the contention being urged in the petition that the evidence affirmatively showed that there was no such causal connection.

[11] 1. As to the first point, we confess that we were in error in the declaration that section 625 of the Code of Civil Procedure, as amended in 1909, had taken effect and was in force at the time of the trial of this action. We now find, upon a closer examination, that the amendment was approved on the 6th day of March, 1909, but, as no other time was fixed in the act amending the section, the amendment, under the terms of section 323 of the Political Code, did not go into effect until the sixtieth day after its passage. The trial of this action was commenced and completed before the expiration of that period, and the amendment was, therefore, not in force at that time.

But it is plainly manifest, if our conception of the issues presented by the complaint and of the effect of the answers returned by the jury to certain particular questions of fact, considered in connection with their failure to answer certain other questions, as explained in the original opinion, be sound, then it became immaterial whether the section as it stood prior to the amendment or as it stands as amended was in force and applicable at the time of the trial of this action. In our original opinion, although mistaken as to the fact of the force of the amendment at that time, we tried to make this proposition clear. At any rate, the necessary effect of our views upon this point was that it was a matter of indifference, under the circumstances of the case, whether the original or amended section was applicable. If the jury had answered favorably to the defendant all the particular questions of fact bearing upon the issue as to the defective trolley pole, there would have been no inconsistency between such answers and the general verdict, since, as is conclusively shown by the record, the general verdict was founded solely on another and different issue of negligence tendered by the complaint. After the return of the general verdict, with the answers to the particular questions of fact involved in the last-mentioned issue of negligence, said answers fully supporting the general verdict on that issue, it became wholly unnecessary to further consider the action of the jury on the particular questions of fact involved in the issue to which the general verdict could obviously have no relation. That issue was entirely eleminated from the case by the jury, and thus, figuratively yet truly speaking, it became a cadaver into whose lifeless veins no amount of blood could be injected by means of answers to interrogatories bearing thereon that could restore to it the power of respiration; hence, as stated, it became wholly immaterial whether the questions to which the jury were unable to formulate and return answers were answered or not answered, or how answered, so far as is concerned any effect any answers which might have been given might have upon the verdict as returned. See Pigeon v. Fuller, 156 Cal. 696, 701, 105 Pac. 976, where this question is exhaustively considered.

2. After a careful re-examination of the record, we are satisfied with the conclusion heretofore arrived at that there was no evidence to which the requested but rejected instructions relating to the fellow servant defense pleaded in the answer are applicable. Counsel do not claim that testimony addressed to that defense was offered by the defendant, but the contention is that whether the motorman, whose instructions as to the manner of performing his duties the plaintiff was ordered by the general foreman to obey, was a fellow servant of the plaintiff in the technical sense of that term or a vice principal of defendant in his relation to the plaintiff, "depends upon the proper construction of the evidence relating to plaintiff's age and experience, and whether he received sufficient warning or instruction," and that, therefore, it was for the jury to determine from the evidence addressed to that fact whether his age and intelligence "were sufficient to give him the discretion necessary to the discharge of his duties as trolley tender," or, "being inexperienced, he had received sufficient warning and instruction." It is argued that these facts proved, if at all, by evidence produced by the plaintiff, were reasonably susceptible of deduction from the evidence so received, and it is further argued, had the jury found that the plaintiff either had sufficient intelligence and experience and warned as to his duties and the hazardous character thereof, the defense of fellow servant would have been unquestionably established. Therefore, it is insisted, the court seriously erred by refusing to submit to the jury the question whether Kleupfer, the motorman, was a fellow servant of the plaintiff. We think that no question can arise from the evidence that the motorman, having been delegated by the general foreman of construction, of whose authority

as an agent or vice principal of the defendant in the transaction with the plaintiff we entertain no doubt, to direct the plaintiff in the matter of the performance of his duties, thus became and stood toward the plaintiff as more than a mere fellow servant. In other words, we think the evidence fairly shows that, as to his relation to the plaintiff, the motorman was placed squarely in the shoes of the defendant by one having the authority to put him in that position.

But, in the light of the action of the jury as shown by their general verdict and their answers to the interrogatories relative to the issue of negligence involved in the omission of the defendant to warn the plaintiff of the hazardous nature of his employment, we are unable to perceive in the question whether the motorman was a fellow servant of the plaintiff any very great importance, so far as any influence it might exercise or effect it might have upon the particular act of negligence which the jury found was the proximate cause of plaintiff's injuries. Graham, who ordered the plaintiff to take the position of trolley tender and to obey the directions of the motorman, was in no sense a fellow servant. This proposition the court was at liberty to assume as a matter of law from the undisputed testimony. He was a general foreman of construction, or in fact, a deputy under the general superintendent of construction for the defendant. In his capacity as general foreman Graham had the authority to assign employés to the various employments involved in railroad construction for the defendant, or, if this is stating his authority too broadly under the evidence, he was at any rate undoubtedly given power by the superintendent of construction to assign the plaintiff to whatever employment he conceived the boy to be fitted for, or his own discretion might suggest. In the exercise of this authority, Graham clearly and unmistakably acted as the agent or vice principal of the defendant. It was, therefore, his duty, acting for the defendant in this matter, to do that which it was incumbent upon his principal to do, viz., warn the plaintiff of the dangerous character of the duties of a trolley tender. If he failed in this duty, then the fault or culpable negligence of the defendant and to which the cause of plaintiff's injuries must be traced lies, primarily, in such failure, and as it is this act of negligence which the jury found had caused the injuries, and as the act of negligence so found involves, essentially, the elements of youth, want of experience, incapacity in the plaintiff, and the duty of obedience on his part to his superiors in years, in experience and in authority, the very failure to warn him of the hazards of the duties to which he was assigned constituted the gist of the offending by the defendant. Therefore it seems to us, as already suggested, that it must be true that it can make little material difference, so far as sustaining this act of negligence is concerned, whether the legal relation existing between the plaintiff and the motorman, as coemployés of the defendant, was that of fellow servants or of employé and vice principal. In other words, the negligence of the defendant which it was found directly caused the injuries to plaintiff originated in and relates solely to the failure of the defendant to discharge the first duty it owed to a youth of inexperience and want of capacity assigned to the performance of duties beset by danger and peril to life and limb, and it seems to us that, under these circumstances, it must compel the laying down of not only an unreasonable but a barbarous rule to hold that the boy, ordered and expected, as to the manner of performing duties to which he was a stranger, to obey the person under whose immediate directions he was placed, should be held responsible for the mistakes or negligence of such person, even though the latter might have been a fellow servant within the legal meaning of that expression; for, how could this inexperienced youth, lacking in that degree of judgment necessary to be exercised in the prosecution of occupations requiring some measure of skill and which can ordinarily come only through experience, know when the directions given him by the motorman, and which he was ordered to follow, were erroneous or the result of mistaken judgment or of negligence? Most assuredly, it may be remarked, if the negligence charged against the defendant were based solely upon the alleged defective condition of the trolley pole, or if the jury had ignored or found against the plaintiff upon the issues of negligence involved in the alleged omission of the defendant to warn the plaintiff of the dangerous character of the services which it required him to perform and founded its verdict solely upon the alleged negligent maintenance of a defective trolley pole, then the question whether Kleupfer was a fellow servant would be of vital and supreme importance. But, as has been shown, the situation here represents the very reverse of the supposititious case thus stated.

But let us now see, by a brief examination of the proofs, if it is not true that the court was justified in holding, as a matter of law, that the evidence incontrovertibly established the proposition that both Graham and Kleupfer were, in the transaction of which this action is the outgrowth, acting as vice principals of the defendant, and that, therefore, the rejection of the "fellow servant" instructions was clearly warranted.

The testimony shows without contradiction that the plaintiff was without previous experience in the line of duty to which he was put; that, in fact, he had never had any experience with or in the use of the mechanical appliances employed in the operation of trolley cars; that he was warned by no one of the hazards of the occupation to which he was assigned on the car. The plaintiff testified that, when he went to work on the car, he had had no experience in the manipulation of the mechanical appliances employed in the operation of trolley cars, and that by no one was he given any warning as to the dangers involved in the discharge of the duties of trolley tender. The motorman, it will be recalled, remonstrated with Graham against putting a boy of the tender years and inexperience of plaintiff in the position of trolley tender, saying, in effect, that a boy of plaintiff's age, wanting in experience in that line of duty, might meet with an accident. Upon these points, the plaintiff and the motorman were not contradicted. Indeed, the testimony of Graham, testifying for the defendant, corroborates that of the plaintiff. He testified that he ordered the boy to take the position and to discharge the duties of trolley tender, and admitted that at no time did he warn or explain to the plaintiff the dangerous character of the duties which he had been ordered to perform. He further testified, as we have seen, that the superintendent of construction of the defendant sent the plaintiff to him (Graham) with instructions to put the lad to work at some employment, without designating the nature thereof, thus leaving to Graham, as the defendant's foreman of construction, the discretion of determining the character of the employment to which he might put the plaintiff. He admitted, and the fact is nowhere disputed, that he placed the boy as trolley tender under the direct control of the motorman, and gave the lad explicit directions to obey the orders of said motorman in the performance of his duties. Thus, it will be observed, the motorman was as to the plaintiff as employé of the defendant in the capacity of trolley tender, placed by the general foreman in the latter's position; that is, he thus became agent or vice principal of the defendant. It is therefore very clear that the court was fully justified in holding as a matter of law that the evidence showed that both Graham and the motorman, so far as the plaintiff was concerned, were vice principals of the defendant.

[12] 3. It is stated in the petition, as we have already shown, that this court in its former opinion ignored or failed to consider the contention that there is no evidence disclosing causal connection between the negligence found by the jury and the injuries sustained by the plaintiff. The negligence which the jury found had proximately caused plaintiff's injuries was fully considered in the original opinion, and it was there held, as we now hold, that the evidence was sufficient to support the finding of the jury that the direct cause of the plaintiff's injuries lay in the negligence of the defendant to warn him of hazards, connected with the discharge of his duties as trolley tender, which were not obvious to a person of his age, understanding, and want of experience.

The theory upon which the defendant appears to insist that there is no causal connection shown between the negligence of which the jury found the defendant guilty and the injuries received by the plaintiff is that, in point of fact, the immediate cause of the injuries was the breaking of the trolley pole.

But the important proposition here is not as to the particular manner in which or the immediate means by which the plaintiff received his injuries, but it is the fact that the defendant negligently put him to work in a dangerous place or where it was hazardous for a youth without experience and general capacity or proper warning to be employed in. These facts proved and the causal connection between the act of omission of the defendant and the injuries was at once established unless some efficient, independent cause operating to arrest the said first or primary causation intervened. The means by which the plaintiff sustained the injuries—that is, the immediate circumstance that precipitated the injuries—cannot in a case of this character be said to have been an independent cause, so interrupting the operation of the original cause or wrong as to have destroyed causal connection between the latter and the injuries. By this we mean to be understood as saying that, unless the plaintiff here were shown to possess experience, judgment, and capacity, or, deficient in these qualifications, had been properly warned as to the hazards of the employment into which the defendant required him to enter, the mere manner in which he may have received his injuries would not constitute an independent cause which in law would have the effect of arresting the primary cause originating in the negligence of the defendant in properly warning him of the hazards of the employment or of the place in which he was directed to work. It is, of course, to be readily conceded that but for the breaking of the trolley pole the plaintiff would not have been injured at all, but the negligent act which made possible the accident to the trolley pole and the consequent injuries to the plaintiff had already been committed. In brief, the circumstance of the breaking of the pole constituted only a concurrent cause of the injuries, and it can argue nothing against the position, sustained by the undisputed testimony in this case, that the original wrongful act of omission on the part of the defendant was the primary act of negligence producing the injuries and ceased not in its operation from its inception until its lamentable culmination. "The original act of negligence, the primary causation," says Mr. Justice Henshaw, in the case of Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 Pac. 534, 139 Am. St. Rep. 134, wherein the precise question in hand is very learnedly considered and discussed, "may be in its nature so continuous that the concurrent wrongful act precipitating the disaster will in law be regarded not as independent, but as conjoining with the original act to create the disastrous result." The primary causation here could not, by its very nature, be otherwise than continuous, for it was the very germ from which the ultimate damage developed and without which there would perhaps have been no damage. Its wrongfulness followed, permeated, and inhered in every subsequent act of the plaintiff in discharging his duties as a trolley tender, and the breaking of the pole was only a necessary ally in the production of the disastrous result which, in all reasonable probability, it was, from its very inception, destined to bring about.

But much stress is laid upon the fact, as to which there is some evidence, that the plaintiff was unusually bright and intelligent and apt at acquiring knowledge, that as a messenger and a water carrier he had had opportunity to observe the manner of operating trolley cars, and that, being bright and intelligent, thus he must have acquired sufficient knowledge of operating such cars to qualify him to intelligently perform the duties of trolley tender. It may be conceded that the plaintiff was of unusual intelligence for one of his years and quick to grasp ideas, but there is no evidence, other than that showing ability to readily learn, that he did acquire any knowledge of the manner of handling with any skill the mechanical appliances used in propelling trolley cars. Indeed, the only testimony that can even be construed into the statement of a fact justifying the theory that the plaintiff was, in the absence of specific instructions and warning on those lines, intelligent enough to exercise sound or mature judgment in the discharge of the duties of trolley tender or to appreciate and realize the hazards thereof, is that portion of Graham's testimony wherein he stated that he first asked the boy if he thought he "could fill the job," and to which question the plaintiff answered affirmatively. But this testimony falls far short of showing, or even tending to show, that the boy appreciated or could appreciate without warning or instruction from older heads the great danger and hazards attending the discharge of the duties of trolley tender on a work car. Indeed, in our opinion, if the answer of the boy tends to show anything of importance at all, it is that he did not realize the difficulties and hazards of the position, otherwise he would not have so readily expressed confidence in his ability to perform duties, obviously more or less difficult, even with an inexperienced adult, with which he had had no previous experience, and thus much more strongly is the reason emphasized for the necessity for giving him proper warning and instructions before he entered upon the performance of the work. But, in any event, the statement of the plaintiff that he could perform the service did not absolve the defendant from the duty of fully and clearly instructing and warning him as to the hazards of the new duties which it had ordered the boy to perform. The plaintiff's youth was apparent and his want of experience known to the defendant, and the law will not permit it to excuse its negligent failure to perform its duty by the plea that the boy said or thought he was fully capable of discharging the duties of a trolley tender. It is, in other words, the imperative duty of a master, when employing a youth of inexperience in the particular line of work upon which he proposes to place him, if such employment necessarily involves hazards to him who engages in it, to warn such youth of such hazards before the latter enters upon its exercise so that he may be fully able to appreciate and realize the hazards to limb and life he is thus to be put up against, and a failure to perform this duty under the circumstances indicated constitutes culpable and actionable negligence.

We have thus considered the petition for a rehearing in extenso because of the importance of the legal questions involved in this record, and, furthermore, because we desired to express our views upon those questions as fully and as clearly as we conceived to be necessary and possible.

We are firmly of the conviction, for the reasons stated in the former opinion as well as those herein ventured, that no substantial reason has been shown or exists for a reversal of the judgment and order, and therefore the petition for a rehearing is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

(19 Cal. App. 85)

J. DEWING CO. v. THOMPSON. (Civ. 977.)

(District Court of Appeal, First District, California. May 17, 1912. Rehearing Denied by Supreme Court July 16, 1912.)

1. TRIAL (§ 396*)—FINDINGS—CONFORMITY TO PLEADINGS AND ISSUES.

Where the allegation of a verified complaint in claim and delivery that the value of the property was $500 was not denied by the answer, it was admitted, and a finding that the value was $200, being outside of the issues, should be disregarded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

2. COURTS (§ 122*)—JURISDICTION—AMOUNT IN CONTROVERSY—HOW DETERMINED.

In claim and delivery, the amount in controversy is to be determined from the pleadings, and where the complaint alleges the value of the property to be $300 or more, and asks judgment in the alternative for the recovery of the property or of its value, the superior court has jurisdiction although it finds that the value is less than $300.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 427; Dec. Dig. § 122.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by the J. Dewing Company against W. B. Thompson. From an order denying a motion to vacate a judgment for plaintiff and enter judgment dismissing the action, defendant appeals. Affirmed.

Knight & Heggerty, for appellant. F. A. Berlin, for respondent.

HALL, J. In this action plaintiff brought suit in the superior court in claim and delivery to recover a piano. The piano is alleged in the complaint to be of the value of $500. Plaintiff also alleges damages in the sum of $100 expended in an effort to recover the piano, and prays for judgment for the possession of the piano or the sum of $500, the value thereof, in case a delivery thereof cannot be had, and for $100 as damages on account of costs incurred in the effort to recover the piano. The court found the value of the piano to be $200, and gave judgment that plaintiff recover from defendant the piano, and, in case recovery thereof cannot be had, that plaintiff recover from defendant the sum of $200, the value thereof. Defendant subsequently moved the court, under sections 663 and 663a of the Code of Civil Procedure, to vacate and set aside said judgment, and to enter a judgment dismissing said action for want of jurisdiction of the superior court over said action. The motion was denied, and the appeal is by defendant from this order.

The attack upon the jurisdiction of the court over the action is predicated solely upon the fact that the court found the value of the piano sued for to be $200. Counsel for appellant have devoted their energies to discussing the question as to whether or not the jurisdiction of the superior court in an action in claim and delivery depends upon the allegations of the complaint or the finding made by the court as to the value of the property in suit. While the answer to this question is not difficult, the correctness of the ruling of the court does not in our opinion depend upon such answer.

[1] The finding as to the value of the piano is entirely without the issues made by the pleadings. The complaint alleges in apt language the value of the piano to be $500, and there is no issue raised by the answer upon the allegations as to value. Defendant denied the ownership and right of possession of plaintiff and the allegations concerning the expenditure of $100 in the effort to recover the piano, and set up a claim to the ownership and right of possession in the piano under a certain contract with plaintiff. But there is not one word in the answer in the record before us raising, or attempting to raise, any issue as to the value of the piano not being as alleged in the complaint. The pleadings were verified. The allegation of value not being denied, it was admitted to be as alleged, and the finding, contrary to such admission, should be disregarded. The fact upon which appellant claims the jurisdiction of the superior court depends was admitted by the answer to be such as to unquestionably support the original jurisdiction of the superior court to try and determine the action upon its merits.

[2] Turning now to the question discussed by appellant in his brief, we have no doubt that the court had jurisdiction of the cause, even if it be conceded that the finding of the court as to the value of the piano is controlling as against the admission in the pleadings.

The only case that lends any support to the contention of appellant is the case of Ballerino v. Bigelow, 90 Cal. 500, 27 Pac. 372, where it was held that a plaintiff could not invest a justice court with jurisdiction to try a case of forcible entry and detainer by alleging that the rental value of the property in suit did not exceed $25 per month, although the proof clearly showed that it did. This case cannot be made to apply to any case other than one in forcible entry and unlawful detainer. It has no application to a case of claim and delivery, where the plaintiff seeks an alternative judgment for the recovery of specific personal property, or, in case such recovery cannot be had, a stated sum of money as the value thereof. In such a case, if the value be alleged to be $300, or in excess thereof, the prayer for judgment contains a demand for such stated sum. Such was the prayer and demand in this case.

An action in claim and delivery has two aspects. In one it is a suit to recover specific personal property. In the other it is a suit to recover a money demand, and, as such, the amount demanded, exclusive of interest, is the test of jurisdiction. In this aspect the suit is within the rule laid down in such cases as Dashiell v. Slingerland, 60 Cal. 655, and Lord v. Goldberg, 81 Cal. 596, 22 Pac. 1126, 15 Am. St. Rep. 82, to the effect that the amount of money sued for is the test of jurisdiction of the court to try and determine the action.

The case of Shealor v. Superior Court, 70 Cal. 564, 11 Pac. 653, was a case of claim and delivery, and it was held that the allegation of value, as made in the complaint, determined the jurisdiction of the court.

The case of Pratt v. Welcome, 6 Cal. App. 475, 92 Pac. 500, was also a case of claim and delivery, and, while what is there said is dictum, it is so apt and logical that we cannot refrain from quoting a paragraph: "It is the demand and not the finding of value which fixes the jurisdiction of the court. Dashiell v. Slingerland, 60 Cal. 655; Lord v. Goldberg, 81 Cal. 596 [22 Pac. 1126, 15 Am. St. Rep. 82]. The jurisdiction of the court, where the amount involved is the question to be considered, must be determined on the pleadings. Any other rule would be fraught with uncertainties and mischiefs beyond the power of anticipation. Rodney v. Curry, 120 Cal. 541 [52 Pac. 999]. Where no question is made of the good faith of the plaintiff in bringing the suit for a sum exceeding $300, the only penalty for the recovery of less than the jurisdictional amount is the loss of the costs." See, also, Greenbaum v. Martinez, 86 Cal. 460, 25 Pac. 12, Becker v. Superior Court, 151 Cal. 313, 90 Pac. 689, and Mannix v. Tryon, 152 Cal. 31, 91 Pac. 983, to the effect generally that, where the allegations of the complaint make a case within the jurisdiction of the superior court, relief not contemplated as within such jurisdiction may be given where the plaintiff fails to prove his whole case.

In conclusion it may be said that the argument of appellant is self-destructive, for if the superior court did not have jurisdiction to try and determine this case upon its merits, because the value of the property involved as found by the court was less than $300, this court has no appellate jurisdiction of the case. The original jurisdiction of the superior court and the appellate jurisdiction of this court, so far as they relate to the subject-matter of this action, are given in precisely the same words by the Constitution. Article 6, § 5, Const., and article 6, § 4.

The order appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 89)

COHRN v. HENDERSON et al. (Civ. 967.)

(District Court of Appeal, First District, California. May 17, 1912.)

1. MUNICIPAL CORPORATIONS (§ 176*)—POLICE—PENSIONS—STATUTES—REPEAL.

The provisions of the San Francisco charter for the pension of police officers, their widows, and dependents, effective January 1, 1900, repealed, so far as the city and county is concerned, act March 4, 1889 (St. 1889, p. 56), as amended in 1891 (St. 1891, p. 287), a general law on the same subject, and hence the widow of a San Francisco policeman, who retired from active service in 1895 upon a pension under act of 1889, which he continued to draw until his death in 1909, is not entitled to relief under section 7 of that act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 427–440; Dec. Dig. § 176.*]

2. CONSTITUTIONAL LAW (§ 102*)—STATUTES—REPEAL.

A law providing pensions for officers and their dependents may be repealed or amended any time before the happening of the contingency upon which the right to a pension vests.

[Ed. Note.—For other cases, see Constitutional Law, Cent.Dig. §§ 225, 356; Dec. Dig. § 102.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Petition by Rebecca Cohrn for writ of mandate against P. L. Henderson and others, as the Board of Police Commissioners, and the Board of Trustees of the Police Relief and Pension Fund of the City and County of San Francisco. From a judgment granting the writ, defendants appeal. Reversed, with directions.

Percy V. Long and J. F. English, for appellants. J. C. B. Hebbard and T. J. Crowley, for respondent.

HALL, J. [1] This is an appeal from a judgment granting to petitioner a writ of mandate against defendants, directing them to pay her the sum of $1,000 out of the police relief and pension fund. The matter was determined in the lower court upon demurrer to respondent's petition.

Edward Cohrn was appointed a policeman of the city and county of San Francisco in 1868. He was retired from active service in 1895 upon a pension as then provided by the general police pension law of 1889. He continued to draw said pension until his death, which occurred in 1909 from natural causes. Petitioner is the widow of said Edward Cohrn, and claims to be entitled to the sum of $1,000 under the provisions of section 7 of the act of the Legislature of March 4, 1889 (Stats. 1889, p. 57), as amended in 1891. Stats. 1891, p. 287.

The present charter of the city and county of San Francisco went into effect on the 1st day of January, 1900, which was prior to the death of said Edward Cohrn. The charter contains a complete scheme for the pensioning of police officers, their widows, and other dependents, and we have no doubt was intended to supersede and repeal, so far as the city and county of San Francisco was concerned, the general law upon the same subject. That such was its effect was held by this court in Burke v. Trustees, etc., 4 Cal. App. 236, 87 Pac. 421, which was a proceeding in mandamus by the widow of a police officer who had died since the taking effect of the charter. There is no provision of the charter under which petitioner can or does claim to be entitled to anything as the widow of the deceased officer.

Respondent relies upon the case of Kavanagh v. Board, etc., 134 Cal. 50, 66 Pac. 36, as sustaining her right to the $1,000; but Kavanagh not only died, but his widow presented her demand and procured the issuance of the writ before the taking effect of the charter. The case is not in point.

[2] That a law providing pensions for officers and their dependents may be repealed or altered at any time before the happening of the contingency upon which the right to the pension vests is not and cannot be denied. Pennie v. Reis, 80 Cal. 266, 22 Pac. 176; Pennie v. Reis, 132 U. S. 464, 10 Sup. Ct. 149, 33 L. Ed. 426.

The judgment is reversed, and the trial

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court is directed to sustain defendants' demurrer to the petition, and to enter judgment thereon for defendants.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 111

O'CONNELL et al. v. BEHAN, Clerk of Board of Sup'rs. (Civ. 893.)

(District Court of Appeal, First District, California. May 20, 1912.)

1. Appeal and Error (§ 695*)—Review—Sufficiency of Evidence—Bill of Exceptions.

An appellate court cannot pass upon the sufficiency of the evidence to support a judgment appealed from where the bill of exceptions does not purport to set out all or any part of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2915; Dec. Dig. § 695.*]

2. Mandamus (§ 167*)—Official Acts—Clerk of Board of Supervisors.

Under San Francisco Charter, art. 12, § 3, which requires a petition favoring acquisition of public utilities to be signed by electors of the city and county, mandamus will not issue against the clerk of the board of supervisors to compel him to act upon a petition where applicant for the writ fails to sustain an allegation that the petition was signed by electors.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 369, 370; Dec. Dig. § 167.*]

3. Appeal and Error (§ 533*)—Record—Trial Court's Opinion.

Ordinarily a trial judge's opinion in rendering judgment is not properly included in a record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2339, 2400; Dec. Dig. § 533.*]

4. Mandamus (§ 90*)—Public Officers—Clerk of Board of Supervisors.

Under San Francisco Charter, art. 12, § 3, permitting the board of supervisors to act on a petition for acquisition of a public utility on receiving a certificate from the clerk that the petition contains the required number of genuine signatures, but which does not prescribe any procedure for ascertaining the genuineness of the signatures, the clerk cannot be compelled to make a certificate on a petition purporting to be signed by several thousand electors.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 195, 196, 204; Dec. Dig. § 90.*]

5. Municipal Corporations (§ 292*)—Public Utilities—Acquisition by Municipality—Petition—Duty of Clerk.

Under San Francisco Charter, art. 12, § 3, providing that a petition for the acquisition of a public utility shall be certified by the clerk of the board of supervisors, stating that the signatures thereunto were genuine, a refusal to certify such petition is proper where the petition itself was not such as prescribed by such section.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 768–772; Dec. Dig. § 292.*]

6. Municipal Corporations (§ 296*)—Public Utilities—Acquisition by Municipality—"Estimate."

The plans and estimates of cost which the board of supervisors is directed to procure under San Francisco Charter, art. 12, § 3, on receipt of a petition for the purchase of a public utility, are those of the original construction and not those of the past construction or completion of existing utilities owned by any other corporation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 792–795; Dec. Dig. § 296.*

For other definitions, see Words and Phrases, vol. 3, pp. 2492, 2493.]

7. Municipal Corporations (§ 292*)—Public Utilities—Acquisition by Municipality—Petitions—Scope.

Under San Francisco Charter, art. 12, § 3, providing that on receipt of a petition for acquisition of a public utility, and a certificate of the clerk that the petition contains the required number of genuine signatures, the board of supervisors shall procure plans and estimates of the cost of original construction and completion of such public utility, the petitions authorized are limited to such utilities as are to be constructed and completed by the city and county, though under section 2 provision may be finally made for the acquisition of an existing utility.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 768–772; Dec. Dig. § 292.*]

8. Municipal Corporations (§ 292*)—Public Utilities—Acquisition by Municipality—Franchises.

Under San Francisco Charter, art. 12, § 3, providing for the acquisition of public utilities, a petition asking for the acquisition of franchises of existing utilities is unauthorized.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 768–772; Dec. Dig. § 292.*]

9. Mandamus (§ 154*)—Pleading—Legal Opinions.

On application for writ of mandate to compel the clerk of a board of supervisors to act upon a petition for the acquisition of public utilities, matter pleading a written opinion of the municipality's counsel as to the form and sufficiency of such petition was properly stricken from the application for the writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. § 154.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Petition by Daniel O'Connell and others for writ of mandate against John E. Behan, Clerk of the Board of Supervisors. Judgment for respondent, and petitioners appeal. Affirmed.

Daniel O'Connell, for appellants. Percy V. Long, City Atty., and John T. Nourse, Asst. City Atty. (Thos. V. Cator, of counsel), for respondent.

LENNON, P. J. The preamble of article 12 of the charter of the city and county of San Francisco declares that it is "the purpose and intention of the people of the city and county of San Francisco that its public utilities shall be gradually acquired and ultimately owned by the city and county"; and with this purpose in view it is provided by section 1 of the same article that "whenever the board of supervisors by ordinance * * * shall determine that the public interest or necessity demands the acquisition, construction or completion of any public utility or utilities by the city and county, or whenever electors shall petition the board of supervisors, as provided by section 3 of this article, for the acquisition of any public utility or utilities, the board of supervisors must procure from the board of works, through the city engineer, plans and estimates of the cost of original construction and completion by the city and county of such public utilities."

Section 3 of the same article, and which is specifically referred to in section 1, provides that "whenever a petition or petitions, each signed by electors of the city and county equal in number to fifteen per centum of all the votes cast in the city and county at the last preceding general election, shall be presented to the board of supervisors, setting forth that the signers of each petition or petitions favor the acquisition of the public utilities therein named, it shall be the duty of the clerk of the board of supervisors to immediately proceed to examine and verify the signatures to such petition or petitions, and to certify the result of such examination to the board of supervisors. If the required number of signatures be found genuine, the clerk shall transmit to the mayor an authentic copy of such petition or petitions without the signatures thereto. Upon receiving a certificate of the clerk that the petition or petitions contain the required number of genuine signatures, it shall be the duty of the board of supervisors to procure, in the manner specified in section 1 of this article, plans and estimates of the cost of original construction and completion of such public utility or utilities named in such petition or petitions. Thereafter the board of supervisors shall formulate for submission to the electors of the city and county, at a special election called for the purpose, a separate proposition for the acquisition of each public utility named in such petition or petitions."

The section and article of the charter just quoted further provides and directs that the signatures to a petition for the acquisition of public utilities shall be examined and verified, and propositions formulated thereunder completed, within six months after the filing of said petition with the board of supervisors.

On February 15, 1908, Daniel O'Connell et al., the appellants herein, presented to the board of supervisors of the city and county of San Francisco a petition, purporting to be signed by 14,616 registered electors of the said city and county, which specified in each instance the residence address of each signer, and prayed that the franchises and the real and personal property of several separate and distinct public utility corporations be acquired by said city and county.

On March 2, 1908, and on April 8, 1908, supplemental petitions to the same effect, containing 4,790 additional signatures of purported electors, were presented to the board of supervisors. These several petitions, in effect, constituted but one petition, wherein the signers declared in favor of the acquisition of the specified public utilities, and prayed that the board of supervisors proceed to ascertain the cost of such acquisition, and then submit to the registered electors of the municipality, at a special election to be called for that purpose, separate propositions for the acquisition of each of said public utilities, and the amount of a bonded indebtedness, if any, to be incurred therefor.

The existing public utilities sought to be acquired by the petitioners were specified in the petition to be: (1) The franchises and real and personal property owned, controlled, and operated by the United Railroads of San Francisco and necessary for the successful operation of its street railway system on streets and avenues of said city and county of San Francisco. (2) The franchises and real and personal property owned, controlled, and operated by the California Street Cable Railway Company on the streets of the city and county of San Francisco and necessary for the successful operation of the street railway system of said company. (3) The franchises and real and personal property of the Pacific States Telephone & Telegraph Company in said city and county of San Francisco, necessary for the successful operation of its telephone system in said city and county of San Francisco. (4) The franchises and real and personal property of the Home Telephone Company in said city and county of San Francisco, necessary for the successful operation of its telephone system in said city and county of San Francisco.

The petition in question was by the board of supervisors referred to its clerk, the respondent herein, and he in due time made and filed the following report: "In accordance with the mandate of the charter, I have proceeded to examine the signatures to the foregoing petition, and as the result of said examination report as follows: The petition is not verified in any manner by the oath of any person or of any signer thereto. There are no means by which I can verify and ascertain whether such signatures are genuine, and by reason of that fact it is not possible for me to make a certificate as required by the charter, that such petition contains the required number of genuine signatures."

Respondent's report and action upon the petition were subsequently approved and adopted by the board of supervisors, whereupon, with substantially the facts herein stated as a basis for the application, the appellants herein instituted mandamus proceedings in the superior court of the city and county of San Francisco to compel the respondent, as the clerk of the board of supervisors, to immediately proceed to examine and verify the signatures to said petition in accordance with the charter provisions, and certify the result to the board of supervisors. An alternative writ of mandate was issued, and for answer thereto the respondent, in addition to practically denying all of the material allegations of the petition, pleaded as a separate defense thereto that neither the charter of the city and county of San Francisco nor any other law provided any adequate or effective means by which respondent could verify the genuineness of the purported signatures to the petition presented to the board of supervisors for the acquisition of the several specified public utilities; that no adequate or effective means existed whereby respondent could verify the genuineness of the signatures appended to said petition; and that therefore he could not truthfully and with knowledge of the fact make a certificate that said petition contained the number of genuine signatures required by the provisions of the charter.

Respondent Behan further averred in justification of his refusal to certify to the genuineness of the signatures that the petition did not conform to the requirements of section 3 of article 12 of the charter, under which section and article, as alleged in the petition for mandate, the petition for the acquisition of the several public utilities was prepared and presented to the board of supervisors.

A trial was had upon the issues thus raised, which resulted in a judgment for the respondent, from which an appeal has been taken upon the judgment roll and a bill of exceptions, which does not purport to set out any of the evidence taken upon the trial.

[1] Counsel for appellants in his closing brief asserts that the case was tried upon the verified petition for the writ of mandate, respondent's answer thereto, and the admission of counsel that the parties would testify to the matters as stated in the said verified pleadings, and that there was no other evidence offered. The record before us does not sustain counsel's assertion in this behalf. On the contrary, it is expressly stated in the trial court's findings of fact that this proceeding came on for trial and final hearing upon the pleadings "and testimony given at the trial." If it be a fact, as counsel for appellant insists, that the findings of fact were based upon stipulated evidence, then he should have taken the pains to make the record show, not only the stipulation, but the facts as well which were stipulated to be in evidence. In the absence of such a showing, we must take the record as we find it. Presumably the findings speak the truth when they recite that the case was tried "upon the pleadings and testimony given at the trial"; and, inasmuch as the bill of exceptions does not even pretend to set out in any manner or form all or any part of the testimony adduced at the trial, obviously we cannot pass upon the sufficiency of the evidence to support the judgment. In the absence of a bill of exceptions showing the evidence offered and received at the trial, we must assume that the evidence fully supports the findings of the trial court in every essential particular, and therefore upon the record before us, we are limited to a consideration of the single question of whether or not the findings of fact support the conclusions of law adduced therefrom, and the judgment subsequently rendered and entered thereon.

It is conceded by respondent that 15 per centum of all the votes cast at the general election held in the city and county of San Francisco, preceding the filing of the petition would be 8,712, and that, in so far as the mere number of signers was concerned, the petition was in conformity with the requirements of the charter. It is disputed, however, that all or any of the signers of the petition were electors of the city and county, and it is further insisted, upon behalf of the respondent, that the petition in other respects, which will be adverted to later, was so insufficient in matters of form and substance as to render it radically defective and utterly useless for the accomplishment of the purpose for which it was intended.

[2] The trial court in its findings of fact found in favor of appellants upon all of the preliminary matters and things put in issue by the pleadings, such as the preparation and filing of the petition for the acquisition of the several specified public utilities, the requisite number of signers thereto, the refusal of respondent to verify and certify the same, etc., but found against the appellants upon the matters and things which constituted the vital issues of the case. Among other things, the court in substance found that the allegation of the petition for mandate, which recited that the petition presented to the board of supervisors for the acquisition of the specified public utilities was signed by electors of the city and county of San Francisco, was not proven as a fact; that no matter or thing appearing upon the face of said last-mentioned petition constituted any proof of the genuineness of the signatures thereto; that there does not exist any adequate or effective means by which the respondent, as clerk of the board of supervisors, or otherwise, might ascertain, so as to have personal knowledge thereof, that the signatures to the said petition, or a sufficient number thereof, are the genuine handwriting of the persons purporting to have made the same; that respondent could not with personal knowledge of the truth thereof make the certificate required by section 3 of article 12 of the charter.

With these latter findings primarily as the basis thereof, the trial court drew the conclusions of law that the petition which was presented by the plaintiffs in this proceeding to the board of supervisors was and is insufficient under section 3 of article 12 of the charter of the city and county of San Francisco; and that, as no adequate or effective means existed by which respondent, as clerk of the said board, could verify the genuineness of the signatures to the petition in question, he was not and could not be required to make the certificate called for by the charter provisions. We are of the opinion that the conclusions of the trial court are correct.

Section 3 of article 12 of the charter clearly provides and requires that a petition favoring the acquisition of public utilities must be signed by "electors" of the city and county of San Francisco. If the petition for the writ of mandate in the present case had failed to allege that the petition presented to the board of supervisors was signed by "electors" of the city and county, no cause of action would have been stated for the relief demanded; and respondent herein, in the absence of amendment of the pleadings, would have been entitled to judgment upon demurrer or upon the pleadings. Although the petition in question purported to be signed by electors, nevertheless, if it was not in fact so signed, as the trial court found, there was a failure of proof which was necessarily fatal to the plaintiffs' action, and the finding of the trial court upon this issue alone was sufficient in itself to justify and support a judgment against the plaintiffs.

[3] The remaining points presented upon this appeal require an interpretation of the scope and effect of section 3 of article 12 of the charter, and relate also to the apparent defect in the charter itself in so far as it fails to provide an adequate method whereby the clerk of the board of supervisors may verify the genuineness of the signatures appended to a petition for the acquisition of public utilities.

Upon this phase of the case the learned judge of the trial court expressed his views in support of the judgment in a written opinion, which is incorporated in and in effect constitutes the whole of the bill of exceptions which accompanies the judgment roll upon this appeal. Ordinarily the trial judge's opinion in rendering judgment has no proper place in a record on appeal, and the purpose of presenting to us, in this instance, a bill of exceptions which, aside from a mere recital that judgment was rendered for the respondent, is made up entirely of the trial judge's opinion, is not readily apparent. But, whatever the purpose may have been, the opinion is before us in a duly authenticated bill of exceptions; and, inasmuch as it is in entire accord with our views of the law and the interpretation which we think should be placed upon the charter provisions under consideration, the views and conclusions of the trial judge are hereby adopted as the views and conclusions of this court. In so far as it is pertinent to the particular subjects immediately in discussion, the opinion of the trial court is as follows:

[4] "The ground upon which the defendant clerk has refused to proceed to examine and verify the signatures to the petition is that the charter has not prescribed any procedure for ascertaining the genuineness of the signatures, and that he cannot be required to certify to a fact as to which he has no knowledge or means of knowledge.

"In the case of a petition for the submission of a proposed ordinance to a popular vote, the charter has provided that the signers must be voters, that the signatures need not all be appended to one paper, that each signer shall add to his signature his place of residence, giving the street and number, and that one of the signers of each paper shall make oath that each signature to the paper is genuine.

"In the case of a petition for acquiring a public utility, section 3 above cited does not require it to be signed by voters but only by electors, and there is no requirement that the signers append to their signatures their respective places of residence. A citizen may be an elector without being a voter. If he is a male citizen of the United States, 21 years of age, and has resided in the state one year, in the county 90 days, and in the precinct 30 days, he is an elector. In order to be a voter he must be a registered elector.

"If the petitioners in this case had merely stated that they were electors of the city and county, and omitted a statement of their respective places of residence, it would have been impossible for the clerk to verify their signatures. The only means suggested for verifying the signatures in the present case is a comparison with those in the great register; it being stated in the petitions that the signers are registered electors. Even assuming that the petitioners have the right to insert in the petitions matters not required by the charter, and that the clerk might be able, by comparison of hands, to form an opinion as to the genuineness of the signatures, he could not be required to do more than certify such opinion. The section under consideration requires him to certify that the signatures are in fact genuine, and the board of supervisors can act only 'upon receiving a certificate from the clerk that the petition or petitions contain the required number of genuine signatures.'

[5] "It will also be observed that by section 3 the clerk is not required to certify that the signers of the petition are electors of the city and county, but merely that their signatures are genuine. Even if the clerk had the means at hand necessary for the performance of the task required of him, it was clearly his duty to refuse to do so if the peti-

tions themselves were not such as are prescribed by section 3 of article 12 of the charter.

"The plans and estimates of cost which the board of supervisors is directed to procure are those of original construction or completion, by the city and county, of a proposed public utility, and not those of the past construction or completion of existing utilities owned by any other corporation or person.

[6] "The term 'estimates' is not an appropriate expression to indicate the determination of the cost of past construction and completion. Such determination would be of a question of fact, and could only be made after receiving competent evidence of actual cost. Section 1 expressly provides that the plans and estimates of cost to be procured from the board of public works are those of original construction and completion by the city and county.

[7] "It is therefore clearly implied that the petitions authorized by section 3 are limited to such public utilities as are to be constructed and completed by the city and county. Section 2 provides that, before submitting propositions to electors for the acquisition by original construction or condemnation of public utilities, the board of supervisors must solicit and consider offers for the sale to the city and county of existing utilities. Although the board may in the end conclude to submit a proposition for the purchase of an existing utility, the proceedings must be inaugurated by a petition for original construction and completion by the city and county. The board is thereupon required to procure plans and estimates of cost of such original construction and completion, and, after they have been furnished, to solicit offers for the sale to the city and county of an existing utility such as is mentioned in the petition. If the price demanded is deemed too high, the board must proceed to formulate propositions in accordance with its own plans.

[8] "The petitions referred to ask not only that the real and personal property of the four corporations be purchased, but also their franchises. There is no provision of the charter which authorizes the acquisition of franchises by the city and county. If it should acquire the physical properties of the corporations, it would not need to purchase their franchises in order to operate them. The plans and estimates furnished by the engineer could not possibly include an estimate of the cost of the franchises. And yet the board of supervisors would have no power to eliminate the proposition to purchase the franchises if the petitions are otherwise sufficient."

For the reasons and in the particulars stated here and in the opinion of the trial court, the petition does not in our opinion conform to the requirements of section 3 of article 12 of the charter; and upon that ground, as well as upon the ground that no adequate means are provided, either within or without the charter, whereby the respondent herein might expeditiously, intelligently, and effectively verify the signatures to a petition for the acquisition of public utilities, he should not be required to certify to the genuineness of the signatures to the petition in the present case, and therefore the petition for a writ of mandate to compel him to do so was properly denied and dismissed. Incidentally to the main discussion, plaintiffs and appellants complain of the trial court's ruling whereby, upon motion of the respondent, certain paragraphs of the petition for mandate were stricken out.

[9] The matter stricken out merely pleaded the written opinion of the city and county attorney as to the form and sufficiency of the petition, which was given in response to a request for legal advice made by the board of supervisors. Clearly that opinon was not any more binding upon the respondent than it was upon the city attorney himself, and that respondent was justified in not following the city attorney's first views of the law and interpretation of the charter provisions is best evidenced by the fact that, upon more mature consideration of the subject, the latter arrived at a different conclusion, and then strenuously and successfully opposed the plaintiffs' suit upon an interpretation of the law and the charter which the trial court approved and which accords with our own views. In any event, the city and county attorney's opinion of the law was not conclusive upon the trial court, and, as matter of pleading, it could serve no useful purpose. It was therefore properly stricken out of plaintiffs' petition for mandate.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

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18 Cal. App. 781

CRAYCROFT v. SUPERIOR COURT OF KERN COUNTY et al. (Civ. 1,119.)

(District Court of Appeal, Second District, California. May 3, 1912. Rehearing Denied by Supreme Court July 2, 1912.)

1. PUBLIC LANDS (§ 144*)—STATE LANDS—EFFECT OF CONTEST—PRESUMPTIONS.

A certificate of purchase of state lands is prima facie evidence of title in the holder because of the presumption which attaches that the state land official has properly performed his duty, which presumption can only be overthrown by the initiation of a contest, the making of a reference, and a hearing before a court with jurisdiction.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

2. PUBLIC LANDS (§ 144*)—STATE LANDS—STATUTORY PROVISIONS—RETROACTIVE EFFECT.

Pol. Code, § 3499, which as amended March 13, 1911 (St. 1911, p. 345), provides that the superior court shall be deprived of jurisdiction to determine a contest of any location or application to purchase state school lands, or of any order of approval or certificate of purchase made or issued by the surveyor general or register of the state land office, unless the contest shall have been filed, heard, determined, referred, or allowed within five years from and after the issuance of the certificate of purchase. *Held*, that the statute not only restricts the right of contest to be determined by the superior court to a period of five years from the issuance of a certificate of purchase, but limits the determination of the questions presented to contests commenced within such period, so that a clear intention to make it retroactive is expressed, and it will apply to divest the superior court of jurisdiction already acquired of a case within its terms.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

3. STATUTES (§ 263*) — CONSTRUCTION — RETROACTIVE EFFECT.

Retroactive effect will not be given a statute unless the legislative intention that it shall so operate is clearly apparent.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.*]

4. CONSTITUTIONAL LAW (§§ 92, 120*)—PUBLIC LANDS (§ 144*)—VESTED RIGHTS—OBLIGATION OF CONTRACTS—LAND CONTESTS.

Pol. Code, § 3499, as amended by St. 1911, p. 345, which divests the superior court of jurisdiction to try land contest cases, unless commenced within five years after the issuance of a certificate of purchase, is not unconstitutional as impairing the obligation of a contract or destroying a vested right or interest, as the application to purchase without payment of money upon which a contest is founded vests no rights in the applicant.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178–180, 207, 225–227, 237, 279–285, 292; Dec. Dig. §§ 92, 120;* Public Lands, Cent. Dig. §§ 391–399; Dec. Dig. § 144.*]

5. PROHIBITION (§ 10*)—GROUNDS—WANT OF JURISDICTION.

Where a superior court has no jurisdiction of a land contest, no judgment entered can be effective, and a writ of prohibition to prevent its proceeding will properly lie.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 37–56; Dec. Dig. § 10.*]

Application by Frank Craycroft, Jr., for a writ of prohibition against the Superior Court of Kern County and another. Writ granted.

Miles Wallace and L. L. Cory, for petitioner. F. A. Stephenson, Alfred Daggett, and Frank Kauke (T. M. McNamara, of counsel), for respondents. J. R. Dorsey, for Robert L. Perry, party in interest. Hatch, Lloyd & Hunt, amici curiæ.

ALLEN, P. J. It appears from the verified petition filed herein that on the 3d day of October, 1901, the register of the state land office at Visalia, upon the payment of 20 per cent. of the purchase price and interest, issued to one Samuel Brown a certificate of purchase for a certain section of school land then owned by the state and subject to sale; that, on the day ensuing, Brown transferred and set over said certificate to petitioner; that said certificate was duly recorded; that petitioner has made payment in full to the state for said land and all interest, taxes, and costs of every kind, nature, and description; that thereafter on October 6, 1910, one Kerr filed his application with the surveyor general, contesting the application of said Brown to purchase the said land, with a demand that the conflicting claims be referred for adjudication; that on the same day an order was entered by the surveyor general referring the contest of Kerr and Brown to the superior court of Kern county for trial and adjudication; that on November 3d Robert L. Perry made application to purchase the north half of said section, contesting also the purchase rights of Brown; that on November 10th one Spencer made application to purchase the north half of said section. That neither said Kerr nor said Brown, within 60 days after the order of reference, commenced any action in the superior court of Kern county with reference to said adjudication; that on December 7, 1910, one Chittenden filed his application for the purchase of the whole of said section, contesting the rights of all the parties before named, and asking that the conflicting claims be referred to the superior court; that on December 7, 1910, after the filing of such application by said Chittenden, Kerr filed his application to purchase all of said section, together, also, with another contest and protest against the application of Brown; that on December 31, 1910, one Charles Smithwick filed his application for the purchase of the south half of said section. That on the 13th day of January, 1911, an order was made by the said state surveyor general and the register of the state land office as follows: "It is therefore ordered and directed that the contest as set forth between the above-named R. D. Chittenden and Samuel Brown be and the same is hereby referred, together with the conflicting claims of John P. Kerr, Robert L. Perry, Richard V. Dorsey, Charles Smithwick and Emmet L. Spencer, and of each of them, to the superior court in and for the county of Kern, state of California, for adjudication." That none of the applications of contesting claimants have ever been allowed or approved in any manner by the surveyor general, and that neither of said parties has paid any portion of the purchase price of the land referred to; that thereafter, on February 21, 1911, an action was commenced in the superior court of Kern county by Emmet L. Spencer against Brown and the other claimants, based upon the order of reference above referred to, praying for an adjudication that the application of said Brown be held illegal and void, and that the certificate of purchase so assigned and held by petitioner be likewise held illegal and void, and that Spencer's application be adjudged and declared a valid application for the purchase of said land; that thereafter petitioner demurred to the complaint and moved to dismiss said action upon the ground that the court had no jurisdiction to hear and determine the same, which said demurrer and motion to dismiss were overruled and denied. It is averred that the said superior court intends to and will, unless restrained by this writ of prohibition, proceed to the trial of said action and thus impose upon petitioner great costs and expense in the defense thereof; that the court has been divested of jurisdiction to hear and determine said action; that petitioner is a laboring man without means, and in order to properly present his defense it will be necessary, at great expense, to bring witnesses from a distance; that such trial will occupy many days or weeks, at much expense; that said land is of little value, except for the oil which it contains, and such value is problematical; and accordingly this writ of prohibition is prayed for.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is contended by petitioner that, notwithstanding the provisions of the Constitution of this state, which provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law," the issuance of the certificate to Brown for 640 acres was an adjudication by a competent authority that the lands involved were not suitable for cultivation. This upon the assumption that a public officer performs his duty, and prima facie the lands were subject to sale in quantities exceeding 320 acres in area, and further that the action sought to be maintained upon the order of reference was not brought within the time provided by statute, and further that under section 3499 of the Political Code, as amended March 13, 1911 (St. 1911, p. 345), the court is divested of jurisdiction to hear and determine the contest or adjudicate with reference to said lands. This section, as amended, in terms provides that contests of the character here mentioned, or made under any section of the Code, "of any location or application to purchase any state school lands which have heretofore been, or shall hereafter be made and filed with the surveyor general or register of the state land office, or of any order of approval made thereof, or of any certificate of purchase issued thereon or pursuant thereto by such surveyor general or register, shall be filed, heard, determined, referred or allowed, unless such contest shall have been or shall be so filed, heard, determined, referred or allowed as provided in said sections of this Code, within five years from and after the date on which such certificate of purchase may have been issued." Section 3495 of the Political Code specifies the matters and things which must be set forth and established by one desiring to purchase lands of the state, as a condition precedent to the issuance of a certificate of purchase, among which it is required that it must be made to appear whether or not the land is suitable for cultivation, upon the filing of which proof depends the right of the officers to issue the certificate of purchase for an amount of land in excess of 320 acres.

[1] "The presumptions that the law has been obeyed, that the first applicant is innocent of the crime of perjury, and that official duty has been properly performed, come to the aid of the defendant. In the absence of controverting proof, these presumptions will prevail. The certificate is made prima facie evidence of title in the holder." Bieber v. Lambert, 152 Cal. 564, 93 Pac. 97. While these presumptions may be overcome by proving that the facts are otherwise, it is nevertheless necessary, in order to admit such proof, that a contest must be initiated, a reference made, and a court with jurisdiction to hear and determine the controversy. Prior to the act of 1911 above referred to, it was not necessary that a contestant should show any right in himself to purchase nor connect himself with any claim to the land. Garfield v. Wilson, 74 Cal. 175, 15 Pac. 620. Nor was there a limitation of time within which the contest should be inaugurated or the action tried and determined. "The jurisdiction of the superior court in actions begun in pursuance to a reference to it of a contest arising in the surveyor general's office over the right to purchase state land is special and limited. It is derived solely from the provisions of the Political Code relating to such contests. The sole object to be achieved by the trial before the superior court is a determination of the question of the rights of the two parties between whom the contest arose in the surveyor general's office to purchase the particular tract of land in question." Youle v. Thomas, 146 Cal. 541, 80 Pac. 715.

[2] This right of contest is by the plain terms of section 3499, as amended, restricted to a period of five years after the issuance of the certificate, and by said section the determination of the questions presented under the order of reference is restricted to contests commenced within such period. If, then, section 3499 is to be construed as operating retroactively, the court was by force of such act divested of jurisdiction to further hear or determine the contest so sought to be initiated.

[3] As said by our Supreme Court in Baird v. Monroe, 150 Cal. 565, 89 Pac. 354, in construing the retroactive character of a statute under the rule that such effect should not be given unless the legislative intention that it shall so operate is clearly apparent: "It is impossible to read carefully the statute in question, however, without coming to the conclusion that it was intended to so op-

erate." It will be observed that the section here under consideration not only restricts the right of contest, the filing thereof, and the reference, but makes the same applicable to all cases, unless such contest shall have been or shall be "determined within five years from and after the date on which such certificate of purchase may have been issued." We think that here is a clearly expressed intention that this section should act retroactively, and the effect of which in the case at bar could only be to divest the superior court of Kern county of all jurisdiction to hear and determine the controversy between the parties. This statute was intended to settle all disputes as to the validity of the purchase after the expiration of five years, and to render as conclusive the presumption attaching to the issuance of the certificate in the first instance.

[4] The mere application to purchase, without payment of money, vests no rights in such applicant, and such section cannot be said to impair the obligations of any contract or to be destructive of any vested rights or interests.

[5] It is insisted, however, by respondents that, assuming everything hereinbefore said to be the law, nevertheless prohibition will not lie because the right of appeal from any decision made by the court is speedy and adequate. The solution of this question is not without difficulty. An apparent conflict seems to exist in this state as to the right to the writ where an appeal will lie, and it has been determined in Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765, that it is not sufficient ground for intervention by prohibition that the trial be expensive and troublesome. This rule, however, to a certain extent, has been modified in instances where costs necessary in the prosecution of the case would have to be incurred which could not be included in a bill therefor, and in Hayne v. Justice's Court, 82 Cal. 284, 23 Pac. 125, 16 Am. St. Rep. 114, it is said: "A court that proceeds in the trial of a cause against the express prohibition of a statute is exceeding its jurisdiction, and may be prevented from doing so by prohibition from this court." This authority is approved in Glide v. Superior Court, 147 Cal. 28, 81 Pac. 225, and it seems to us that it is proper to grant the writ in instances where it is evident from the record that any order or judgment made by the court would be ineffective. Mr. Justice Shaw, in his concurring opinion in the case last cited, says: "The question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of this court upon the particular circumstances of each case." The authority, then, to grant the writ in this case seems to us to be warranted under such discretionary power. It were idle for this petitioner to be required, at large costs and expense upon a trial, to establish that which must be conclusively presumed. That the trial court in this instance has overruled the demurrer, has denied the motion to dismiss, and has assumed jurisdiction in a case wherein we think it has been divested of jurisdiction, we regard as presenting a proper case in which, in the exercise of our discretion, to direct the issuance of the writ of prohibition.

The writ is therefore ordered as prayed for.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 144

GUTHRIE v. CARNEY. (Civ. 966.)

(District Court of Appeal, First District, California. May 21, 1912.)

1. FRAUDULENT CONVEYANCES (§ 147*)—SALE BEFORE LEVY—VALIDITY.

In an action against an officer for conversion of liquors levied on as the property of a debtor, proof of the debtor's prior execution and record of a bill of sale of the liquors to plaintiff and delivery at the time of the executing and recording of the bill of sale of the key to a barn in which the liquors were stored, that 10 days thereafter the debtor took plaintiff to the barn and pointed out the property, and at that time informed the owner of the barn that plaintiff was the owner of the liquors, was insufficient to show immediate delivery and an actual, continued change of possession under Civ. Code, § 3440, providing that every transfer of personal property is conclusively presumed to be fraudulent and void against the seller's creditors while he remains in possession, etc., and if made by a person in possession, not accompanied by immediate delivery and followed by an actual, continued change of possession of the property transferred.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 457–470, 473–478, 481; Dec. Dig. § 147.*]

2. FRAUDULENT CONVEYANCES (§ 147*)—DELIVERY—CHANGE OF POSSESSION.

The execution and record of a bill of sale of personal property, while prima facie proof of the rights of the parties as between themselves, is not material in a determination, as between the buyer and the seller's execution creditors, of the question whether there had been an immediate delivery and an actual change of possession.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 457–470, 473–478, 481; Dec. Dig. § 147.*]

3. FRAUDULENT CONVEYANCES (§ 150*)—PERSONAL PROPERTY—"ACTUAL."

Civ. Code, § 3440, provides that a sale of personal property shall be conclusively presumed to be fraudulent as against the seller's creditors, where there is no immediate delivery and actual and continued change of possession. *Held* that, where liquor stored in a barn was sold by a debtor to plaintiff, the delivery of a key to the barn was mere evidence of a constructive delivery and possession, and was not an actual change of possession required by such section, the word "actual," as so used, meaning "existing in act, and truly and absolutely so; really acted or acting; carried out;

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as opposed to potential, possible, visual or theoretical."

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 464; Dec. Dig. § 150.*

For other definitions, see Words and Phrases, vol. 1, p. 151.]

4. FRAUDULENT CONVEYANCES (§ 149*)—PERSONAL PROPERTY—SALES—"IMMEDIATE DELIVERY."

"Immediate delivery," as used in such section, while not requiring a delivery instanter, requires delivery within a reasonable time according to the character of the property, its situation, and all the attending circumstances, so that the fact that the seller took the buyer to the barn 10 days after the sale and pointed out the property to him did not constitute an "immediate delivery" within such requirement.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 462–463½; Dec. Dig. § 149.*

For other definitions, see Words and Phrases, vol. 4, pp. 3395–3396; vol. 8, p. 7681.]

5. EVIDENCE (§ 271*) — CONCLUSIONS—SELF-SERVING DECLARATIONS.

Where a debtor sold liquors which were stored in a barn to plaintiff, his assertion to the owner of the barn that he had purchased the property when negotiating for the continued use of the barn as a place of storage was a mere conclusion and self-serving declaration, which had no tendency to prove a delivery as against the seller's creditors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068–1079, 1081–1104; Dec. Dig. § 271.*]

6. FRAUDULENT CONVEYANCES (§ 309*)—PERSONAL PROPERTY—IMMEDIATE DELIVERY.

Under Civ. Code, § 3440, providing that a sale unaccompanied by immediate delivery and an actual and continued change of possession shall be conclusively presumed to be fraudulent as against the seller's creditors, instructions that, if the property was so situated that the buyer was entitled to and could rightfully take possession of it at his pleasure, he would be considered as having actually received it, and that it was not necessary that he should actually take the property into his possession, that when a valuable consideration is paid for the purchase of property the purchase is presumed to be in good faith, and that fraud is never presumed but must be affirmatively proven by the party alleging the same, were erroneous as ignoring the statute.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 941, 944–958; Dec. Dig. § 309.*]

7. FRAUDULENT CONVEYANCES (§ 132*) — PROOF OF FRAUD—STATUTORY PRESUMPTION.

Ordinarily, the burden of proof, where it is not shifted by statute, is on the party assailing a transfer of property on the ground of fraud, yet, where facts appear which prima facie tend to create a statutory presumption of fraud as against the seller's creditors, the burden of proof not only shifts to the buyer, but the presumption, if established, renders the transaction absolutely void as provided by Civ. Code, § 3440.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 285, 286; Dec. Dig. § 132.*]

8. FRAUDULENT CONVEYANCES (§ 309*)—INSTRUCTIONS—CONTRADICTION.

Where defendant claimed that a sale of a debtor's goods to plaintiff before levy was fraudulent, instructions that, if the property was so situated that the buyer could rightfully take possession at his pleasure, it was not necessary that he actually take the property into his possession, but that the sale was conclusively presumed to be fraudulent if it was not followed by an actual change of possession, and that such actual change meant "existing in fact," excluding the idea of a mere formal possession, were irreconcilably in conflict, and therefore erroneous.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 941, 944–958; Dec. Dig. § 309.*]

9. APPEAL AND ERROR (§ 702*)—REVIEW—RECORD—INSTRUCTIONS.

Where each of the requested instructions was indorsed as "given" by the trial judge, the fact that the record did not show an independent charge by the court was insufficient to show that the record did not contain all the instructions given so as to preclude review of a conflict between requested instructions; it being presumed that the instructions contained in the record were the only ones given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2936–2938; Dec. Dig. § 702.*]

10. JUSTICES OF THE PEACE (§ 129*)—JUDGMENT—COLLATERAL ATTACK.

Where plaintiff sued an officer for conversion of property levied on under a justice's judgment in favor of D., the validity of the justice's judgment and execution could not be collaterally attacked in that action by proof that D.'s claim had been settled before the rendition of the judgment, and that he was therefore not a creditor at the time of the levy.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 408–411; Dec. Dig. § 129.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Joseph G. Guthrie against James H. Carney. From a judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed and remanded.

Benj. K. Knight, for appellant. Netherton & Torchiana, for respondent.

LENNON, P. J. In this action the plaintiff recovered a judgment against the defendant in the sum of $600, as damages for the alleged conversion of personal property which the defendant, as constable of Santa Cruz township, took into his possession and sold at public auction under and by virtue of a writ of execution issued out of the justice's court of said township, in an action therein pending wherein G. A. Deiter was plaintiff and the firm of Hedgpeth Bros. was defendant. The present case was tried by the court with a jury, and verdict rendered in favor of the plaintiff. From the judgment entered thereon, and from an order denying a new trial, the defendant has appealed upon the judgment roll and a statement of the case, which purports to contain all of the evidence and proceedings had and taken upon the trial in the lower court.

The plaintiff's complaint is in the usual and ordinary form of actions in conversion. Defendant's answer denied plaintiff's ownership of the property claimed to have been converted, and alleged ownership in the copartnership consisting of M. Hedgpeth and N. Hedgpeth. As a further defense to the action, defendant pleaded that, with intent to cheat and defraud one G. A. Deiter, a creditor of Hedgpeth Bros., and while an action brought by Deiter was pending in the justice's court, the Hedgpeths pretended to sell to Guthrie, the plaintiff here, the property in question, which consisted of a small stock of wines and liquors. In his answer the defendant further averred that the pretended sale was not accompanied by an immediate delivery, nor followed by an actual and continued change of possession of the property.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The facts of the case upon which the verdict and judgment were founded are, in their essential features, practically without conflict, and in substance are as follows:

In the month of November, 1907, and for some time prior thereto, Hedgpeth Bros. were engaged in carrying on the hotel and saloon business of the Pacific Ocean House in the city of Santa Cruz. On November 3, 1907, the hotel and bar were destroyed by fire. At the time of the fire Hedgpeth Bros. were indebted to numerous creditors; and immediately after the fire they made an assignment to their creditors, among whom were Guthrie, the plaintiff in this action, and Deiter, the plaintiff in the justice's court action, out of which issued the writ of execution hereinbefore referred to. Before any settlement with the creditors of Hedgpeth Bros. had been actually consummated, the trustees appointed by the creditors, in disposing of the assigned assets of Hedgpeth Bros., resold to them for the sum of $100 the entire stock of wines and liquors in question. Some time thereafter Hedgpeth Bros. moved the stock of wines and liquors from the cellar of the Pacific Ocean House, where they had remained since the fire, to a barn situated immediately in the rear of and appurtenant to the Metropole Hotel in the city of Santa Cruz, which hotel was also conducted by Hedgpeth Bros. On November 17, 1907, which was after the fire and after a settlement with the creditors of Hedgpeth Bros. had been made, the plaintiff Guthrie loaned them the sum of $300 on an unsecured promissory note; and on March 26, 1908, Guthrie entered into an agreement with Hedgpeth Bros. to buy the stock of wines and liquors for the sum of $600. In payment therefor the promissory note previously executed by Hedgpeth Bros. was canceled and returned. The balance of the purchase price was to be paid in cash, but no time was specified within which it was to be paid. However, $150 in cash was paid on April 23, 1908, and on May 23, 1908, the remaining $150 was paid in cash. At the time of the alleged sale to Guthrie and before a cash payment had been made by him, Hedgpeth Bros. executed a bill of sale of the stock of wines and liquors to Guthrie, which was recorded shortly thereafter. Simultaneously with the execution of the bill of sale Hedgpeth Bros. delivered to plaintiff the key to the barn in which the property was stored. Ten days thereafter Hedgpeth Bros. took Guthrie to the barn where the property was stored, and pointed it out. An inventory of the property was not attached to the bill of sale, and Guthrie did not at the time the property was shown to him, or at any other time, prior to the levy of the execution, make an inventory of the same. Mr. Rhein, the owner of the Hotel Metropole building and of the barn appurtenant thereto, was present when Hedgpeth Bros. and Guthrie visited the barn to view the property; and upon that occasion Rhein was informed by Guthrie that he had purchased the property from Hedgpeth Bros. and would thereafter pay the rent for the use of the barn. Hedgpeth Bros., however, had been using the barn free of rent, and Rhein consented that Guthrie might also use it free of rent.

From March 26, 1908, the date of the alleged sale to Guthrie, the property remained in the barn under the conditions stated until it was levied upon and sold by the defendant Carney on the 26th day of May, 1908.

Aside from receiving the keys to the barn and viewing the property 10 days later, Guthrie exercised no acts of ownership over the property, and several times after the alleged sale Hedgpeth Bros. endeavored to sell the property to as many as four different persons in Santa Cruz and to others in Watsonville. Hedgpeth Bros., however, claimed that in offering the property for sale they were merely acting as the agents of Guthrie.

[1] The points urged by appellant for a reversal of the judgment and order are (1) insufficiency of the evidence to justify the verdict or support the judgment; (2) erroneous instructions of the trial court; and (3) error occurring at the trial in the admission of certain testimony.

It is appellant's contention that the evidence is insufficient to justify the verdict and support the judgment, in this: that it affirmatively appears that the alleged transfer was not accompanied by an immediate and actual delivery of the property, nor followed by an actual and continued change of possession, as is imperatively required by section 3440 of the Civil Code. The finding of the jury, implied from the verdict, that the sale in question was accompanied by an actual and immediate delivery of the property, in the sense contemplated by the statute, must stand or fall upon the salient features of the transaction, which may be epitomized as follows: (1) The execution and recordation of the bill of sale at the time of the alleged sale; (2) the delivery at the time of the execution and recordation of the bill of sale of the key to the barn in which the property was stored; (3) that 10 days after the execution of the bill of sale and the delivery of the key Hedgpeth Bros. took Guthrie to the barn and pointed out the property; and (4) that at the time of pointing out the property to Guthrie, Mr. Rhein was informed that Guthrie was the owner thereof.

In our opinion these facts, measured by the rule declared in section 3440 of the Civil Code, fall short of showing that there was an immediate delivery of the property in controversy to the plaintiff by Hedgpeth Bros., or that there was an actual and continued change of possession such as the law demands in order to validate a sale of personal property as against the claims of creditors.

[2] In an action between the parties to a transaction involving a dispute as to the title to the property claimed to have been sold, the execution and recordation of the bill of sale might suffice as prima facie proof of the respective rights of the parties; but in the present action it was of no consequence in the determination of the question as to whether or not there was an immediate delivery and an actual change of possession of the property. George v. Pierce, 123 Cal. 172, 55 Pac. 775, 56 Pac. 53.

[3] The delivery of the key to the barn where the property was stored did not in and of itself constitute an actual delivery. Viewed in its most favorable aspect, this circumstance was merely evidence of a constructive delivery and possession, whereas the law requires in every case, where the situation and nature of the property render it possible, that the change of possession must be visible, apparent, and actual, and not merely constructive. Civ. Code, § 2440; Chaffin v. Doub, 14 Cal. 386; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; Sequeira v. Collins, 153 Cal. 430, 95 Pac. 876. The word "actual," as used in section 3440 of the Civil Code, has been defined to mean "existing in act, and truly and absolutely so; really acted or acting; carried out; opposed to potential, possible, visual or theoretical." Bunting v. Saltz, supra.

[4] Conceding that a mere pointing out of the property in conjunction with a previous constructive delivery may, in certain circumstances, constitute a sufficient delivery and change of possession, the undisputed fact remains that 10 days at least had elapsed between the constructive delivery and the actual viewing of the property. This fact in itself, under all of the circumstances of the present case, is obviously and absolutely opposed to the claim that an immediate delivery of possession followed the sale. Immediate delivery was imperatively necessary under the statute in order to constitute a sale which would be valid in the eyes of the law and protected from the claims of creditors. This is so, even though the creditors had acquired no rights by attachment or execution previous to a delivery which may have been actual, but which did not immediately follow the sale. Howe v. Johnson, 107 Cal. 75, 40 Pac. 42; Ruggles v. Cannedy, 127 Cal. 300, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371.

We do not wish to be understood as declaring that the phrase "immediate delivery," as used in the statute, means delivery instanter. Delivery within a reasonable time, or as soon after the sale as is practicable, will satisfy the demand of the statute; and in determining what is a reasonable time the character of the property, its situation, and all of the circumstances of the transaction must be considered. Samuels v. Gorham, 5 Cal. 226; Carpenter v. Clark, 2 Nev. 246; Bassinger v. Spangler, 9 Colo. 189, 10 Pac. 809. In the case of Howe v. Johnson, supra, the property in controversy was capable of immediate delivery; and in that case it was squarely held that a delivery of the property about two weeks after the sale was not an immediate delivery as required by section 3440 of the Civil Code, and that, as a consequence, the sale must be conclusively presumed to be fraudulent and void as against the claims of creditors existing at the time of the sale.

We are not unmindful of the suggestion of counsel for the plaintiff that the statutory rule under discussion must be reasonably applied to the facts of each particular case, and that, therefore, the determination of the question as to whether or not there has been in any given case an immediate delivery and actual possession of the thing sold depends, in a measure, upon the character of the thing sold, the nature of the transaction, the position of the parties, and the intended use of the property. Porter v. Bucher, 98 Cal. 458, 33 Pac. 335. Thus in cases where actual delivery and immediate possession are, by reason of the peculiar situation and bulky nature of the thing sold, impossible by ordinary means and methods, the strictness of the rule is relaxed to meet the exigencies of the case. Chaffin v. Doub, supra, was such a case; and there the court, in construing and applying the rule, declared that: "It may be said in general that a delivery must be a transfer of possession and control made by the seller with the purpose and effect of putting the goods out of his hands. This is a sufficient delivery, whatever its form. Hence it may be constructive, as by delivering the key of a warehouse, or making an entry in the books of a warehouse keeper, or delivery with an indorsement of a bill of lading, or even a receipt, or without even such, when the goods are bulky and difficult of access, as a quantity of lumber floating in boom, or a mass of granite, or a large stock of hay." In the present case the property consisted solely of wines and liquors, some of which was in barrels, some in demijohns, and the balance in bottles. There was no apparent reason—and none has been attempted to be shown—why Guthrie could not have taken actual possession of the property at the time of or immediately following the sale. The present case, therefore, does not fall within the category of those cases wherein it has been held that an actual and immediate delivery is not necessary where, by reason of the situation of the property or its character, such delivery is impracticable or impossible.

[5] The fact that Rhein, the owner of the barn in which the property was stored, had been informed some 10 days after the alleged sale that Guthrie was then the owner of the property, was of no importance in determining whether or not there had been a valid sale as against the creditors of Hedgpeth Bros. Verbal or written notice of a sale of personal property given to an individual or to any number of individuals unaccompanied by an immediate and actual change in the status of the property is not equivalent to delivery of possession; and Guthrie's assertion that he had purchased the property in question was but a mere conclusion and a self-serving declaration, which had no legitimate tendency to prove a delivery. Sequeira v. Collins, 153 Cal. 426, 95 Pac. 876. See opinion of Beatty, C. J., in Hunt v. Hammel, 142 Cal. 461, 76 Pac. 378.

In concluding this phase of the case, it will suffice to say that for the reasons stated the facts hereinbefore enumerated, taken singly or all together, were not, under the particular circumstances of the case, sufficient to support the finding of the jury that the alleged sale of the property in question was accompanied by an immediate delivery and an actual and continued change of possession within the purview of the statute.

[6] The erroneous finding of the jury doubtless was inspired by the erroneous instructions of the trial court, wherein the jury were in effect charged (1) that, if the property was so situated that the vendee was entitled to and could rightfully take possession of it at his pleasure, he is considered as having actually received it, and that it was not necessary under the law and the circumstances of this case that he should actually take the property into his possession; (2) that, when a valuable consideration is paid for the purchase of property, the purchase is presumed to be in good faith; (3) that fraud is never presumed, but must be affirmatively proven by the party alleging the same. The language of the first instruction just referred to is almost identical with that of an instruction which in the case of Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906, was held to be prejudicial error. To charge the jury, as in effect the trial court did in the present case, that the right of the vendee to take the property at his pleasure was the equivalent of an actual delivery was held, in the case last cited, to be in direct conflict with section 3440, Civil Code, for the reason that "if the property is so situated that the vendee can take possession thereof at his pleasure, his failure to take such possession constitutes the very fraud which the statute is intended to prevent, and renders the previous transfer to him void as against the creditors of his vendor." See, also, Hesthal v. Myles, 53 Cal. 623.

The averment of the defendant's answer that there was no immediate delivery and no actual and continued change of possession of the property presented the paramount issue in the present case. Notwithstanding the presence of proof which tended strongly to support the averment, and bring the facts of the case within the presumption provided for by section 3440, Civil Code, the trial court charged the jury that "fraud is never to be presumed, but must be affirmatively proven by the parties alleging the same. The law presumes that all men are fair and honest, that their dealings are in good faith and without intention to disturb, cheat, hinder, delay, or defraud others. And where a transaction called into question is equally capable of two constructions—one that it is fair and honest, and one that it is dishonest—then the law is that the fair and honest construction must prevail, and the transaction called in question must be determined to be fair and honest; and in this connection I instruct you that the law presumes the transaction between Hedgpeth Bros. and Guthrie to have been fair and honest, and you must so consider it until the contrary has been proven by a preponderance of evidence." The vice of the quoted instruction lies in the fact that it ignores the provisions of section 3440, Civil Code, which, in effect, declares that a sale of personal property under the circumstances therein enumerated is conclusively presumed to be fraudulent, and therefore void against those who are the creditors of the vendor while he remains in possession of the property.

[7] Ordinarily the burden of proof, where it is not shifted by statutory provisions, is on the party assailing a transfer of property upon the ground of fraud; but where, as here, facts appear which prima facie create or tend to create a statutory presumption of fraud as against the vendors' creditors, the burden of proof not only shifts to the party claiming under the vendor, but the presumption, if established, renders the transaction absolutely void, under our statute. While it is true generally that fraud must be established like any other fact in a case, and that as a matter of law, in the absence of proof, it is never to be presumed, nevertheless, in actions of the kind under consideration, if the facts appearing in evidence tend to create the statutory presumption of fraud, this in itself would be a complete de-

fense to the action; and of necessity the defendant here was entitled to have the jury fully and clearly instructed upon the law appertaining to that phase of the case. Cooper v. Friedman, 23 Tex. Civ. App. 585, 57 S. W. 581.

Upon the question of fraud the trial court further charged the jury that, "when a valuable consideration is paid for the purchase of property, the purchase is presumed to be in good faith," and that, before a finding could be made against the plaintiff in the present case on the question of fraud, the jury "must be satisfied by a preponderance of the evidence not only that Hedgpeth Bros. transferred the property to plaintiff with the intention to defraud their creditors, but that plaintiff himself either knew of such intention, and was a party thereto, or as a reasonable person ought to have known thereof." This instruction, not only eliminates, but nullifies, the provisions of section 3440, Civil Code, and clearly, under the authorities cited, the giving of it was prejudicial error. We express no opinion as to whether or not the evidence upon the whole case, as claimed by defendant, shows that Hedgpeth Bros. transferred the property in question to the plaintiff in fraud of creditors, and that plaintiff was aware of such intention and was willfully a party thereto. Assuming, however, that defendant failed in his proof to support that issue, still it was the duty of the jury to find against the plaintiff, and the trial court should have so charged, if the evidence was otherwise sufficient to warrant a finding that the transfer of the property was not accompanied by an immediate delivery and followed by an actual and continued change of possession. The error of these instructions was not cured by anything which the trial court said elsewhere in its charge to the jury. True, the trial court did in another part of its charge correctly state the law as applied to the invalidity of a transfer of personal property which was not accompanied by an immediate delivery nor followed by an actual and continued change of possession.

[8] The charge of the court, however, was in its entirety so hopelessly contradictory and inconsistent in its application of the law to the vital issues of the case as to make it impossible to determine which of the trial court's conflicting views of the law the jury adopted as the basis for their verdict. For instance, in one part of its charge, the trial court told the jury that the sale in question was conclusively presumed to be fraudulent if it was not followed by an actual change of possession, and that "an 'actual change' of possession means existing in fact. * * * The word 'actual' as used in the law is intended to exclude the idea of a mere formal change of possession. * * *" On the other hand, the jury in a preceding instruction were erroneously told that, "if the property was so situated that Guthrie was entitled to and could rightfully take possession of it at his pleasure, it was not necessary under the law that Guthrie should take the property into his possession. A delivery thus made will satisfy the requirements of the law."

Clearly these two instructions are irreconcilable and confusing. They are fair examples of the conflict of ideas which runs throughout the charge of the court; and doubtless so confused the jury that they were unable from the instructions as a whole to fully, fairly, and intelligently appreciate and apply the law of the case. It being impossible to tell which of the several conflicting instructions controlled the verdict of the jury, a material error in any one of them must be deemed to be prejudicial. Sappenfield v. Main St., etc., R. R. Co., 91 Cal. 48, 27 Pac. 590; Stephenson v. S. P. Co., 102 Cal. 150, 34 Pac. 618, 36 Pac. 407; Rathbun v. White, 157 Cal. 253, 107 Pac. 309; Ryan v. Oakland Gas, etc., Co., 10 Cal. App. 492, 102 Pac. 558.

[9] The point is made that the record shows only the requested instructions of the respective parties, and not the charge of the court itself. Because of this it is insisted that the record does not affirmatively show all of the instructions given by the court, and that therefore the error and conflict in the requested instructions cannot be considered. The point is without merit. Each of the requested instructions was indorsed as "given" by the trial judge; and, although the record does not show an independent charge by the court, it is evident that the court adopted the several requested instructions as the law of the case, and gave them without modification or reconciliation as its charge to the jury.

[10] The trial court erred in its ruling admitting in evidence, over the objection of the defendant, the testimony of the witnesses Rittenhouse and Moore. The evident purpose of the testimony was to show that Deiter had made a settlement in full of his claims as a creditor of Hedgpeth Bros. prior to the rendition of the judgment in his favor in the justice's court, and therefore was not a creditor at the time of the levy of the execution by the defendant Carney.

It does not appear from the record before us that the subject-matter of Deiter's claim, whether adjusted or not by Messrs. Rittenhouse and Moore, constituted the cause of action in the justice's court wherein Deiter recovered a judgment against Hedgpeth Bros.; and therefore the testimony in question did not show or tend to show that the claim sued on in the justice's court had been settled in full prior to the judgment rendered therein. But, apart from this, the judgment and execution in the justice's court action of Deiter v. Hedgpeth Bros. was offered and admitted in evidence in the present case without objection. The judgment and execution were prima facie valid. The testimony of the witnesses Rittenhouse and Moore was offered and admitted apparently for the purpose of impeaching collaterally the validity of the justice's court judgment and execution. This could not be done without violating the settled rules of evidence in actions of this character; and to permit it was clearly error. Brush v. Smith, 141 Cal. 466, 75 Pac. 55; Gregory v. Bovier, 77 Cal. 121, 19 Pac. 232; Norcross v. Nunan, 61 Cal. 642; 2 Jones on Ev. (1st Ed.) § 601.

The judgment and order appealed from are reversed and the cause remanded for a new trial.

We concur: KERRIGAN, J.; HALL, J.

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19 Cal. App. 213

HUDSON v. SEELEY SPECIALTIES CO.

(Civ. 1,120.)

(District Court of Appeal, Second District, California. May 29, 1912.)

1. Corporations (§ 117*)—Sale of Stock—Contracts—Option to Rescind.

Where a majority stockholder, agreeing to pay a third person a specified sum for his cancellation of a contract with the corporation, issued to the third person stock of the corporation, to be held until the specified sum was paid, and executed an instrument, reciting that he would, within six months, purchase of the third person the stock for a specified sum, provided the agreement was presented within 10 days after maturity, otherwise he should be released from the obligation to purchase, the contract evidenced by the instrument reserved to the third person the right to rescind the purchase, and, on his exercising such right, the title to the stock at once vested in the stockholder; and, where the stockholder refused to pay for the stock when tendered, the third person could protect the stock from an assessment, which became a lien before the day of the maturity of the contract, and recover the assessment paid as special damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 506; Dec. Dig. § 117.*]

2. Corporations (§ 452*)—Contracts—Validity.

Where a contract, made in the name of a corporation, had the corporate seal affixed, with the names of the president and secretary, who were two of the three directors, and the president managed the corporate affairs, the contract was binding on the corporation, especially where it was beneficial to it, and it received the benefits without disclaiming authority to make the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1796, 1797, 1804, 1805; Dec. Dig. § 452.*]

3. Contracts (§ 74*)—Consideration—Sufficiency.

A promise by a majority stockholder to pay a third person a specified sum, in consideration of his canceling a contract with the corporation, is supported by a sufficient consideration; and an agreement to carry out the promise, whereby the stockholder delivered stock to the third person, to repurchase within a specified time for a special sum was enforceable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 331–343; Dec. Dig. § 74.*]

4. Corporations (§ 425*)—Contracts—Estoppel.

A corporation receiving the benefits of a contract made by its officers without authority, and remaining silent until the arrival of the maturing day of the contract, is estopped from disclaiming liability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

Appeal from Superior Court, Los Angeles County; W. M. Conley, Judge.

Action by C. D. Hudson against the Seeley Specialties Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Gilbert F. Wyvell, for appellant. Tom C. Thornton and Tobias R. Archer, for respondent.

JAMES, J. Defendant appeals from a judgment for the sum of $1,955.77 and interest entered against it. The facts upon which plaintiff based his cause of action, and as determined by the findings of the court, were these: On or about May 9, 1910, plaintiff held a certain contract theretofore made with a corporation called the High Frequency Ignition Coil Company, and at the time mentioned he was approached by defendant and informed that defendant had acquired a majority of the stock and the control of said High Frequency Ignition Coil Company, and that it desired to secure a cancellation of the contract held by plaintiff. Defendant offered to pay plaintiff for the cancellation and surrender of the contract $1,700, this amount to be paid on the 21st of November following, which offer was accepted. The transaction, however, for the payment of this money took the following form: Defendant agreed to have issued to plaintiff 1,700 shares of the capital stock of the High Frequency Ignition Coil Company, which plaintiff was to hold until the money provided to be paid for the surrender of his contract became due, when, upon the redelivery of the certificates for the 1,700 shares of stock to defendant, he was to receive the $1,700. The following writing was made and executed by defendant as evidencing the latter agreement:

"Los Angeles, Cal., May 21, 1910.

"Six months after date hereof, we, the Seeley Specialties Co., a corporation, doing business under the laws of the state of California, hereby agree to purchase of C. D. Hudson of Los Angeles, seventeen hundred shares of the capital stock of the High Frequency Ignition Coil Co., represented by certificate No. 100, dated the ninth day of May, 1910, for the sum of seventeen hundred dollars ($1,700) providing this agreement is presented within ten days after maturity; otherwise the said Seeley Specialties Co. is released from any and all obligations to purchase said stock. Seeley Specialties Company, by Henry Fleetwood, Pres., by Geo. Howard, Sec. [Seal.]"

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Immediately upon the maturity of this contract, plaintiff tendered to the Seeley Specialties Company the certificates of shares of stock in the other corporation mentioned and demanded payment of the $1,700, which was refused him. At the date of this tender, an assessment had been levied against the stock of the High Frequency Ignition Coil Company, the amount which was due as a charge against the 1,700 shares of stock held by plaintiff, being the sum of $255.77. After the commencement of this action, and in order to prevent a sale of the stock on account of that assessment, which had become delinquent, plaintiff paid the sum required to satisfy that demand and filed a supplemental complaint, setting up an additional cause of action for the amount of the assessment. The court found in favor of plaintiff on all of the issues tendered by the complaint and supplemental complaint, and its findings were made upon sufficient evidence. The complaint set forth all of the facts constituting the cause of action in narrative form, and the court did not err in overruling the demurrer of defendant interposed thereto.

[1] It was contended that the action must be treated as one for damages, and that the complaint nowhere set out facts from which it could be determined plaintiff had suffered any damage. The facts, as alleged by the complaint, were so closely parallel to those involved in the case of Gay v. Dare, 103 Cal. 454, 37 Pac. 466, as to make the decision in that action applicable to this upon all of the chief points of objection raised by defendant. The court there says that in cases of this kind the contract will be construed as not amounting in law to a contract to repurchase, but that it is one whereby an option to rescind is reserved to the vendee; and that upon the exercise of such option title to the property at once vests in the original vendor. The obligation of the defendant in this case was to pay plaintiff the sum of $1,700 on or within 10 days after the 21st day of November, 1910, which it refused to do. In order to protect the stock from forced sale to satisfy the assessment levied thereon, payment of which was then due, plaintiff was compelled to pay an additional sum of $255.77. This amount constituted an account for special damages accruing to him by reason of the refusal of defendant to fulfill its obligation, and which, in our opinion, and under the decision in Gay v. Dare, he was entitled to recover. We do not think that the fact that this assessment became a lien before the day of the maturity of the written contract affected either the sufficiency of the tender made by plaintiff, or his right to recover the additional amount paid to satisfy the assessment, as damages. When he offered back to the defendant the stock which they had agreed he might surrender to them, it was their duty to receive it and pay him the amount agreed upon. When they did not do this, plaintiff continued to own the stock for their benefit; and he rightfully assumed the duty of protecting it from forced sale while it remained in his hands, or subject to any control on his part.

[2] The further point is made that the contract was not shown to be the contract of defendant corporation, because it was not made to appear that the board of directors had expressly authorized its execution; and, further, that no consideration had been received by defendant for the making of it. The contract, as executed, was made in the name of the defendant company; it had the corporate seal attached, together with the names of the president and secretary. It appeared by the evidence that there were only three directors; the president and secretary being two of the number, and the third director being one who took no active part in the management of the corporation. It was testified to by the secretary, who signed the contract, that the president managed the affairs of the corporation. At any rate, and further than this, it did appear clearly that the contract as made was within the corporate powers of defendant corporation; that it was deemed to be of benefit to the corporation; and that the corporation received it, and whatever benefits may have accrued on that account, without disclaiming the authority of its officers to make a binding contract in that behalf. Plaintiff, when he surrendered his contract with the High Frequency Ignition Coil Company to defendant, surrendered rights which admittedly were of considerable value, and the corporation receiving the benefit of such surrender certainly could not afterwards be heard to say that no benefit was received by it, and thus escape any liability on account of its obligation to compensate plaintiff for his property.

[3, 4] It is very clear to us that there was ample consideration to support the making of the contract here sued upon, and also that the president, in his capacity as manager of the corporation, had authority to make the contract in its name; further, that, even conceding that the officers of the corporation did not possess authority to enter into the contract, by receiving whatever benefits may have flowed therefrom and remaining silent until the maturing day of the contract had arrived, the corporation is estopped from disclaiming its liability. Brown v. Crown Gold M. Co., 150 Cal. 376, 89 Pac. 86.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

19 Cal. App. 177

HARLAN DOUGLAS CO. v. MONCUR, Superior Judge. (Civ. 1,155.)

(District Court of Appeal, Second District, California. May 27, 1912.)

Assignments (§ 123*)—Control of Litigation.

A contract, transferring all the capital stock of plaintiff corporation, reserved to H., among other things, the right to prosecute to final judgment, at his own cost and for his own benefit, any suit to which the corporation was then a party. *Held* that, under Code Civ. Proc. § 385, providing that, in case of transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding, the corporation, after the transfer and after the purchaser had become president thereof, was not entitled to control a pending suit brought by the corporation, nor to demand a substitution of attorneys therein.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 211, 212; Dec. Dig. § 123.*]

Application for a writ of mandamus to compel a substitution of attorneys. Denied.

Schweitzer & Hutton, for petitioner. E. A. Meserve and Hanson, Hackler & Heath, for respondent.

JAMES, J. Proceeding in mandamus to compel defendant, as judge of the superior court, to make an order of substitution of attorneys in an action entitled Harlan Douglas Company, a Corporation, v. Dean Drug Company, a Corporation, now pending in the superior court of the county of Los Angeles. An alternative writ was issued herein, and a hearing has been had after return made thereto. It appears that on or about the 12th day of January, 1912, a motion was made before the defendant, sitting as judge of the superior court, by Schweitzer & Hutton, Esqs., representing the Harlan Douglas Company, by which motion an order was requested that the attorneys mentioned be substituted as attorneys for plaintiff in the action referred to. The motion came on to be heard and was resisted by the counsel, who appeared as attorneys of record for the plaintiff in that action, and evidence by affidavits was received which established the following state of facts: On or about the 16th day of June, 1911, John Harlan, who then owned or controlled all of the capital stock of the Harlan Douglas Company, made a contract in writing with one C. P. V. Watson, whereby the said Harlan agreed to sell to Watson all of the capital stock of the Harlan Douglas Company. By that contract it was agreed that there should be reserved to Harlan, among other things, the right to prosecute, at his own cost and charge, and for his own benefit, to final judgment any suit at law to which the said company was then a party, and that Watson should be relieved by Harlan from any liability for the payment of charges or costs by reason of such litigation; that this contract so made by Harlan was made with the knowledge of the stockholders of the Harlan Douglas Company; that Watson, having so acquired all of the stock of said corporation, became president thereof; and that later he distributed some of the shares of stock to other persons. The evidence heard was further sufficient to show that Harlan had acted in good faith, and had proceeded to discharge the obligations assumed by him under his contract with Watson, and that he claimed the right to and was proceeding with the prosecution of the action first mentioned, when it was sought to have a substitution of attorneys made in that suit. In this proceeding it is for us only to determine whether, upon the facts as shown to the judge of the superior court, the petitioner was entitled to have an order of substitution of attorneys made, as demanded by its motion. In our opinion, it was clearly not so entitled. By section 385 of the Code of Civil Procedure, it is provided as follows: "An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

Under the terms of the contract made between Harlan and Watson, the interest of the Harlan Douglas Company in the cause of action set up in the suit of that corporation against the Dean Drug Company passed to Harlan. Therefore the petitioner, having no further interest in the matter in litigation, had no right to interfere with the control of the suit by Harlan. The provisions of the Code which we have quoted gave to Harlan, at his option, the right to either continue the prosecution of that action in his own name, or in the name of the corporation.

Peremptory writ denied.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 171

NELSON v. SUMIDA et al. (Civ. 970.)

(District Court of Appeal, First District, California. May 27, 1912.)

1. Sales (§ 447*)—Breach of Warranty—Findings—Consistency.

In an action for breach of warranty that vines sold by defendants to plaintiff should be Malaga vines, where defendants' evidence tended to show that they agreed only to furnish vines from a particular vineyard, and informed the plaintiff that practically all of the vines in that vineyard were Malaga vines, findings that the vines delivered were Malaga vines, and true to name and that no warranty was made that they were Malaga vines and true to name, but that the only representation was that they were from the particular vineyard, were not inconsistent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1318; Dec. Dig. § 447.*]

2. SALES (§ 441*)—WARRANTY—ACTIONS FOR BREACH—EVIDENCE.

In an action for breach of a warranty that vines sold to plaintiff were of a particular variety, evidence *held* to support trial court's findings that the only warranty made was that the vines were to be from a particular vineyard, and that the vines delivered were from that vineyard.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277–1283; Dec. Dig. § 441.*]

3. APPEAL AND ERROR (§ 1052*)—REVIEW—HARMLESS ERROR.

In an action for breach of warranty, where the trial court found that there was no breach, errors in the admission and rejection of evidence bearing only on the question of damages were harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. § 1052.*]

4. EVIDENCE (§ 471*)—FACTS OR CONCLUSIONS.

Questions asked witnesses calling for opinions of the witness were properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by Fred Nelson against H. Sumida and another. From a judgment for defendants, and an order denying a new trial, plaintiff appeals. Affirmed.

Everts & Ewing, for appellant. S. C. St. John and Frank Kauke, for respondents.

LENNON, P. J. In the month of January, 1907, the defendants sold and delivered to the Fowler Nursery & Warehouse Company of the city of Fresno some 47,000 rooted vines at the agreed price of $11 per thousand, which was finally and fully paid to the defendants. The present action arises out of that transaction, and is for damages alleged to have been sustained by the purchaser because of the alleged breach by the defendants of a covenant of warranty which, it is claimed, accompanied and was made a part of the contract of sale. In that behalf the plaintiff's complaint, in substance, alleges that at the time of the sale and as a part of the consideration for the purchase price thereof the defendants covenanted and agreed with the purchaser that the vines and all of them should be Malaga rooted vines and of no other variety; that, when delivered, they should be true to name; that defendants warranted said vines to be Malaga rooted vines and no other, and that the purchase price was paid because of such warranty; that all of the vines delivered to the purchaser were not Malaga rooted vines, but that contrary to the covenant of warranty about 20,000 of said vines were of a miscellaneous kind and of an inferior variety; that the purchaser, acting under the warranty and in the course of its business, sold all of the 47,000 vines received from the defendants to several of its customers upon the representation that they were Malaga vines; that, because of the fact that a large portion of such vines was not true to name and made up of a miscellaneous variety of vines of an inferior grade and value, the purchaser, the Fowler Nursery & Warehouse Company, to its detriment and damage in the sum of $2,500, lost many customers and much business, and was compelled to repay in money the loss resulting to those of its customers to whom it had sold such vines. The Fowler Nursery & Warehouse Company assigned its claim for damages against the defendants to the plaintiff, and upon a trial of the action judgment was rendered for the defendants. From the judgment and an order denying a new trial the plaintiff appeals upon the judgment roll and a statement of the case.

The defendants by their answer admitted the sale of the vines, but denied the making of the covenant of warranty pleaded in the plaintiff's complaint, and alleged in that behalf that the only agreement made by the parties to the sale concerning the kind of rootings sold and purchased was that they should be from the vineyard known as the "Turner Vineyard." Defendants further denied that the vines sold and delivered under the contract were of any other variety than Malaga rooted vines, and alleged affirmatively that they were in fact Malaga rooted vines and true to name, although not warranted to be such by the defendants.

[1] The trial court's findings of fact are assailed by plaintiff upon the grounds that they are inconsistent and contradictory of themselves, and that they are not supported by the evidence. The findings are claimed to be contradictory, in this: that, notwithstanding a finding that the vines were "all Malaga vines and true to name," it is also found in effect that the sale was not made upon or accompanied by a covenant that the vines were "all Malaga vines and true to name," but that the only representation and agreement made by the defendants with reference to the kind and character of the vines was that they were from the "Turner Vineyard." Because of the alleged conflict in the findings plaintiff insists that it is impossible to ascertain upon what theory the paramount issue in the case was decided.

In our opinion the conflict, if any, in the findings, is more apparent than real, and may be readily reconciled when read and construed in conjunction with the evidence adduced at the trial. Upon a close analysis of the evidence, it will be found that the findings complained of are founded upon the theory that practically all the vines in the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

"Turner Vineyard" were of the Malaga variety, and that the defendants agreed to gather and deliver the vines sold from that particular vineyard. The evidence further shows that plaintiff's assignor was fully informed of the kind of vines grown in the Turner vineyard, and that it would be satisfied if the vines contracted for were gathered and delivered from that vineyard. It follows that, if in fact all the vines sold and delivered did come from the Turner vineyard, they must have been of the "Malaga variety and true to name" to the extent contemplated by the parties to the sale. This, we take it, is all that was intended to be found by the trial court; and, so construed, the findings complained of must be held to be free from conflict.

[2] As to the point that the findings are not supported by the evidence, we find upon a careful examination of the record that the testimony offered and received in support of defendants' case accords with the trial court's finding of fact to the effect that it was agreed by the parties to the contract that the vines should be from the Turner vineyard, and that no representations or agreement concerning the kind or quality of such vines were made by the defendants other than that they should come from the Turner vineyard.

The plaintiff Nelson, as a member of the Fowler Nursery & Warehouse Company, negotiated the sale; and he testified, in substance, that it was his purpose to purchase only Malaga vines, and so informed the defendants, and that the defendants represented and agreed at the time of the sale that the vines were to be gathered from the Turner vineyard and true to name. It may be safely said, however, that nowhere in the plaintiff's testimony, or elsewhere in the record, is it made to appear that the defendants, as is alleged in the complaint, expressly agreed "that said vines and all thereof should be Malaga rooted vines and nothing else." The sum and substance of Nelson's testimony upon the point under discussion was that he wanted Malaga vines; that he inquired of defendants from what vineyard they procured Malaga cuttings, and, in reply, was "assured that the cuttings were taken from the Turner vineyard and that they were true to name." On the other hand, H. Sumida, the defendant who negotiated the sale with Nelson, testified that although he did represent and agree that the vines were to come from the Turner vineyard, and stated generally that they were Malagas and not mixed vines, nevertheless nothing was said at the time of the sale or at any other time about guaranteeing the vines to be Malaga vines, and that no warranty other than that the vines were to come from the Turner vineyard was ever given or made.

It may be true that, if the trial court had accepted Nelson's testimony to the exclusion of everything else appearing in evidence, it might have justified a finding that, impliedly at least, the defendants had warranted the vines to be Malaga vines. The evidence upon the whole case, however, is in substantial conflict as to what was said and done by the parties to the sale upon the subject of a warranty. It is likewise in conflict as to whether or not the vines sold and delivered all came from the Turner vineyard, and the evidence upon the whole sufficiently supports, we think, the trial court's findings of fact that no warranty, other than that the vines were to come from the Turner vineyard, was ever given or made by the defendants, and that all the vines actually sold and delivered did come from the Turner vineyard, as was warranted by the defendants.

[3] Several rulings of the trial court in the admission and rejection of evidence are assigned as error, but the trial court's finding of fact that the vines were delivered in accordance with the warranty of the defendants was in effect a finding that there was no breach of the warranty upon which plaintiff's cause of action for damages was founded, and such finding necessarily foreclosed plaintiff of all right to recover the damages alleged and sued for. In so far, therefore, as the rulings complained of relate to the issue of damages, they are of no consequence, and may be disregarded upon this appeal.

[4] With respect to the trial court's rejection of testimony bearing upon the issue of warranty, it will suffice to say that in each instance wherein the ruling of the court is claimed to be erroneous the question objected to sought to elicit the opinion or conclusion of the witness, and for this reason, if for no other, the testimony was properly excluded.

Upon an examination of the entire record we are satisfied that the cause was fairly tried and correctly decided.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J

19 Cal. App. 217

Ex parte JORGENSEN. (Cr. 187.)

(District Court of Appeal, Third District, California. May 29, 1912.)

Contempt (§ 71*)—Imprisonment for Fine.

Under Code Civ. Proc. § 1218, authorizing a fine not exceeding $500 or imprisonment not exceeding five days, or both as a punishment for contempt, a sentence to imprisonment for two days and to pay a fine of $200, and, in default of payment, imprisonment one day for each $2 thereof, is valid; Pen. Code, § 1205, which authorizes imprisonment for nonpayment of a fine to the extent of one day for every $2 of the fine unpaid, not to exceed the term for which defendant has been sentenced being inapplicable to contempt cases.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 247, 248; Dec. Dig. § 71.*]

Application by H. P. Jorgensen for writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

Peck, Bunker & Cole, for petitioner. F. G. Ostrander, for respondent.

CHIPMAN, P. J. On the 9th day of May, 1912, by an order duly given and made by the superior court of Merced county, petitioner was adjudged guilty of contempt of the said superior court for the violation of its decree in an injunction case, and was sentenced to imprisonment in the county jail for the period of two days and to pay a fine of $200, and, in default of the payment of said fine to be confined in the county jail for one day for every two dollars of said fine. Petitioner was taken into custody and imprisoned on May 9th, and so remained until May 16th, when the petition for the writ herein was filed.

There is but one question presented, namely: Is that part of the sentence imprisoning petitioner one day for each $2 of the fine remaining unpaid void? The claim of petitioner is that the sentence was imposed under section 1218 of the Code of Civil Procedure, which authorizes the infliction of a fine not to exceed $500 or imprisonment not to exceed five days, or both; that section 1205 of the Penal Code, which authorizes the imposition of imprisonment for nonpayment of fine to the extent of one day for every two dollars of the fine unpaid, expressly provides that such imprisonment must not "extend in any case beyond the term for which defendant has been sentenced." It is hence contended that, the extent of the imprisonment being limited by section 1218 of the Code of Civil Procedure to five days, the imprisonment could not be prolonged under section 1205 of the Penal Code and that its infliction is double punishment.

People v. Brown, 113 Cal. 35, 45 Pac. 181, is cited in support of petitioner's contention. That was the case where the defendant had been convicted of crime for which the statute authorized a sentence of imprisonment for a limited period. So, also, are all the other cases cited by petitioner. In Ex parte Abbott, 94 Cal. 333, 29 Pac. 622, the question arose in a contempt proceedings, and it was there held that a superior court imposing a fine for contempt has the power to make and enforce a judgment that in default of payment the party in contempt be imprisoned in satisfaction of the fine until the fine is satisfied, at the rate of one day for every $2 of the fine unpaid. It was also held that section 1205 of the Penal Code, as amended in 1891, does not apply to cases of contempt. The point was involved to some extent in Ex parte Krouse, 148 Cal. 232, 82 Pac. 1043, although the fine there was $100, and the order was that in default of payment "he be imprisoned in the county jail * * * until the said fine is paid, such imprisonment not to exceed one day for each twenty dollars of said fine that shall so remain unpaid." Inasmuch as section 1205 of the Penal Code has no application to contempt cases, the principle decided in the Krouse Case seems to have been the same as decided in the Abbott Case, supra. Petitioner contends that the Abbott Case differs from the case here, in this, that here a judgment of imprisonment and fine was imposed, while in the Abbott Case a fine only was imposed. We cannot see that this difference affects the principle decided.

That the court imposed punishment by imprisonment and also imposed a fine would not take from the court the power to enforce the payment of the fine as was exercised in the Abbott Case.

The writ is discharged and the petitioner remanded to the custody of the sheriff.

We concur: HART, J.; BURNETT, J.

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19 Cal. App. 209

SAN FRANCISCO COMMERCIAL AGENCY v. WIDEMANN. (Civ. 961.)

(District Court of Appeal, First District, California. May 28, 1912. Rehearing Denied by Supreme Court July 24, 1912.)

1. PLEADING (§ 378*)—ISSUES—GENERAL DENIAL.

A general denial, which, under Code Civ. Proc. § 437, puts in issue the material allegations of the complaint, puts in issue all of the material allegations of an unverified complaint, and places the burden on plaintiff of showing facts constituting the cause of action alleged.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1232–1236; Dec. Dig. § 378.*]

2. SALES (§§ 391, 397*)—CONTRACTS—RECOVERY OF DEPOSIT—BURDEN OF PROOF.

A buyer, suing to recover the money paid on account of the contract on the ground of the seller's breach, has the burden to show the breach; and, where the buyer first breached the contract without fault of the seller, no cause of action for the return of the money paid exists.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1110–1127, 1136; Dec.Dig. §§ 391, 397.*]

3. SALES (§ 396*)—BREACH OF CONTRACT—RECOVERY OF DEPOSIT—ISSUES.

Under Civ. Code, § 1439, providing that, before any party to an obligation can require another party to perform any act under it, he must fulfill all conditions precedent, a seller, who is sued for the money paid by the buyer on account of the contract, may, under the general issue, avail himself, as a defense, of the buyer's first breach of the contract, without fault of the seller, charged by the buyer with breaching the contract forming the basis for the recovery of the deposit.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1134, 1135; Dec. Dig. § 396.*]

Appeal from Superior Court, Monterey County; B. V. Sargent, Judge.

Action by the San Francisco Commercial Agency against C. H. Widemann. From a judgment for defendant, plaintiff appeals. Affirmed.

Perry & Perry, for appellant. Sargent & Bardin, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

LENNON, P. J. Plaintiff's complaint in this action consists of two counts. The first count in effect alleges that plaintiff's assignor entered into a contract with the defendant for the purchase and sale of certain live stock for the sum of $5,170.46, which was to be paid upon the delivery of the cattle; that $500 thereof was deposited with the defendant as payment in part; that the sum so paid was to be returned to plaintiff's assignor if defendant failed to deliver the cattle as per the terms and conditions of the contract; that the cattle contracted for were subsequently delivered and accepted as agreed, and that, in addition to the $500 previously paid on account, the full purchase price was paid to the defendant; that, although demand had been made upon the defendant for the said $500, he had failed and refused to return the same. The second count of plaintiff's complaint stated a cause of action in the nature of a claim for moneys had and received, based upon the theory that the $500 paid on account was to be returned, unless the defendant delivered to plaintiff's assignor sufficient of the cattle contracted for to equal in value, quality, and quantity, the sum of $500. The answer of the defendant denied all of the material allegations of the complaint, and, in addition, pleaded in abatement of the action the nonjoinder of a necessary party defendant. Upon the issues thus raised, the trial court rendered and entered judgment for the defendant, from which, and from an order denying a new trial, the plaintiff has appealed upon the judgment roll and a statement of the case.

By the terms of the contract, a written memorandum of which was offered and received in evidence, the defendant agreed to deliver the cattle in a specified condition to the plaintiff's assignor at King City, in the county of Monterey. They were to be delivered in two herds—one on May 20, 1909, and the other on June 1st of the same year.

With reference to the number of cattle purchased and the price to be paid therefor, the written memorandum of the contract recited merely that plaintiff's assignor had bought from the defendant "all fat cows and heifers at 6½¢.," and that the sum of $500 had been paid on account of the purchase. It is apparent, therefore, that the exact number of cattle sold and to be delivered under the contract was left to be subsequently determined by the parties to the contract; and that the price ultimately to be paid was a matter of calculation to be made upon delivery.

The trial court in effect found as facts that on May 24, 1909, the defendant delivered to plaintiff's assignor a portion of the cattle contracted for, and that the defendant received in payment therefor the sum of $5,170.46; that it was not agreed between the parties to the sale that $5,170.46 was the total purchase price of the two herds of cattle, but, on the contrary, that the said sum, estimated in accordance with the terms of the contract, was only the value and purchase price of the first herd sold and actually delivered to plaintiff's assignor; that the $500 in dispute was intended and agreed by the parties to be applied as part payment only on the purchase price of the cattle agreed to be delivered on June 1, 1909; that, although the defendant, on said last-mentioned date, had offered to make delivery, and was at all times ready, able, and willing to make delivery, of the second herd of cattle in accord with the conditions specified in the contract of sale, plaintiff's assignor refused to accept delivery of the same then, or at any time since then.

That these findings are amply supported by the evidence is not disputed by plaintiff; but it is insisted that the defendant should not have been permitted to show a breach of the contract, or have judgment under an answer which, by general denials only, puts in issue the facts constituting plaintiff's cause of action; and that, unless a breach of the contract was specifically pleaded as a defense to the action, and damages for the breach sought by way of cross-complaint or counterclaim, no relief could be afforded defendant in the present action.

[1] A general denial puts in issue the material allegations of the complaint. Code Civ. Proc. § 437. In the present case the plaintiff's complaint was not verified; and the general denial of the defendant's answer put in issue all of the material allegations of the complaint, and placed the burden upon plaintiff of showing facts sufficient to constitute the particular cause of action alleged in the complaint. One of the allegations of plaintiff's complaint was "that on or about the 24th day of May, 1909, the Oakland Meat & Packing Company [plaintiff's assignor] accepted the quantity of cattle * * * agreed to be purchased by it." The evidence complained of was addressed to the issue raised by the denial of this averment; and, as it tended to show a breach of the contract by plaintiff's assignor in refusing to accept the cattle, such evidence was clearly admissible.

[2, 3] In the present case the evidence is more than sufficient to warrant the conclusion that the defendant was at all times ready, able, and willing to make delivery of the cattle contracted for; and that such delivery was prevented solely by the neglect and default of the plaintiff's assignor. The burden of proof was upon the plaintiff to show the defendant's breach of the contract; and if, as the trial court found, plaintiff's assignor itself first breached the contract, without fault or failure of the defendant, no cause of action for the return of the money paid on account of the contract existed in favor of the plaintiff, and the defendant was

properly permitted to avail himself of such defense under the general issue. Civ. Code, § 1439; Wood Curtis Co. v. Seurich, 5 Cal. App. 252, 90 Pac. 51.

The findings of the trial court upon the issues of price, payment, and delivery were, in themselves, sufficient to warrant and support a judgment in favor of the defendant; and those findings necessarily defeat and dispose of plaintiff's right to recover on the contract, whether it be an individual or partnership obligation. It is unnecessary, therefore, to pass upon the sufficiency of the evidence to support the issue and finding of nonjoinder, or to decide the question as to whether or not parol evidence was admissible to prove that issue.

The judgment and order appealed from are affirmed.

We concur: KERRIGAN, J.; HALL, J.

19 Cal. App. 184

RANDALL et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY. (Civ. 1,197.)

(District Court of Appeal, Second District, California. May 27, 1912.)

APPEAL AND ERROR (§ 381*)—BOND—JUSTIFICATION OF SURETIES—TIME.

Notice of the justification of sureties on an appeal bond, and the time set therefor, being more than five days after notice of exception to the sureties, was ineffectual to preserve the rights of the parties on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2029–2035; Dec. Dig. § 381.*]

Application for writ of review by Monroe Randall and others against the Superior Court of Los Angeles County. Denied.

Randall & Gaines, for petitioners. Edwin Judson Brown, for respondent.

PER CURIAM. It appears from the record, files, and papers herein that the notice of exception to the sufficiency of the sureties was duly given and made on the 22d of March, 1912; that the notice for the justification of the sureties and the time set therefor was the 29th day of March, more than five days after service of the notice of exception. This was beyond the time authorized by the statute, and such notice was ineffectual to preserve the rights of the parties upon the appeal.

It is therefore ordered that the writ be denied.

MEMORANDUM DECISIONS

162 Cal. 763

In re STYLES' ESTATE. (S. F. 5,772.) (Supreme Court of California. May 24, 1912.) Department 2. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge. Proceedings in the estate of Catherine Styles, also known as Catherine McKenna, deceased. From a judgment certain parties appeal. Reversed, with directions. Costello & Costello, for appellants. Breen & Kelly, for respondents.

PER CURIAM. The questions involved herein being identically the same as those passed upon in the case of McKenna v. McKenna, 123 Pac. 532, S. F. No. 5,770, and decided March 18, 1912, the judgment appealed from herein is therefore reversed, with directions to the trial court to overrule the general demurrer.

163 Cal. 84

PEOPLE v. SELBY SMELTING & LEAD CO. (Sac. 1,847.)

(Supreme Court of California. July 15, 1912.)

For former opinion, see 124 Pac. 692.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and from the judgment of the court, upon the ground that the district attorney of Solano county had no authority to institute the action in the name of the people of the state. The statute, in my opinion, authorizes but one action in the name of the people, and that is an action to be instituted by the district attorney of the one county where the nuisance exists—where, in other words, it has its situs—or perhaps by the Attorney General in a case where the district attorney neglects his duty. Within the meaning of this statute the smelting works in Contra Costa county was the nuisance, if there was any nuisance, and not the fumes and gases in Solano county. The works have a situs; the gases have none. To hold that every place to which they may be carried by the wind is the place where the nuisance exists is to hold that the statute authorizes, not merely one action in the name of the people of the state, but an indefinite number of actions. If this view was essential to the protection of the residents of Benicia, or any part of Solano county, there would be much to commend it; but it is not essential. They can commence and maintain actions in their own name for the abatement of the nuisance, if it is a nuisance. It is in such an action that, in my opinion, the issue should be tried. This difference as to parties would in many cases be determinative of the place of trial, and in causes involving local interests and affected by local feeling the place of trial is not a trifling consideration.

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163 Cal. 290

In re DOMBROWSKI'S ESTATE.

(L. A. 3,117.)

(Supreme Court of California. July 9, 1912.)

1. Wills (§ 111*)—Validity—Execution.

Under Civ. Code, § 1276, providing that all wills other than an holographic will must be subscribed at the end by the testator himself, or by some person in his presence and by his direction, and section 1278, providing that the person who subscribes the testator's name must write his own name as a witness to the will, but that a failure will not affect the will's validity, the subscription of the testatrix's name by another without the addition of the witness' name is a valid execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267–275; Dec. Dig. § 111.*]

2. Wills (§ 111*)—Execution—Validity.

Where a testatrix, who was too ill to sign her own name, requested one present to attach her name to her will, and he did so, and the testatrix added her mark thereto, her intention being to execute a will, the execution of a signature by another being sufficient, the execution was not insufficient because, if considered as a signing by mark there was no compliance with Civ. Code, § 14, providing that, where a subscription is by mark, the name of the person so signing is to be written near the mark by one who writes his own name as witness.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267–275; Dec. Dig. § 111.*]

3. Wills (§ 111*)—Execution—Intention.

Unless made with the intention of authenticating the will, no subscription or signing will constitute a valid execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267–275; Dec. Dig. § 111.*]

4. Wills (§ 423*) — Record — Recitals — Effect.

While Code Civ. Proc. §§ 1304, 1306, requires executors making petition for the probate of a will to make proof of the mailing of notice of the time appointed for probate to all others named as executors, a recital, in the order admitting the will to probate, that notice was given as required by law, sufficiently establishes the giving of notice unless the record affirmatively shows such recital to be untrue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1067, 1068, 1303; Dec. Dig. § 423.*]

5. Appeal and Error (§ 185*) — Presentation of Grounds of Review in Court Below—Necessity.

The appellate court will not, at the instance of one who appeared below and failed in any way to urge his objection, review the conclusions of the trial court as to facts essential to its jurisdiction, concerning which the lower court is vested with power to hear and determine.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1176, 1375; Dec. Dig. § 185.*]

Department 1. Appeal from Superior Court, Los Angeles County; N. D. Arnot, Judge.

Robert H. Lovett and another filed a petition for the probate of the will of Fannie Dombrowski, deceased, which was contested by Walter Dombrowski and others. From a judgment for petitioners, contestants appeal. Affirmed.

Isidore B. Dockweiler, Walter R. Leeds, and Robert B. Murphey, for appellants. P. W. Thomson and Louis W. Myers, for respondents.

SLOSS, J. Two papers, claimed to be, respectively, the will and the codicil thereto of Fannie Dombrowski, deceased, were filed in the superior court of Los Angeles county by E. B. Studer, who petitioned for letters of administration with the will annexed. Subsequently a petition for probate and for letters testamentary was filed by Robert H Lovett and Joseph W. Maple, two of the persons named as executors. Walter, Elsa, and Flora Dombrowski, the children and sole heirs of the decedent, filed a contest, opposing probate on the ground that the papers had not been executed as required by the statutes governing the execution of wills. Studer dismissed his petition, and a hearing was had on the contest to the petition of Lovett and Maple. The findings were in favor of the petitioners, and the court, on June 16, 1911, made its judgment and order, admitting the alleged will and codicil to probate, and granting letters testamentary as prayed. The contestants appeal from such judgment and order, and from an order denying their motion for a new trial. There is also an appeal from an order made June 14, 1911, dismissing the contest; but the substantial questions involved are presented by the other appeals, and this one need not be separately considered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The will was dated January 13, 1908, the codicil April 2, 1908. Upon these dates the decedent, Fannie Dombrowski, was a resident of Peoria, Ill., where all of the acts which, as respondents claim, constituted an execution of the papers as testamentary writings took place. Thereafter Mrs. Dombrowski moved to the county of Los Angeles, in this state. She was a resident of that county at the date of her death, March 31, 1911, and left considerable property in this state.

Except for a minor point, to be mentioned later, the due execution of the papers was and is the only question in controversy between the parties. It is conceded on all sides that this question must be decided by reference to the requirements of the laws of California. Civ. Code, §§ 1285, 1376.

The evidence shows that the manner of the attempted execution was substantially the same in the case of the will as of the codicil. It will suffice, therefore, to outline the facts surrounding the making of the will.

There were three subscribing witnesses, each of whom gave testimony by deposition. The document, which was in typewritten form, was declared by Mrs. Dombrowski to be her will, and she asked the three witnesses to sign as subscribing witnesses, which they did. Her own signature (if it was a signature) had been affixed, in the presence of the witnesses, as follows: She was, by reason of illness, unable at the time to write her name, and requested Mr. Maple, her legal adviser, and one of the persons named as executors, to write her name. This he did, adding the words "her mark," as follows:

her
"Fannie Dombrowski."
mark

Mrs. Dombrowski made a cross (X) in the space left between her given name and her surname, and the three witnesses signed the attestation clause, and also signed their names under the words "Witnesses to mark," which had also been written by Mr. Maple. Mr. Maple did not, however, write his own name on the paper as witness or otherwise. There was testimony that the decedent requested the subscribing witnesses to sign as witnesses to her mark, as well as to become attesting witnesses to the will.

[1-3] Section 1276 of the Civil Code provides, among other requisites to the execution of a written will, other than holographic, that "it must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto." Section 1278 provides that "a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will." Since the testimony shows beyond all question that the name of the testatrix was subscribed by Mr. Maple in her presence and at her direction, it would seem that the requirements of the sections quoted had been fully met.

But the appellants argue that the decedent did not intend to perform the testamentary act by having her name written by another person; that what she in fact undertook to do was to sign her name by mark; that such signing was incomplete and ineffectual for want of compliance with the requirement of section 14 of the Civil Code; that, where a subscription is by mark, the name of the person so signing is to be written near the mark, by a person "who writes his own name as a witness." Here, as has been stated, the person (Maple), who wrote the name of Mrs. Dombrowski, did not write his own name as witness. While, accordingly, the writing of the testatrix's name by Maple would have been sufficient, if nothing more had been contemplated or done, yet, where such writing was merely a step in an ineffectual attempt to sign by mark, there was, it is claimed, no completed subscription by either method. The subscription by mark was defective for want of the signing as witness by the person writing the name. The execution was not sufficient under section 1276, because the decedent never intended that the writing of her name by Maple, without the making of her mark, should complete her act of formal execution.

The argument thus advanced rests upon rather refined and technical reasoning. The testatrix unquestionably intended to execute a will, and performed certain acts in order to carry out this intent. She did everything necessary, under the statute, to a valid execution. Is her act to be overthrown because, in addition, she tried to do something more? All that was done—the direction to Maple to write her name, his writing of it, the making of a mark—taken together, formed a single transaction, every part of which was influenced by the one intent of executing a will. To say that the decedent intended to sign *by mark*, rather than under section 1276, is to lose sight of the real nature of her acts. What she intended was to execute a will. No doubt she thought that all of the acts performed were necessary, or at least proper parts of a valid execution. But there is no good ground for saying that she intended that one of them, rather than another, should accomplish the desired end. Her intent was to carry out and authenticate her testamentary purpose by means of all these acts. The essential facts are that she did everything which she designed to do in executing her will, and that what she did included the formalities required by the statute for such execution. This being so, the validity of that which was rightly done is not affected by the circumstance that she may have entertained and acted upon the belief that something more was needed.

The cases cited by appellants are not in conflict with these views. The one which comes nearest to supporting their position is Main v. Ryder, 84 Pa. 217. There Daniel Miner, the maker of the alleged will, directed one Thorpe to write his name, which was done in the manner here employed; that is to say, by leaving a space between the words "Daniel" and "Miner," and writing the words "his" and "mark" over and under, respectively, such words. The court held that if the testator had "directed his name to be written with the view of adding his mark, and thus making his signature," and had not in fact added his mark, there would have been no sufficient execution of the will. This was put on the ground that what was done, in the case supposed, was not intended as a full execution of the will. The correctness of this holding may well be conceded without affecting the soundness of the finding in the case at bar that the will of Mrs. Dombrowski was duly executed. There the acts intended to operate as a subscription of the will were never completed. Here, however, all that was contemplated was done. The testatrix intended to complete a valid execution by means of acts all of which were in fact done. Robertson v. Hill, 127 Ga. 175, 56 S. E. 289, also cited by appellants, goes no further than Main v. Ryder.

No doubt a subscription or signing of any kind will not constitute a valid execution of a will unless made with the intention, on the part of the testator, of finally and completely authenticating the will. The principle is well applied in such cases as Everhart v. Everhart (C. C.) 34 Fed. 82, where the alleged testator attempted to sign a will, but succeeded only in making a small mark or scratch, which, apparently, he did not intend as a substitute for a complete signature, or Plate's Estate, 148 Pa. 55, 23 Atl. 1038, 33 Am. St. Rep. 805, where the decedent, undertaking to sign his name, stopped after making one stroke, saying, "I can't sign it now," or Waller v. Waller, 1 Grat. (Va.) 454, 42 Am. Dec. 564, where the name of the alleged testator was written by him in the body of the (holographic) will, but there was nothing written in a blank evidently left at the bottom for signature. But none of these cases, nor any other cited by appellants, lays down a rule that would justify the holding that the will here in question was not properly executed.

So far as authority in this state goes, the decisions, although made in cases not exactly like the one before us, are distinctly favorable to the position of the respondents. In Estate of Toomes, 54 Cal. 509, 35 Am. Rep. 83, the signature was similar to that here made; the testatrix making her mark. The person who wrote her name signed as a witness to the will, but not otherwise. This was held to be sufficient notwithstanding the objection that the party who wrote the name of the testatrix should have signed his name "as a part of the signature." Section 1278 of the Civil Code is quoted in support of the court's conclusion. In the case just cited, the party who wrote the name of the testatrix did witness the will, and to this extent the case differs in its facts from the one before us. The Toomes Case is, however, relied upon as authority in Estate of Langan, 74 Cal. 353, 16 Pac. 188, where the jury found that the name of the testatrix was signed to the will by another person in her presence and at her request, and also that the person who so signed her name did not write his own name near her signature as a witness to said signature. It was held that the latter finding was immaterial. The report of the case is brief, and does not fully disclose the facts. It appears, however, from the transcript, that the signature included a mark made by the testatrix.

We have assumed, in the foregoing discussion, that the undisputed evidence shows, as appellants contend, that the decedent contemplated making her mark when she directed the writing of her name, and that she did not intend that execution should be complete until all of the acts—the writing of her name by Maple, the making of a mark by herself, and the witnessing of her mark by the three who did witness it—should be accomplished. We have also assumed that the provision of section 14, requiring one who writes the name of a person signing by mark to write his own name, is applicable to the execution of wills. Both points are disputed by the respondents, but we think it unnecessary to express an opinion upon either. We prefer to rest our decision on the broad proposition that there is a valid execution where a person undertaking to make a will has done certain acts with the intention of thereby executing his will, leaving undone nothing which he undertook to do to carry out that intention, and the acts done include everything necessary, under our statutes, to the execution of a will.

[4] The appellants make the further point that the court was without jurisdiction to

hear the petition for probate, because the petitioners had failed to make proof of mailing of notice of time appointed for probate to three persons named as coexecutors of the petitioners and not joining in the petition. Code Civ. Proc. §§ 1304, 1306. But the record does not support the contention. The order admitting the will and codicil to probate recites that the petition "was duly set for the 31st day of May, 1911, and that notice of said hearing has been duly given as required by law. * * *" This recital of the giving of notice is sufficient to establish the truth of the fact recited, unless the record affirmatively shows that the recital is untrue. It does not so show.

[5] The appellants rely upon the fact that no proof of notice is contained in the bill of exceptions and that the bill states, at the outset, that "the foregoing proceedings, and none other, were had and taken." But it is apparent from the introduction and the specifications of insufficiency of evidence contained in the bill that it was designed merely to present for review the correctness of the findings of the court with respect to the issues raised by the petition for probate, the contest, and the answer thereto. The hearing was had on the merits, without any suggestion being made that the court had not acquired jurisdiction. Under these circumstances, it cannot fairly be said that the record affirmatively shows a want of proof of the notice required by the code. On the contrary, it indicates plainly that there was no question, in the court below, of the sufficiency of the steps required to give the court authority to proceed. As was said in Estate of Latour, 140 Cal. 414, 425, 73 Pac. 1070, 1074: "This court will not upon appeal review the conclusions of a trial court as to facts essential to its jurisdiction, concerning which such court was vested with the power to hear and determine, at the instance of a party who has appeared in that court in the action or proceeding, and has omitted there to in any way urge his objection, but has proceeded therein upon the theory that the court had jurisdiction."

The judgment and the orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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163 Cal. 276

H. K. MULFORD CO. v. CURRY, Secretary of State. (S. F. 5,505.)

(Supreme Court of California. July 3, 1912. Rehearing Denied Aug. 2, 1912.)

1. COMMERCE (§ 69*)—INTERSTATE COMMERCE—STATE INTERFERENCE—FOREIGN CORPORATIONS—LICENSE TAX.

Civ. Code, § 409, and Pol. Code, § 416, subd. 4, so far as they provide an annual license tax to be paid by corporations, domestic and foreign, in accordance with the amount of their capital stock, for the right to do business in California, are an illegal interference with interstate commerce, and, so far as they relate to corporations, whether domestic or foreign, doing an interstate business, though also doing intrastate business, are invalid.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 113–118; Dec. Dig. § 69.*]

2. COMMERCE (§ 13*)—INTERSTATE COMMERCE — STATE CONTROL OF FOREIGN CORPORATIONS.

The power of the state to prescribe the terms under which a foreign corporation may engage in intrastate business is subject to the limitation that, where such foreign corporation is engaged in interstate, as well as intrastate, business, no such term, condition, or requirement will be constitutional, if it imposes a burden on the interstate business, whatever its name or form.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 7; Dec. Dig. § 13.*]

3. CONSTITUTIONAL LAW (§§ 287, 230*)—COMMERCE (§ 69*) — EQUAL PROTECTION — DUE PROCESS OF LAW—FOREIGN CORPORATIONS—LICENSE OR PRIVILEGE TAX.

A license or privilege tax imposed on foreign corporations doing both interstate and intrastate business, based on the total capital or the total capital stock of such corporations, without just relation to the proportion which the capital or capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of the corporation, is unconstitutional, as a violation of the equal protection and due process of law clauses of the fourteenth amendment of the federal Constitution, as an effort to tax the property of citizens of the United States situated beyond the jurisdiction of the taxing power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 905, 687; Dec. Dig. §§ 287, 230;* Commerce, Cent. Dig. §§ 113–118; Dec. Dig. § 69.*]

4. CORPORATIONS (§ 631*) — FOREIGN CORPORATIONS—POWERS.

A corporation, unless expressly forbidden, may acquire rights of contract and property in a foreign jurisdiction.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2489–2494, 2528; Dec. Dig. § 631.*]

5. CORPORATIONS (§ 636*) — FOREIGN CORPORATIONS—REGULATION.

A state may absolutely exclude a foreign corporation not engaged in interstate commerce, but which proposes solely to engage in domestic business, from doing such business within its limits, and so may impose terms and conditions on which alone such business may be commenced within its limits, provided no unconstitutional condition is made a part of any actual agreement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2505–2509; Dec. Dig. § 636.*]

6. CONSTITUTIONAL LAW (§ 92*) — CORPORATIONS (§ 636*) — FOREIGN CORPORATIONS — EXCLUSION.

When a foreign corporation has once engaged in domestic business within the state, the state may not thereafter exercise its powers of exclusion or regulation to the destruction of the corporation's property or its vested constitutional rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 174, 175, 178–180, 225, 227; Dec. Dig. § 92;* Corporations, Cent. Dig. §§ 2505–2509; Dec. Dig. § 636.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

7. CORPORATIONS (§ 637*) — CONSTITUTIONAL LAW (§ 287*)—FOREIGN CORPORATIONS—LICENSE TAXES—VALIDITY.

Civ. Code, § 409, and Pol. Code, § 416, subd. 4, in so far as they attempt to impose a license tax on foreign corporations, graduated according to the amount of the corporation's capital stock, whether invested and used in its business within the state or elsewhere, is unconstitutional, as depriving the corporation of its property without due process of law, since the state has no power to tax property permanently located beyond its limits.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 637;* Constitutional Law, Cent. Dig. §§ 831, 905; Dec. Dig. § 287.*]

8. CORPORATIONS (§ 637*)—COMMERCE (§ 69*) — FOREIGN CORPORATIONS — REGULATION — FILING ARTICLES.

Civ. Code, § 408, requiring foreign corporations, before doing business within the state, to file a certified copy of their articles with the Secretary of State, is a reasonable and proper requirement, not in restraint of interstate commerce, and is therefore valid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 637;* Commerce, Cent. Dig. §§ 113–118; Dec. Dig. § 69.*]

In Bank. Mandamus by the H. K. Mulford Company against C. F. Curry, Secretary of State. Mandate issued as prayed.

Hillyer, Stringham & O'Brien, for petitioner. U. S. Webb, Atty. Gen., and R. C. Van Fleet, Deputy Atty. Gen., for respondent.

HENSHAW, J. This is an original petition addressed to this court for a writ of mandate, requiring the Secretary of State to receive and file a certain document tendered to him by petitioner, designating and appointing one F. L. Clark as agent of petitioner upon whom process affecting petitioner may be served. Respondent refused to accept and file the tendered document, basing his refusal upon the declination of petitioner to tender therewith for filing a certified copy of its articles of incorporation, and to pay the fee prescribed by section 409 of the Civil Code, which last-named section is as follows: "For filing and issuing a certified copy as required in section four hundred and eight of this Code, corporations formed under the laws of another state, or of a territory, or of a foreign country, must pay the same fees as are paid by corporations formed under the laws of this state."

The fees herein referred to are fixed by section 416 of the Political Code which declares: "The Secretary of State, for services performed in his office, must charge and collect the following fees: * * * 4. For filing articles of incorporation, if the capital stock amounts to twenty-five thousand dollars or less, fifteen dollars; if the capital stock amounts to over twenty-five thousand dollars, and not over seventy-five thousand dollars, twenty-five dollars; if the capital stock amounts to over seventy-five thousand dollars, and not over two hundred thousand dollars, fifty dollars; if the capital stock amounts to over two hundred thousand dollars, and not over five hundred thousand dollars, seventy-five dollars; if the capital stock is over five hundred thousand dollars, and not over one million dollars, one hundred dollars; if the capital stock is over one million dollars, fifty dollars additional for every five hundred thousand dollars or fraction thereof of capital stock over and above one million dollars," etc.

Having further relation to the matter is an act entitled "An act relating to revenue and taxation, providing for a license tax upon corporations, and making an appropriation for the purpose of carrying out the objects of this act." Section 2 of this act declares as follows: "It shall be the duty of every corporation, incorporated under the laws of this state, and of every foreign corporation now doing business, or which shall hereafter engage in business in this state, to procure annually from the Secretary of State a license authorizing the transaction of such business in this state, and shall pay therefor a license tax as follows: When the authorized capital stock of the corporation does not exceed ten thousand dollars ($10,000) the tax shall be ten dollars ($10); when the authorized capital stock exceeds ten thousand dollars ($10,000) but does not exceed twenty thousand dollars ($20,000) the tax shall be fifteen dollars ($15); when the authorized capital stock exceeds twenty thousand dollars ($20,000) but does not exceed fifty thousand dollars ($50,000) the tax shall be twenty dollars ($20); when the authorized capital stock exceeds fifty thousand dollars ($50,000) but does not exceed one hundred thousand dollars ($100,000) the tax shall be twenty-five dollars ($25); when the authorized capital stock exceeds one hundred thousand dollars ($100,000) but does not exceed two hundred and fifty thousand dollars ($250,000) the tax shall be fifty dollars ($50); when the authorized capital stock exceeds two hundred and fifty thousand dollars ($250,000) but does not exceed five hundred thousand dollars ($500,000) the tax shall be seventy-five dollars ($75); when the authorized capital stock exceeds five hundred thousand dollars ($500,000) but does not exceed two million dollars ($2,000,000) the tax shall be one hundred dollars ($100); when the authorized capital stock exceeds two million dollars ($2.000,000) but does not exceed five million dollars ($5,000,000) the tax shall be two hundred dollars ($200); when the authorized capital stock exceeds five million dollars ($5,000,000) the tax shall be two hundred and fifty dollars ($250). * * * The license tax or fee hereby provided authorizes the corporation to transact its business during the year or for any fractional part of such year in which such license tax or fee is paid." Stats. 1905, p. 493, as amended by St. 1909, p. 458, § 1.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The uncontroverted showing is that the petitioner is a foreign corporation, duly organized and existing under the laws of the state of Pennsylvania. It has an authorized and issued capital stock of $1,000,000, and was organized for and is engaged in the business of manufacturing and selling tablets, pills, triturates, fluid extracts, etc. It was so engaged within the state of California before the passage of the license law above quoted. Its principal place of business is in Philadelphia, Pa. It maintains branch houses in the principal cities of many other states, including the city of San Francisco, state of California. It maintains its plant and laboratory in Philadelphia, and sells its products in each and all of the various states and territories of the United States. It has maintained an agency in the state of California, for the purpose of receiving, and filling orders for articles of its own manufacture, at all times since the 1st day of December, 1908; and from its place of business at San Franciso, California, it ships goods upon orders received from the states of Oregon, Nevada, and Arizona. By section 405 of the Civil Code, every foreign corporation must, as this petitioner attempted to do, file in the office of the Secretary of State the "designation of some person residing within the state upon whom process issued by authority of or under any law of this state may be served." By section 406 of the same Code, no foreign corporation can "maintain or defend any action or proceeding in any court of this state until the corporation has complied with the provisions" of section 405 of the Civil Code.

By section 15 of article 12 of the Constitution of this state, it is declared that "no corporation organized outside the limits of this state shall be allowed to transact business within this state under more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state." Petitioner's contention is that as to it, a foreign corporation, the exaction of these license taxes is the imposition of a direct burden upon its interstate commerce, in violation of the commerce clause of the Constitution of the United States. Const. U. S. art. 1, § 8, subd. 3.

[1] This court is forced to the conclusion that upon the authority of Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, Pullman Co. v. Kansas, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, and Ludwig v. Western Union Telegraph Co., 216 U. S. 146, 30 Sup. Ct. 280, 54 L. Ed. 423, this contention must be upheld. The consequences which follow this conclusion have not been overlooked. They are far reaching and serious, affecting to no inconsiderable extent the revenue and the revenue laws of this state. The decisions of the Supreme Court of the United States in the last-cited cases were rendered by a bare majority of a sharply divided court. The decision of the case at bar was deliberately delayed to note whether any recession from the views expressed in these cases would follow from the change in the personnel of the court. No such recession, however, has followed, and, indeed, the Supreme Court of the United States as a body has acquiesced in and accepted these decisions, as is shown by Atchison, Topeka & Santa Fé R. R. Co. v. Timothy O'Connor, 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, decided February 9, 1912, where Justice Holmes, who wrote the dissenting opinions in the earlier cases, delivered the opinion of the undivided court, based upon and in affirmance of those earlier cases.

[2, 3] The principle of those decisions may be briefly stated. The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in intrastate or domestic business is subject to this limitation that, where such foreign corporation is engaged in interstate, as well as intrastate, business, no such term, condition, or requirement will be constitutional, if it imposes any burden upon the interstate business of such corporation, whatever be its name or form. A license or privilege tax for the conduct of such intrastate business, based upon the total capital or the total capital stock of such corporation, without just relation to the proportion which the capital or the capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of such corporation, is unconstitutional and void, (a) as being in violation of the commerce clause of the Constitution by the imposition of an illegal burden upon interstate commerce, and (b) because violative of the fourteenth amendment of the Constitution and its equal protection and due process of law clause, as an effort to tax the property of citizens of the United States, which property is situated beyond the jurisdiction of the taxing state, and is not amenable to its revenue laws.

The minutest investigation and the most careful consideration fail to disclose any ground upon which the case here at bar may be dintinguished from those cited. The legal parallelism between this case and that of Ludwig v. Western Union Telegraph Co., supra, is perfect. Both corporations were engaged in inter as well as intra state business. Both were so engaged before the passage of the excise law in question. The Arkansas law required every foreign corporation now or hereafter doing business in the state to file a copy of its articles of incorporation, etc., and to pay for the filing of such articles "a fee of $25 where the capital stock is $50,000 or under; $75 where the capital stock is over $50,000 and not more than $100,000; and $25 additional for each $100,000 of capital stock." Laws Ark. 1907, p.

746, § 3. A foreign corporation failing to comply with the provisions of the act was forbidden to do any business in the state, and was subjected to fine. The Supreme Court of the United States, first meeting the argument that the statute should be construed as applying only to the intrastate business of foreign corporations, declared, in effect, that when such a question was presented its ultimate determination would always rest with that court which would of and for itself determine the meaning of such statutes solely from what it should conclude would be their operation and effect. It construed the provision of the statute before it to mean that, upon a failure of a foreign corporation to comply with the provisions of the act, such a corporation should be *forbidden* to do any business within the state, interstate as well as intrastate. Then, laying this construction aside, it declared that, if the provisions of the act were held to apply solely to the intrastate business of such corporations, the provisions were unconstitutional and void for the reasons above given; the court saying: "The capital stock of the company represents, we repeat, *all* its business, property, and interests throughout the United States and foreign countries, and the requirement that the company, engaged in interstate business, may continue to do a local business in Arkansas, and escape the heavy penalties prescribed, must pay a given amount (in this case $25,050), based on all its capital stock, merely for filing its articles of incorporation with the Secretary of State, is, in effect, a direct burden and tax on its interstate business, as well as on its property outside of the state. The case cannot be distinguished in principle from Western Union Telegraph Co. v. Kansas, ante, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355, and Pullman Company v. Kansas, ante, 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, recently decided. The difference in the wording of the Kansas and Arkansas statutes cannot take the present case out of the ruling of the former cases. On the authority of the Kansas cases, and for the reasons stated in the opinions therein, we hold the statute in question to be unconstitutional and void, as illegally burdening interstate commerce and imposing a tax on property beyond the jurisdiction of the state."

The parallelism between this case and the case at bar is, we repeat, so perfect as to render futile any attempt to distinguish them, and thus to save the California laws. This court is alive to the difficulties which the Supreme Court of the United States has frequently adverted to, and which arise from the complexity of state laws that, with or without design, trespass upon the reserved rights of the United States in its control of foreign and interstate commerce. It has full appreciation of the significance of the language of Chief Justice Marshall, in Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678: "It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great resolution which introduced the present system than the deep and general conviction, that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." It is just and right that the Supreme Court of the United States should sit as an ever watchful Warden of the Marches to repel either unintentional trespass or deliberate invasion upon this most important domain. It is but natural, too, that in the multitude of forms in which the question arises, and in the multitude of cases through which it is presented, apparent inconsistencies of expression should be found, and minds should differ over the question whether any given state law does in effect exceed the powers of the state and invade the domain reserved exclusively to federal control. But over one question there can be no doubt that in all this multitude of cases there is an absolute unanimity in the principle declared, namely, that the state is without power to impose any burden or regulation on interstate commerce "in a relatively immediate way." Galveston, etc., Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031. So much we think it proper to say, in view of our further duty in pointing out for future legislative action the limitations upon the power of the state in dealing with foreign corporations.

[4-6] The limitations upon the power of the state to forbid a corporation from doing a domestic business within its borders, or to regulate the conduct of that business, may be thus summarized: A corporation, unless expressly forbidden so to do, may acquire rights of contract and property in a foreign jurisdiction. A state, however, may exclude absolutely a foreign corporation not engaged in interstate commerce, but which proposes solely to engage in domestic business, from doing such business within its limits, and so may, of course, impose terms and conditions upon which alone such business may be commenced within its limits, provided no unconstitutional condition is made a part of any actual agreement. S. P. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. When a foreign corporation has once engaged in domestic business within the state, the state may not exercise its powers of exclusion or regulation to the destruction of the property of the corporation or of its vested constitutional rights. And, finally, when such corpo-

ration is engaged both in interstate, as well as intrastate, business, no fee or regulation, though expressly directed to intrastate business, will be upheld, if, in the view of the Supreme Court of the United States, such exaction or requirement imposes a burden upon the interstate business of such corporation. Bank of Augusta v. Earle, 13 Pet. 579, 10 L. Ed. 274; Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 Sup. Ct. 403, 36 L. Ed. 164; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317; National Council v. State Council, 203 U. S. 151, 27 Sup. Ct. 46, 51 L. Ed. 132; U. S. ex rel. Attorney General v. Delaware & Hudson Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; Home Ins. Co. v. New York, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025, and cases supra.

Under these principles of law, it is proper to point out that not only do these license taxes fall with respect to foreign corporations engaged in interstate, as well as intrastate, business in California, but of necessity fall as well with respect to domestic corporations engaged in such foreign business and having property without the state. Galveston, Harrisburg, etc., Ry. Co. v. Texas, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031. Since if a tax based on the total capital stock of a foreign corporation doing business within this state is a burden on interstate commerce, equally must it be so with a domestic corporation engaged elsewhere in interstate commerce and intrastate business and owning property without the state. The attention of the Legislature is thus directed to the fact that the law in question can apply only to domestic corporations nowhere engaged in interstate business, and to foreign corporations seeking to enter the state solely to do domestic business. For upon the right of a foreign corporation to enter the state to do an interstate business the state may impose no burden whatsoever. International Text-Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, 18 Ann. Cas. 1103.

[7] The invalidity of these license laws, if sought to be applied to foreign corporations engaged in domestic business within the state, and so engaged (as was this petitioner) at the time the law went into effect, rests upon entirely different constitutional provisions. As has been pointed out, the Supreme Court of the United States declared the Kansas laws under review in Western Union Telegraph Co. v. Kansas and Pullman Co. v. Kansas, supra, to be unconstitutional upon two separate, distinct and wholly unrelated constitutional grounds. The first, because the law violated the "commerce clause" of the Constitution of the United States; and the second, because the law levied a tax, by requiring a fee to be paid, based upon the total capital stock of the foreign corporation, in violation of the fourteenth amendment of the Constitution of the United States, its "due process of law" and its "equal protection of the law" clauses. It attempted to tax the property of a corporation without the state, and therefore beyond the jurisdiction of the taxing power of the state. It is, of course, well established that a tax law of a state can have no extraterritorial operation. State Tax on Foreign Held Bonds, 15 Wall. 300, 21 L. Ed. 179; Union Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493. It is, of course, equally apparent that, if a tax levied by a state upon all the capital stock of a foreign corporation is violative of the fourteenth amendment of the Constitution and confiscatory in character, it is equally violative of such constitutional amendment, whether such foreign corporation be engaged in interstate business or purely in domestic business. For this determination is not at all dependent on, but is entirely independent of and unrelated to, the consideration whether or not such corporation is engaged in interstate commerce. It is not, in other words, *because* a foreign corporation is engaged in interstate commerce and has property without the state that a state tax based upon its total capital stock is unconstitutional. It is unconstitutional in the case of any corporation, *solely because*, in taxing property beyond the jurisdiction of the state, it is in violation of the fourteenth amendment of the Constitution of the United States, an amendment which, as we have said, is in no way related to and is entirely independent of the commerce clause of the Constitution. In both the Western Union Telegraph Company Case and in the Pullman Case, the Kansas law was held to be unconstitutional upon both of these separate and distinct grounds. More attention was paid in the opinions to the consideration of the commerce clause than to a consideration of the fourteenth amendment, because, as pointed out by Mr. Justice White in his concurring opinion in the former of the two cases, "no one questions that the law which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Constitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its extrinsic merits." In the prevailing opinion in the same case, it is said: "We need not stop to discuss at length the specific question whether the state can by any regulation make the property of the company outside of Kansas contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury, for the benefit of the

state school fund, a given per cent. of all its capital stock as a condition of its doing local business in Kansas. It is firmly established that, consistently with the due process clause of the Constitution of the United States, a state cannot tax property located or existing permanently beyond its limits. Louisville, etc., v. Kentucky, 188 U. S. 385, 398 [23 Sup. Ct. 463, 47 L. Ed. 513]; Union Transit Co. v. Kentucky, 199 U. S. 209 [26 Sup. Ct. 36, 50 L. Ed. 150, 4 Ann. Cas. 493]." In the Pullman Case, the court sums up its reasons and conclusions under three heads. The first of these is that the tax is a burden upon interstate commerce. The second is that it is in violation of the fourteenth amendment; the court, in that connection, saying: "That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital was a violation of the Constitution of the United States, in that such a single fee, based, as it was, on all the property, interests, and business of the company within and out of the state, was, in effect, a tax both on the interstate business of that company and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state and contribute from its capital to the support of the public schools of Kansas." While in the Ludwig Case, the court states the "vital question" to be the constitutionality of the Arkansas statute, which, "under the guise of regulating intrastate business, imposes a tax upon the interstate business of such corporation, *as well as a tax on its property used and permanently located outside the state.*" And the court further said: "If a statute, by its necessary operation, really and substantially burdens the interstate business of a foreign corporation seeking to do business in a state *or* imposes a tax upon its property outside of such state, then it is unconstitutional and void, although the state Legislature may not have intended to enact an invalid statute."

These constitutional questions thus decided are, as we have pointed out, in no way correlated, but are entirely separate and distinct. It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law, and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without the jurisdiction of the state) was, in both instances, identically the same. Nor can relief be found in a refusal to call such a license fee a tax. A state court may call it a fee or an exaction or a regulation; but the Supreme Court of the United States will call it a tax if, in its effect, it partake of the nature of a tax. As to the license fee exacted by our own statute, it has been declared to be a tax by the Supreme Court of the United States, which says the condition that the company should, "in the form of a fee, pay to the state a specified per cent. of its authorized capital was a violation of the Constitution of the United States, in that such a single fee, based, as it was, upon all the property, interests, and business of the company within and out of the state, was, in effect a tax * * * on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas, * * * to waive its constitutional exemption from state taxation * * * on its property outside of the state."

[8] It follows from the foregoing that the requirement of section 408 of the Civil Code that petitioner file a certified copy of its articles, standing alone, is a reasonable requirement, an exaction not in restraint of interstate commerce, and therefore valid (Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915), but that the further requirement of the law that, as a condition of such filing, the petitioner pay the license tax prescribed is invalid.

Let the mandate issue as prayed for.

We concur: LORIGAN, J.; MELVIN, J.; SHAW, J.

ANGELLOTTI, J. (concurring). In view of the recent decisions of the United States Supreme Court referred to in the opinion, I concur in the judgment and in the opinion, except so far as it intimates that subdivision 4 of section 416 of the Political Code and our so-called Corporation License Tax Law are not valid as to *all* foreign corporations doing a purely domestic business in this state, and in no way engaged in interstate commerce in any other state. I can see no distinction in this regard between those foreign corporations engaged in a purely domestic business within this state at the time these laws went into effect, and those since coming into the state for the purpose of doing such business.

I am not at all satisfied that there is anything in any of the opinions of the United States Supreme Court referred to, when considered in the light of the exact questions presented for consideration therein, that compels the conclusion on this point that is declared in the opinion herein.

I concur: SLOSS, J.

(163 Cal. 298)

UNION CONST. CO. v. WESTERN UNION TELEGRAPH CO. (Sac. 1,732.)

(Supreme Court of California. July 9, 1912. Rehearing Denied Aug. 8, 1912.)

1. EVIDENCE (§ 237*)—DECLARATIONS OF ANOTHER—EXISTENCE OF AGENCY.

One is not bound by the declaration of another, not his agent, and expressly or impliedly authorized to make the declaration; and, unless a prima facie evidence of authority is shown, the declaration must be excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 604–613; Dec. Dig. § 237.*]

2. PRINCIPAL AND AGENT (§ 22*)—EXISTENCE OF RELATION—EVIDENCE.

Agency is not provable by the declarations of the agent, not made under oath or in the presence of the principal, unless communicated to and acquiesced in by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

3. EVIDENCE (§ 9*)—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The courts will take notice of all inventions that have become of common and general use, and of the manner of communicating by telephone.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 8; Dec. Dig. § 9.*]

4. EVIDENCE (§ 69*)—PRESUMPTIONS—STATUTES.

Business carried on over the telephone is subject to the operation of the disputable presumptions declared by Code Civ. Proc. § 1963, providing that the ordinary course of business has been followed, and that things have happened according to the ordinary habits of life; and, where nothing unusual occurs, there is a disputable presumption that a request to the central telephone operator to connect the caller with a named number in the directory, and to call the latter by means of a signal, has been complied with by making the proper connection with the number and giving the necessary signal at the other end of the line.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 90; Dec. Dig. § 69.*]

5. EVIDENCE (§ 258*)—TELEPHONIC COMMUNICATIONS—ADMISSIBILITY.

Where plaintiff and defendant maintained business offices in the same city, and each had a telephone in the office connecting with the same telephone system, with their respective names in the telephone directory, and plaintiff called on the operator at the central station in the usual way for a connection with defendant's office, and a connection was made at the central office with some line, apparently in the usual manner, and some one responded at the other end of the line and answered that he was at the office of defendant, there was prima facie proof that the person answering was defendant's agent, so that a conversation between plaintiff and such person could be proved against defendant; but the weight of the evidence was for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

6. EVIDENCE (§ 355*)—DOCUMENTARY EVIDENCE—ADMISSIBILITY.

A note of time of the reception of a message by a telegraph company for transmission, made by the company on a copy of the message delivered to the sendee, is evidence of the time of the reception of the message for transmission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1444, 1484–1491; Dec. Dig. § 355.*]

7. TELEGRAPHS AND TELEPHONES (§ 66*)—DELAY IN DELIVERY OF MESSAGES—EVIDENCE—QUESTION FOR JURY.

Evidence *held* to support a finding that a telegraph company was guilty of gross negligence in delaying the delivery of a message.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61–63; Dec. Dig. § 66.*]

8. TELEGRAPHS AND TELEPHONES (§ 67*)—DELAY IN DELIVERY OF MESSAGES—EVIDENCE.

Where plaintiff's agents would have exercised the option to accept a contract with a third person for construction work, if messages sent by telegraph company had been promptly delivered, and, on the failure to receive messages, the agents made an agreement with the third person for an extension of the option, subject to the right of the third person to change the contract price, and plaintiff was required to pay a substantial sum for the work in excess of the price fixed by the original contract, the damages sustained by plaintiff in consequence of the delay in the delivery of the messages were substantial.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 64–68; Dec. Dig. § 67.*]

9. APPEAL AND ERROR (§ 927*)—QUESTIONS REVIEWABLE—EVIDENCE.

The court on appeal, on reviewing a judgment of nonsuit, must give the evidence the construction most favorable to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

10. TELEGRAPHS AND TELEPHONES (§ 54*)—CONTRACT FOR TRANSMISSION OF MESSAGES—CONSTRUCTION.

A contract for the transmission of messages by a telegraph company, stipulating that, to guard "against mistakes or delays, the sender of a message should order it repeated," made by the company and printed on all its blanks provided for the use of the public, must, as required by Civ. Code, § 1654, be construed most strongly against the company; and it must be construed to provide only for delays and mistakes occurring in the forwarding of a message from the office where it is received to the office where it is written out and made ready for delivery to the addressee; and a delay in the delivery to the addressee is not excused by the failure of the sendee to order the message to be repeated.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39–47; Dec. Dig. § 54.*]

Department 1. Appeal from Superior Court, Tuolumne County; J. W. Hughes, Judge.

Action by the Union Construction Company against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Reversed.

Chickering & Gregory and F. W. Street, for appellant. Beverly L. Hodghead, for respondent.

SHAW, J. The plaintiff appeals from a judgment of nonsuit.

The action is to recover damages arising from the alleged negligence of the defendant in failing to deliver two telegrams sent to the plaintiff's agents in San Francisco.

The plaintiff was constructing a power

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plant on the Stanislaus river, in Tuolumne county. On October 10, 1906, it made an agreement with the Risdon Iron & Locomotive Works, of San Francisco, by which the plaintiff was given the option to close a contract with said Iron Works, within 90 days from said date, for the construction by said Iron Works of a part of the plant, consisting of an additional pressure line, known as the "Mine Line," at a cost of $143,000, to be paid by the plaintiff. The right to exercise this option expired at midnight of January 8, 1907. The determination whether or not plaintiff would accept said contract within that time was committed by plaintiff to its engineers, Sanderson & Porter, of New York. Plaintiff's headquarters for said construction work was at Vallecito, Tuolumne county, where H. F. Jackson, its manager, conducted the work. It also maintained an office in the Kohl building in San Francisco, in charge of H. P. Veeder. A day or two before January 8, 1907, Jackson went to San Francisco, expecting there to receive a telegram from Sanderson & Porter, accepting or rejecting the contract offered by the Iron Works, and for the purpose of at once closing the contract with the Iron Works, if it were accepted. In the afternoon of January 8th, he procured Mr. Field, the agent of the Iron Works, to come to the office of the plaintiff and remain in his company, so as to be ready to receive the acceptance for the Iron Works. In the evening, a little before 6 o'clock, no telegram having been received, Jackson and Field went out to dine together, leaving Veeder in the office. Plaintiff endeavored to prove at the trial that it was arranged between them that Veeder should remain in the office for the purpose of receiving the expected telegram, should it arrive, and bringing it to Jackson where he was dining with Field. The court refused to allow this evidence, and exception was taken to the ruling. If it appears that this evidence was material, the error would be injurious. In the consideration of the case, therefore, we must assume that such arrangement was made.

On that day Sanderson & Porter sent to plaintiff, at Vallecito, the following telegram regarding this option: "Wire Jackson that we will exercise option on mine line and header." The plaintiff's agent at Vallecito received this telegram, and thereupon wrote and delivered to the agent of the Western Union Telegraph Company at Vallecito, for transmission to Jackson at San Francisco, the following telegram:

"Vallecito, Cal., Jany. 8, 1907.

"H. F. Jackson, 909 Kohl Building, S. F. Cal.:

"Hobart Porter wires he will exercise option on mine line and header.

"[Signed] Union Construction Company."

This telegram was received by the telegraph company at its San Francisco office at 8:35 p. m. of that day. It was not delivered to Jackson, or to plaintiff, until after 9 a. m. the next day. Porter had left New York for California, and had arrived at Chicago, on January 8th. He there delivered to the defendant for transmission the following telegram:

"Chicago, Jan. 8, 1907.

"H. P. Veeder, Kohl Building, San Francisco:

"Advise Jackson that we wired him Vallecito to close option on mine line and header. [Signed] Hobart Porter."

This message was received at the San Francisco office of the defendant at 6:57 p. m. that day. It was not delivered until after 9 a. m. the next day. These are the two messages which, it is alleged, the defendant negligently failed to deliver on the day on which they were received at defendant's San Francisco office. The Vallecito message was given to the defendant, by telephone, at San Andreas, Cal., at 7:55 p. m. of January 8th. The Chicago message was given to defendant for transmission at Chicago at 7:50 p. m. Chicago time, being the same as 5:50 p. m. California time.

The complaint alleges that, after the defendant had received the dispatches at its San Francisco office, and during the evening of January 8th, the plaintiff inquired of the defendant's agent at that office to learn whether or not said telegrams had been received by defendant, and was informed by said agent that they had not been received. Jackson testified, for the plaintiff, that he went out to dine with Field that evening, and remained at the restaurant with him until nearly 10 o'clock. As stated, he was not allowed to testify that he directed Veeder to stay at the office and bring or send him any telegrams that were received while he was at the restaurant. The court also refused to permit him to testify that, during his absence at dinner, he had inquired of Veeder by telephone in regard to the telegrams. Veeder testified that he remained at the plaintiff's office after Jackson went out to dine; that Jackson left at 6 o'clock; that he was himself absent at dinner from 6:30 to 7:15; that he then stayed in the office until 10:15 that evening; that no telegrams were received or delivered there during that time; and that when he reached the office after dining he looked about to see if a notice of a telegram had been left during his absence. Finding none, he then took down the telephone and called the central telephone office to connect him with the line running to the Western Union Telegraph Company's office in the city. The connection was made, and some one responded, apparently at that office. He then inquired if that was the Western Union Telegraph office, and received through the receiver the answer, "Yes." He did not recognize the voice of the person answering, and had no means of knowing that he was connected with the defendant's office, except that he had made the call and received the response in the usual and customary manner of telephone communication. It was also shown, in effect, that the plaintiff had a telephone in its office as a part of the public telephone system then in operation in San Francisco; that the defendant's office had a like telephone connection; that the telephone company had printed and issued to its subscribers the usual directory, showing the name, address, and telephone number of each of its subscribers, among which were those of the plaintiff and defendant, respectively; and that the telephone company operated its system by means of operators at a central station to make connections between subscribers when called on to do so, and in the usual manner. The court refused to allow testimony of the conversation over the telephone between Veeder and the person answering for the defendant through the receiver. There is a sort of a suggestion in the defendant's brief that the court was not informed of the nature of the conversation sought to be produced. We do not understand, however, that it is claimed that it was not made to appear that it related to the receipt of a telegram by defendant for plaintiff at that time. In view of the allegation, above mentioned, on that subject, this must have been understood by court and counsel, and the ruling must have been made on the theory, that such a communication was not admissible to prove the allegation.

The Kohl building and the defendant's office were half a mile apart. A street car line was in operation from a point near the defendant's office to and beyond the Kohl building. The excuse offered by the defendant for failing to make delivery that evening was that it had no messengers at its office during the evening. The Kohl building was in the midst of the district destroyed by the great fire of April, 1906; and in January, 1907, there were few buildings near it that were occupied in the evenings after dark. The evidence offered, as will presently be more fully shown, would have a tendency to prove gross negligence of the defendant in relation to the delivery of the telegrams. For that purpose, it was material, and, in view of the fact that the court may be presumed to have granted the nonsuit because it believed no negligence was proven, it was very important to the plaintiff. Its exclusion is assigned as error.

[1, 2] The defendant claims that, under the circumstances we have stated, the telephone conversation was not admissible as evidence against it; that to render it admissible it should have been proven, by better evidence than was given, that the person answering the telephone call was an agent of defendant authorized to act for it in receiving and answering the communication. It is, of course, a well-settled and just principle of law that no person is bound by the declarations of another, who is not his agent, and expressly or by implication authorized by him to make the declarations. Unless at least prima facie evidence of such authority appears, such conversations are not admissible. If, in the present instance, there is no sufficient evidence of the identity of the person answering the call as the agent of the defendant at its office, the evidence was properly excluded. It may be added that the statement of that person that he was such agent was not, in and of itself, competent evidence of the agency. Agency is not provable by the mere declarations of the agent, not made under oath or in the presence of the principal, unless communicated to and acquiesced in by the principal. We are of the opinion, however, that there was sufficient circumstantial evidence to make a prima facie case of identity and authority.

[3] The courts take notice of discoveries and inventions that have become of common and general use. The telephone has been in common use for more than 30 years past. For many years its use, especially in such large cities as San Francisco, has been well-nigh universal, more so than the telegraph, and almost as much so as the mails. The system and method of communication by that means is universally known among business men. Practically every business house and office has one or more of such instruments, and uses it daily and frequently. Large establishments maintain a local system, with a special operator at their place of business, with ear to the receiver, to hear calls and answer them, or connect the local wire with the person called for, or some one authorized to act in the particular matter. The telephone companies keep a large force of operators in their central stations constantly engaged in connecting the wires of the different subscribers who wish to speak to each other. The process of making these connections is so rapid and frequent that it becomes almost mechanical. The telephone companies are engaged in public service of the same character as that of a telegraph company or a common carrier, and they are in like manner subject to regulation by law, as quasi public servants. The contrivance has been found so satisfactory in actual use that a large volume of the important business of the country is now transacted by means of it. It may, therefore, be assumed that, as compared with the whole number, the number of mistakes in connections that are not immediately discovered by both parties is very small. These considerations are matters of common knowledge, and they enter into the question of the identification of the defendant's agent.

[4] They show that the telephone and its use have become so much a part of daily

life and experience that business carried on over it must be deemed to be subject to the operation of the disputable presumptions or inferences applicable to like affairs, as declared in section 1963 of the Code of Civil Procedure. We refer to the following subdivisions of that section: "That private transactions have been fair and regular." Subd. 19. "That the ordinary course of business has been followed." Subd. 20. "That things have happened according to the ordinary course of nature and the ordinary habits of life." Subd. 28. These presumptions have been recognized by the courts and applied to the cognate operations of the telegraph and the post office. If a letter or telegram is duly addressed, prepaid, and delivered in the post office receptacle, or to the telegraph company, there is a disputable presumption of fact, arising from the almost invariable result, that it has been transmitted and delivered in regular course to the person addressed. Eppinger v. Scott, 112 Cal. 371, 42 Pac. 301, 44 Pac. 723, 53 Am. St. Rep. 220; Code Civ. Proc. § 1963, subd. 24; 1 Greenl. on Ev. § 40; 1 Elliott on Ev. § 107; 1 Wigmore on Ev. § 95. For like reasons, if nothing unusual occurs in the process, there would be a disputable presumption that a request to the central telephone operator to connect the caller with a named number in the directory, and to call such subscriber by means of a bell or other signal, has been complied with by making the proper connection with the number and giving the necessary signal at the other end of the line.

[5] For these reasons, we conclude that when it appeared that plaintiff and defendant each maintained a business office in the same city, that each had a telephone in such office connecting with the same city telephone system, with their respective names and numbers in the regular telephone directory, that plaintiff called on the operator at the central station, in the usual way, for a connection with defendant's office, that a connection was thereupon made at the central station with some line, apparently in the usual manner, that some one responded at the other end of the line, and, being asked, answered that that end was the office of the Western Union Telegraph Company, there was sufficient prima facie proof that the person answering was the agent of the defendant at its said office, employed there by it to receive for it such communications as should come in that manner. All of these conditions were shown to exist upon the trial of this case, either by direct evidence, or by fair and reasonable inference, or as matters of judicial knowledge.

The question has never heretofore been considered by this court. It has frequently arisen in other states, and the decisions in the main support our conclusion. The following cases, in effect declare the rule to be as we have stated it: Wolfe v. Railway Co. (1888) 97 Mo. 481, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331; Globe P. Co. v. Stahl (1886) 23 Mo. App. 451; Guest v. Hannibal, etc., Co. (1898) 77 Mo. App. 262; Kansas C. S. Co. v. Standard W. Co. (1907) 123 Mo. App. 13, 99 S. W. 765; Star B. Co. v. Cleveland F. Co. (1907) 128 Mo. App. 517, 109 S. W. 802; Rock I., etc., Co. v. Potter (1889) 36 Ill. App. 592; Rogers Grain Co. v. Tanton (1907) 136 Ill. App. 533; Godair v. Hamilton, N. B. (1907) 225 Ill. 572, 80 N. E. 407, 116 Am. St. Rep. 172, 8 Ann. Cas. 447; General H. Soc. v. New Haven Co. (1907) 79 Conn. 581, 65 Atl. 1065, 118 Am. St. Rep. 173, 9 Ann. Cas. 168; Knickerbocker Ice Co. v. Gardiner Co. (1908) 107 Md. 571, 69 Atl. 405, 16 L. R. A. (N. S.) 746; Miller v. Leib (1909) 109 Md. 425, 72 Atl. 466; Conkling v. Standard O. Co. (1908) 138 Iowa, 596, 116 N. W. 822; Western U. T. Co. v. Rowell (1907) 153 Ala. 314, 45 South. 73; Barrett v. Magner (1908) 105 Minn. 120, 117 N. W. 245; Holzhauer v. Sheeny (1907) 127 Ky. 35, 104 S. W. 1034; Gilliland v. Southern R. Co. (1910) 85 S. C. 36, 67 S. E. 20, 27 L. R. A. (N. S.) 1106, 137 Am. St. Rep. 861.

There are a few decisions to the contrary. Young v. Seattle T. Co. (1903) 33 Wash. 225, 74 Pac. 375, 63 L. R. A. 988, 99 Am. St. Rep. 942, Planters', etc., Co. v. Western U. T. Co. (1906) 126 Ga. 621, 55 S. E. 495, 6 L. R. A. (N. S.) 1180, Murphy v. Jack, 142 N. Y. 215, 36 N. E. 882, 40 Am. St. Rep. 590, and Oberman B. Co. v. Adams, 35 Ill. App. 540, take the opposite view. Oberman v. Adams, so far as applicable here, is overruled by the later case in the Court of Appeals and the Supreme Court of Illinois, above cited. In Murphy v. Jack, the point received slight attention. The other two cases, as is pointed out in 6 L. R. A. (N. S.) 1180, in a note to the Georgia case, are contrary to the weight of authority. The respondent cites the following cases, claiming that they also are contrary to the rule we have announced: People v. McKane, 143 N. Y. 474, 38 N. E. 950; Stepp v. State, 31 Tex. Cr. R. 349, 20 S. W. 753; People v. Strollo, 191 N. Y. 42, 83 N. E. 573; Deering Co. v. Shumpik, 67 Minn. 348, 69 N. W. 1088; Harrison G. Co. v. Penn. R. Co., 145 Mich. 712, 108 N. W. 1081; Lord Electric Co. v. Morrill, 178 Mass. 304, 59 N. E. 807. In each of these cases there was either a recognition of the voice of the other party, or other sufficient evidence of his identity; and the remarks indicating a contrary doctrine than here stated are obiter dictum. The Minnesota case, so far as it is contrary to the main current of authority, is, in effect, overruled by the later decision in Barrett v. Magner, supra.

In the application of the rule, many of the conditions we have mentioned are usually deemed matters of judicial knowledge, or as implied from other facts, and are not expressly shown. The general rule, as gathered from the foregoing decisions, is that, where it is shown that the witness called up the other party at his place of business through the central station with which both were connected, and received a response as in the usual course of business over the telephone, this is sufficient prima facie identification of the speaker at the other end of the line as the party called, or his authorized agent; and that, upon such proof, the ensuing conversation, if otherwise admissible, may be testified to by the witness. It is proper to add that the weight of such evidence depends largely upon the circumstances of each case, and is always a question for the trial court or jury. The court below erred in excluding the evidence of Veeder and Jackson relating to this subject.

Each of the messages in question were written upon a blank provided by the defendant, containing a contract purporting to exempt it from liability for damages in excess of the charges for transmission. It is claimed that this relieves the defendant from the damages here claimed. The contract is as follows: "To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company, that said company shall not be liable for mistakes or delays in transmission or delivery, or for nondelivery of any *unrepeated* message, beyond the amount received for sending the same; nor for any mistakes or delays in the delivery of any *repeated* message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. * * * Correctness in the transmission of a message to any point on the lines of this company can be *insured* by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charges for repeated messages, viz., one per cent., for any distance not exceeding 1,000 miles, and two per cent. for any greater distance."

This contract is identical with those considered by this court in Hart v. Western U. T. Co., 66 Cal. 581, 6 Pac. 637, 56 Am. Rep. 119, Redington v. Pacific P. T. C. Co., 107 Cal. 321, 40 Pac. 432, 48 Am. St. Rep. 132, and Coit v. Western U. T. Co., 130 Cal. 661, 63 Pac. 84, 53 L. R. A. 678, 80 Am. St. Rep. 153, except that the words "whether happening by negligence of its servants or otherwise," occurred in those messages in the second paragraph immediately after the words "unrepeated message," and before the word "beyond." It was decided in those cases that the taking of such contract was a reasonable precaution by the company; that it was lawful and binding upon all senders of messages who assented to it; and that it exempted the telegraph company from liability, except as stated, for any cause except willful misconduct or gross negligence.

It is admitted that the usual tolls for such messages were in each instance paid to the defendant, and that each was an *unrepeated* message. Upon the trial, however, the plaintiff expressly waived any claim for the amount of the tolls paid as damages. For this reason, if no further damage appeared, the court below was justified in granting the nonsuit.

[6, 7] The message from Porter at Chicago to Veeder at the Kohl building in San Francisco was received at the main office of the defendant in the Ferry building in San Francisco at 6:57 p. m. of January 8th. The defendant claims that this was not proven. The evidence shows, however, that a note of that time was made by the defendant upon the copy of the message delivered by it to Veeder; and, from what was said at the trial, concerning this fact, by the court and counsel, it is a fair inference that these figures were intended by the defendant as a note of the hour and minute of the arrival of the message at its office in the Ferry building. It therefore constitutes evidence of that effect. Street cars were then running frequently from a point near the Ferry building, along California street, and directly in front of the Kohl building, to which the message was directed. According to the evidence offered and improperly excluded, we must assume that the plaintiff would have been able to prove thereby that, within half an hour after defendant had received this message, and while the copy for delivery was lying among the messages in its possession at the Ferry building office, and then awaiting delivery, Veeder inquired of defendant's agent at said office to learn if such message had been received by the defendant, and that he was informed by defendant's agent that none such had been received. After receiving this information that the telegram was important, and that Veeder could be communicated with by telephone, the defendant failed to deliver either this telegram, or the one received later from Jackson, apparently on the same subject, on that evening, and, so far as appears, made no effort to do so, or to inform Veeder thereof. If these facts had been proven, they would have tended to prove gross neglect on the part of the defendant in failing to deliver the Veeder message on that day, or to inform Veeder of its arrival. Such evidence would support a finding of gross negligence. It is fully as strong as that held sufficient in Redington v. Pacific P. T. C. Co., supra. It follows, therefore, that, under any tenable theory of the effect of the contract, the plaintiff was deprived of the opportunity of proving such gross negligence.

[8, 9] The respondent contends that the evidence does not show that the plaintiff has sustained any damage, except to the amount of the charges, which, as above stated, the plaintiff waived. Taking the evidence as a whole, it is plain that, if either message had been received by the plaintiff's agents during the evening of January 8th, the option would have been exercised by them on behalf of the plaintiff. In that event the Iron Works would have been bound to furnish the pipe and construct the mine line for $143,000. After waiting until late that evening for the expected telegram, Jackson and Field agreed that the option should be extended for an additional period of 15 days, but that the Iron Works should be entitled to change the price mentioned in said contract. Within the 15 days thus allowed, the plaintiff and the Risdon Iron Works agreed to and executed a modification of the contract. The evidence shows that this was the best contract the plaintiff could obtain for the mine line. By its provisions the price for the mine line, instead of being fixed at $143,000, was to be at the rate of 8 cents per pound for the weight of metal furnished for the mine line. Jackson testified that this change added to the price of the mine line the sum of $21,252 in excess of the sum of $143,000 fixed by the first contract. He further testified that the price of steel had raised in the interval between the making of the first contract and the 8th day of January about one-quarter to one-half a cent. There was a provision in the first contract that, if the price of steel rose before the option was exercised, the price fixed should be increased accordingly. Jackson stated that he was not sure that the increase was no more than half a cent per pound. From this respondent argues that the actual advance may have been enough to cover the difference in price between the two contracts, and hence that no loss was shown. It is apparent, however, from all of the evidence that Jackson did not intend to suggest that so great an advance was made as would be necessary to cover this difference. It would have required a raise of 1½ cents per pound to have had that effect. His remark was evidently intended as a mere suggestion that there was some raise in the price of steel, which would have increased somewhat the stated price in the original contract. Such is the fair inference from the whole testimony, and, upon a motion for nonsuit, all reasonable inferences must be resolved in favor of the plaintiff. We add that in stating the effect of the evidence we have kept in mind the rule in motions for nonsuit, and have accordingly given it the construction most favorable to the plaintiff. We think a substantial loss and damage from the failure to exercise the option on January 8th was sufficiently shown.

The California decisions, above cited, are all cases of mistakes made in the words of the message in transmitting it through the wires, or in receiving it at the office of its destination. The negligence complained of in the present case is a delay in the delivery of the message after it had been correctly transmitted. The plaintiff contends that there is an obvious distinction between errors or delays in transmission and a delay in the delivery of a message after its arrival. It is argued that, since the repeating of a message would have no tendency to prevent a delay in delivery, but merely secures accuracy in transmission, it has no logical relation to any other object; that, as the provision for insurance applies only to accuracy of transmission, and the contract as a whole affords the sender no means of protection against a delay in the subsequent delivery, the question of the reasonableness of such a contract, and its accordance with public policy, is not settled by said decisions. Able and exhaustive arguments are presented on each side of this question.

The question whether the restriction of liability for errors in transmission is void, because contrary to public policy, has produced an unusual conflict in the authorities. In a comparatively few jurisdictions outside of California, the contract is declared to be valid, unless there is gross negligence or willful misconduct. These are as follows: Maryland, in U. S. Telegraph Co. v. Gildersleve, 29 Md. 232, 96 Am. Dec. 519; Massachusetts, in Wheelock v. Postal, etc., Co., 197 Mass. 125, 83 N. E. 313, 14 Ann. Cas. 188; Michigan, in Birkett v. W. U. T. Co., 103 Mich. 361, 61 N. W. 645, 33 L. R. A. 404, 50 Am. St. Rep. 374; New York, in Halsted v. Postal, etc., Co., 193 N. Y. 303, 85 N. E. 1078, 19 L. R. A. (N. S.) 1021, 127 Am. St. Rep. 952; Rhode Island, in Stone v. Postal, etc., Co., 31 R. I. 180, 76 Atl. 762; Texas, in Womack v. W. U. T. Co., 58 Tex. 176, 44 Am. Rep. 614; the United States Supreme Court, in Primrose v. W. U. T. Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; and in England, McAndrew v. Telegraph Co., 17 Com. B. 3, 25 L. J. C. B. 26. In South Dakota and Kansas, there are decisions which concede its validity for the purposes of the case, but affirm the judgment against the company, on the ground that gross negligence was proved. Lothian v. W. U. T. Co., 25 S. D. 319, 126 N. W. 621; W. U. T. Co. v. Crall, 38 Kan. 683, 17 Pac. 309, 5 Am. St. Rep. 795. Pennsylvania decisions seem to conflict with each other. Passmore v. W. U. T. Co., 78 Pa. 238, treats the case as an action in tort, and seems to hold such contract valid as a rule of business, the violation of which by the sender will exonerate the company, as in a case of contributory negligence. In the later case of Bailey v. W. U. T. Co., 227 Pa. 529, 76 Atl. 739, 19 Ann. Cas. 895, the court states the rule to be settled that a telegraph company "cannot stipulate for exemption from liability caused by its own negligence."

For the opposite side, the following states declare such contracts to be against public policy and void as a protection to the company against its own ordinary negligence. We cite but one case from each state: Alabama, in American, etc., Co. v. Daugherty, 89 Ala. 196, 7 South. 660; Arkansas, in W. U. T. Co. v. Short, 53 Ark. 440, 14 S. W. 649, 9 L. R. A. 744; Florida, in W. U. T. Co. v. Milton, 53 Fla. 496, 43 South. 495, 11 L. R. A. (N. S.) 560, 125 Am. St. Rep. 1077; Georgia, in W. U. T. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480; Illinois, in W. U. T. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279; Indiana, in W. U. T. Co. v. Meredith, 95 Ind. 94; Idaho, in Strong v. W. U. T. Co., 18 Idaho, 389, 109 Pac. 910, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55; Iowa, in Harkness v. W. U. T. Co., 73 Iowa, 193, 34 N. W. 811, 5 Am. St. Rep. 672; Kentucky, in W. U. T. Co. v. Eubanks, 100 Ky. 601, 38 S. W. 1068, 36 L. R. A. 711, 66 Am. St. Rep. 361; Maine, in Ayer v. W. U. T. Co., 79 Me. 497, 10 Atl. 495, 1 Am. St. Rep. 353; Mississippi, in Postal, etc., Co. v. Wells, 82 Miss. 740, 35 South. 190; Missouri, in Reed v. W. U. T. Co., 135 Mo. 668, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; New Mexico, in W. U. T. Co. v. Longwill, 5 N. M. 308, 21 Pac. 339; North Carolina, in Williamson v. Postal, etc., Co., 151 N. C. 228, 65 S. E. 974, overruling Lassiter v. Telegraph Co., 89 N. C. 334, on this point; Ohio, in Telegraph Co. v. Griswold, 37 Ohio St. 313, 41 Am. Rep. 500; Oklahoma, in Blackwell v. W. U. T. Co., 17 Okl. 381, 89 Pac. 235, 10 Ann. Cas. 855; Tennessee, in Pepper v. Telegraph Co., 87 Tenn. 559, 11 S. W. 783, 4 L. R. A. 660, 10 Am. St. Rep. 699; Utah, in Wertz v. W. U. T. Co., 7 Utah, 449, 27 Pac. 172, 13 L. R. A. 510; Vermont, in Gillis v. W. U. T. Co., 61 Vt. 466, 17 Atl. 736, 4 L. R. A. 611, 15 Am. St. Rep. 917; Wisconsin, in Fox v. Postal, etc., Co., 138 Wis. 648, 120 N. W. 399, 28 L. R. A. (N. S.) 490.

In this connection it may be observed that it is somewhat difficult to reconcile the California decisions with our Civil Code. Section 2162 provides that "a carrier of messages for reward must use great care and diligence in the transmission and delivery of messages." Section 1667 declares that a contract which is contrary to an express provision of law, or to the policy of express law, is unlawful. Section 1668 declares that "all contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own * * * violation of law, whether willful or negligent, are against the policy of the law." It is essential to the legal existence of a contract—that is, to its recognition by the law as a contract—that it shall have a lawful object. Section 1550. Where the object of a contract is unlawful, the contract is void. Section 1598. It seems clear that if the law requires the telegraph company to use great care and diligence in the transmission and delivery of messages, and the object of this contract, directly or indirectly, is to relieve it from responsibility for the damages caused by its failure to use great care and diligence in so doing, or, in other words, by its negligent violation of section 2162, then, by the express provision of section 1668, the contract is against the policy of the law. If that be the case, section 1667 makes it unlawful, and section 1598 declares that it is void. A person guilty of ordinary negligence has certainly failed to use great care and diligence. It appears logically to follow that a decision that such a contract will exempt the company from everything, except gross negligence or willful misconduct, is directly in the teeth of these statutory provisions. There is much force in the statement which Justice Ross, the author of the opinion in Hart v. W. U. T. Co., supra, afterwards made, as Judge of the United States Circuit Court, in W. U. T. Co. v. Cook, 61 Fed. 629, 9 C. C. A. 684, declaring a contrary doctrine, as follows: "It would be against reason and public policy to hold that it is permissible for such a company to stipulate for immunity from liability for a failure to exercise the care and diligence that the statute under which it operates declares it shall exercise."

[10] Under these circumstances, we may consider whether or not the contract in question should be construed to apply to delays in delivery of a message which has been correctly transmitted. These contracts are prepared by the telegraph company and printed upon all of its blanks provided for the use of the public. They are not often the result of negotiation between the parties. The sender has no choice, nor any reasonable opportunity to make terms not specified in the printed contract. Although he does not sign it, he is presumed to have seen it; and from his failure to object he is taken to have assented to it. Hence, if it is uncertain in any particular, its language on that point is to be interpreted most strongly against the company. Civ. Code, § 1654. The subject to which it was intended to relate and the delays and mistakes against which it was intended to provide are shown by the opening words, to wit: "To guard against mistakes or delays, the sender of a message should order it repeated." Where a guard is offered against mistakes and delays, which are not more particularly described, a reasonable construction of the language is that the mistakes and delays intended are those which the proposed guard would prevent; in this case, mistakes and delays which a repetition of the message would disclose, so that they could be immediately corrected or

avoided. That this was the object and meaning of the contract is further shown by the final proposal to insure "correctness in the transmission of a message to any point on the lines of this company." This language does not suggest, as some of the decisions holding the contract valid intimate, promptness in delivery after arrival. It plainly confines the insurance to the subject of correctness or accuracy in transmitting it to the company's delivering office on its lines, and does not refer to delays in subsequent delivery. The company has power only to make reasonable regulations. If the condition sought to be imposed requires an act to be done to protect the sender against a certain mischance, and such act would have no tendency to do so, the regulation could not be deemed reasonable. The contract should, therefore, not receive this construction, unless no other meaning can reasonably be deduced. For these reasons it should be interpreted to provide only for delays and mistakes occurring in the forwarding of a message from the company's desk, where it is received from the sender, to the company's office, where it is written out and made ready for delivery to the addressee.

There are some cases in the states, which hold the contract valid as to errors in transmission, which extend the rule to delays in subsequent delivery. But the better reason and the greater number of cases uphold the views we have stated. In Texas the contract is held valid as to mistakes in transmission, but invalid with respect to delays in delivery. Gulf, etc., Co. v. Wilson, 69 Tex. 741, 7 S. W. 653; W. U. T. Co. v. Bennett (Tex. Civ. App.) 124 S. W. 154. In Barnes v. W. U. T. Co., 24 Nev. 140, 50 Pac. 438, 77 Am. St. Rep. 791, and W. U. T. Co. v. Graham, 1 Colo. 234, 9 Am. Rep. 136, it is conceded that it is valid against errors in transmission, but held to be void as to delays in delivery. In all of these cases the distinction we have pointed out is held to be good. In Box v. Postal T. Co., 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566, the court says: "Although the regulation purports to be made to guard against mistakes or delays, it should be construed to refer to such mistakes or delays as could be corrected or avoided by repetition or comparison." In Beatty v. W. U. T. Co., 52 W. Va. 412, 44 S. E. 310, the court declares that "this condition has no relevancy, except as to such failure or error as might be cured by repetition; it is only to errors preventable by repetition that such a condition logically applies." The company in that case was held liable for a negligent failure to deliver, notwithstanding the contract in question.

The judgment is reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

19 Cal. App. 232

TAYLOR v. DARLING. (Civ. 1,117.)

(District Court of Appeal, First District, California. June 4, 1912.)

1. Appeal and Error (§ 113*)—Appealable Order—Refusal to Vacate Judgment.

An order denying the motion under Code Civ. Proc. §§ 663, 663a, to vacate and set aside, as not supported by the facts found, the judgment rendered and entered, is within section 963, declaring appealable any special order after judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 758–785; Dec. Dig. § 113.*]

2. Husband and Wife (§ 239*)—Action Against Wife—Joinder of Husband.

The fact that one sued alone for conversion was a married woman not living separate and apart from her husband, requiring, under provision of Code Civ. Proc. § 370, that her husband be joined as a defendant, being pleaded by the answer and found by the court, defeats right to recover against her in such action.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 856; Dec. Dig. § 239.*]

Appeal from Superior Court, City and County of San Francisco; Franklin J. Cole, Judge.

Action by Catherine M. Taylor, administratrix of Catherine Kenny, deceased, against Agnes Darling. From an order denying her motion, defendant appeals. Reversed, and motion ordered granted.

George A. Connolly, for appellant. Neal Power, for respondent.

HALL, J. [1] This is an appeal from an order made after final judgment, denying defendant's motion made under sections 663 and 663a of the Code of Civil Procedure to vacate and set aside the judgment rendered and entered against defendant as not supported by the facts found.

1. The contention of respondent that such order is not appealable is fully answered by the cases of Bond v. United Railroads, 159 Cal. 270, 113 Pac. 366, Condon v. Donohue, 160 Cal. 749, 118 Pac. 113, and Rahmel v. Lehndorff, 142 Cal. 681, 76 Pac. 659, 65 L. R. A. 88, 100 Am. St. Rep. 154. The order denying such a motion is one made after final judgment, and is appealable under the provisions of section 963, Code of Civil Procedure.

[2] 2. Defendant was sued alone for the alleged conversion of $1,000. She answered and pleaded in abatement that she "is a married woman, not living separate and apart, or separate or apart, from her husband, and that her husband has not been made a party to this action," and the court found this allegation of her answer to be true, but nevertheless rendered judgment against her as prayed for. A married woman not living separate and apart from her husband cannot be sued without joining her husband as a party defendant, except where her husband

is the plaintiff. Section 370, Code Civ. Proc.; McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817. The defect of parties defendant in this case did not appear upon the face of the complaint but defendant pleaded the facts in her answer, and the court found in accordance therewith. Such finding necessarily defeated plaintiff's right to recover against defendant in this action. Bogart v. Woodruff, 96 Cal. 609, 31 Pac. 618; McDonald v. Porsh, 136 Cal. 301, 68 Pac. 817; section 370, Code Civ. Proc.

The court therefore erred in denying defendant's motion and the order is reversed, and the court directed to grant said motion.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 223

PEOPLE v. MILES. (Cr. 379.)

(District Court of Appeal, First District, California. June 1, 1912. Rehearing Denied July 1, 1912. Denied by Supreme Court July 31, 1912.)

1. LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

Evidence *held* to show that defendant was a fellow conspirator with his codefendants, and an active participant in the entire scheme by which the larceny was committed.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164, 165, 167–169; Dec. Dig. § 55.*]

2. LARCENY (§ 68*)—EVIDENCE—QUESTION FOR JURY.

Where, in a larceny case, the evidence showed that the victim of a "seance" scheme was fraudulently induced to part with her money in exchange for a postdated receipt for money paid for stock to be issued by a corporation not yet formed, and it also appeared that she was promised part of her money back shortly if she wished it, the question whether it was intended that the title to the money should remain in the victim until the stock was delivered, so that the offense would be larceny and not the obtaining of money by false pretenses, was for the jury.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

3. CRIMINAL LAW (§ 1137*)—APPEAL—INVITED ERROR.

Where defendant, subsequent to the rejection of an offer of improper proof, made a vague and general offer of testimony, and stated that the court had "practically ruled on that," he invited the ruling against him, and could not complain of it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

4. INDICTMENT AND INFORMATION (§ 129*)—DIFFERENT OFFENSES RELATING TO THE SAME TRANSACTION.

Under Penal Code, § 954, as amended in 1905 (St. 1905, p. 772), permitting different offenses to be charged in different counts where they all relate to the same transaction, the offenses of larceny, false pretenses, or embezzlement, relating to the same transaction, may be charged in the same accusation, and should be so charged where there is any doubt which offense the evidence will disclose.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 414–418; Dec. Dig. § 129.*]

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

E. C. Miles was convicted of larceny, and he appeals. Affirmed.

William Maxwell and N. C. Coghlan, for appellant. Attorney General U. S. Webb, for the People.

HALL, J. Appellant was jointly indicted with Mr. and Mrs. Arnold and one Emma Smith for the larceny of $1,000 of the property of Olive Griesse and Henry Griesse. Appellant was tried separately and by the jury found guilty as charged, and from the judgment rendered upon such conviction appealed to this court.

In the methods resorted to by appellant and his codefendants to obtain the money from the prosecuting witnesses this case bears a close resemblance to the case of People v. Tessie Arnold, 17 Cal. App. 68, 118 Pac. 729, in which all of the same parties were indicted for stealing $150 from one Francis Shaw, and in which case the conviction of Tessie Arnold was by this court sustained. It is urged by the appellant that the verdict is not sustained by the evidence.

[1] The evidence shows that at all the times referred to by the witnesses Tessie Arnold was residing at 1237 O'Farrell street in the city and county of San Francisco, and at her apartments there conducted from time to time what she was pleased to call "seances," at which, as she represented to her patrons, voices from the spirit world audibly spoke to her and to those participating in the seances. The prosecuting witnesses first visited Mrs. Arnold's apartments in the latter part of December, 1909, or in the early part of January, 1910, and became interested in the "seances." They kept up their visits at frequent intervals for about four months. They were early induced by Mrs. Arnold to have a "seance." At the invitation of Mrs. Arnold they entered a small apartment or cabinet, in the center of which was a small table, upon which was placed a music box and a trumpet. The room was hung with curtains, apparently against the walls, and was illuminated by artificial light. During the "seances" this was turned down so as to give but a very dim light, and the music box was set running so as to give forth strains of music. Mrs. Arnold and the prosecuting witnesses being seated at the table, voices were heard, apparently coming from the trumpet, and which Mrs. Arnold represented to be from the spirit world. One of these called himself Dr. Winthrop, and claimed to be the guide and "control" of Mrs. Arnold, while the other called himself Abdewater, and claimed to be the guide and "control" of Mrs. Griesse. We have no doubt but that the jury from the subsequent developments correctly believed that these voices came from the throats of Mr. Arnold and

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

appellant Miles, and that they were confederates of Mrs. Arnold in a scheme to mulct Mr. and Mrs. Griesse of their little savings.

The confederates, as we shall hereafter term them, soon learned that Mr. and Mrs. Griesse were the owners of a lodging house. Thereafter at each "seance" the voices advised and urged Mr. and Mrs. Griesse to sell their lodging house, to the end that the money could be invested under the directions of "Dr. Winthrop" and "Abdewater." By means of urging, cajoling, and bullying repeated at frequent "seances," the confederates finally induced the Griesses to dispose of their lodging house, for which they received the sum of $1,400, and which they promptly on the 18th day of April, 1910, deposited in the Anglo, London & Paris National Bank in such a manner that it could be withdrawn upon the order of either Mr. or Mrs. Griesse. Shortly afterwards Mr. and Mrs. Griesse, at the invitation, over the telephone, of Mrs. Arnold, visited her, and were given a "seance," at which the voices urged and advised the Griesses to invest their money in a wonderful invention originated by an "honest man" whom they had been "developing" as an inventor. At the conclusion of the "seance" the Griesses were conducted by Mrs. Arnold to another room, where they were introduced to appellant as the inventor and to Mr. Arnold. The merits of his "fountain tooth brush" and the wonderful business prospects of the "American Fountain Tooth Brush Company," to be organized to market and exploit this invention, not yet completed nor patented, were explained to Mr. and Mrs. Griesse by appellant, and the "confederates" earnestly and persistently urged the Griesses to invest in the stock of the company, but without immediate success. The Griesses went home without coming to a decision.

On April 21, 1910, Mrs. Griesse visited Mrs. Arnold, and was again treated to a "seance," at which she was urged and advised by the voices of "Dr. Winthrop" and "Abdewater" speaking through the trumpet to invest in the stock of the company. At the "seances" some sort of incense was burned, but at this one more than usual, and she was urged by Mrs. Arnold to inhale of it, so as to more fully come under the "control." This she did to such an extent as to become dizzy. At the conclusion of the "seance" she was conducted to another room, where she again met Mr. Arnold and appellant, and, after more talk and persistent urging in which she was told among other things that she could at any time get back $250 of her money and in a short time all of it, she signed and delivered to appellant a check on the bank for $1,000, payable to him, and which he promptly cashed. Appellant upon the receipt of the check gave her an instrument, signed by him, as follows: "San Francisco, California, 6/21/1910. Received of Olive M. Griesse, on account of purchase price of ten thousand shares of the capital stock of the American Fountain Tooth Brush Company (now being organized), owner of patent rights for U. S. Patent application No. 546289, now pending. Stock to be issued and delivered as soon as printed and to be fully paid and nonassessable.—A. C. Miles, Agent." This transaction occurred and the check was dated April 21, 1910.

It is urged that the evidence does not support the verdict, in that, as it is claimed, no criminal connection of appellant is shown with the scheme to fleece Mr. and Mrs. Griesse, and because, as it is claimed, the evidence shows that the crime committed was not that of larceny, because, as it is claimed, the evidence shows that Mrs. Griesse intended to part with the title to her money when she gave the check.

As to the first contention there can be no doubt, from the evidence as we have detailed it, as well as from other matters in evidence not adverted to, that appellant was a fellow conspirator and an active participant in the entire scheme.

[2] The other point, to wit, that the evidence shows that Mrs. Griesse intended to and did part with title to the money when she made the transfer of possession, and that, therefore, the case is one of obtaining money by false and fraudulent pretenses, and not a case of larceny, is more plausible. The court very correctly and clearly explained to the jury what constituted larceny by trick and device, and the difference between such a larceny and the crime of obtaining money by false and fraudulent pretenses in accordance with the rule as laid down in People v. Delbos, 146 Cal. 734, 81 Pac. 131, and the cases there cited. It must be conceded, we think, that the jury would have been justified in finding that Mrs. Griesse did intend to and did in fact part with title to her money in the transaction with appellant. It may well be that such would have been the more logical conclusion to draw from the facts disclosed by the evidence.

But from this it does not follow that a contrary conclusion may not be supported by the evidence. Mrs. Griesse had been told that she could at any time have the return of $250 of her money, and could shortly get it all back if she wished. The transaction occurred and the check was dated April 21, 1910. At this time the corporation had not been formed, nor indeed had any steps been taken to form the corporation. No stock was yet issued or printed. The receipt was dated by appellant as of June 21, 1910 (6/21/1910), two months later than the date of the check. From this significant fact in connection with the other circumstances, the jury may well have found that it was intended and understood that until such date arrived, June 21, 1910, and the stock could be delivered and the transaction finally closed, the title to the money should remain with Mrs. Griesse, and the possession only be in appellant, for the purpose of paying for the stock when it could be issued by the company to Mrs. Griesse. This view of the transaction finds substantial support in the evidence, and for that reason we cannot say that the verdict of guilty of grand larceny is not supported by the evidence.

[3] The defendant also complains of the ruling of the court in sustaining an objection to appellant's offer to prove that the stock of the company was of some value. Without determining whether or not such evidence was at all pertinent or material in view of the peculiar facts of the case, we do not think the court in its ruling committed any error of which appellant can be heard to complain. Before this offer of testimony occurred, appellant had offered in evidence certain letters from various persons which, though not set forth in the record, seem to have been addressed to appellant, and to have contained statements bearing upon the value of the invention and the like. Upon objection these letters were ruled out, and appellant very properly makes no complaint as to such rulings. When he made his offer, of the ruling out of which he does complain, he did not put his witnesses upon the stand nor ask them any question. They were not shown to have had any knowledge of the company or of the value of the so-called invention. Appellant made a somewhat vague and general offer of testimony along certain general lines, and concluded his offer by the statement that "your honor has practically ruled on that." By this statement counsel manifestly referred to the ruling of the court in rejecting the letters that had previously been offered, and we think in so doing really invited the ruling of the court that was thereupon made as to his present offer. The matter was certainly so presented to the court as to convey the idea that the same point was involved as had been ruled on. In this way the action of counsel was well calculated to mislead the court (unintentionally of course) as to the purpose of the offer. The previous ruling was clearly correct; and we think, under the circumstances above detailed as attending the last offer, appellant should not be heard to complain of the ruling which he in effect invited.

Appellant also complains of the refusal of the court to give some instructions requested by appellant, but an examination of the record satisfies us that, so far as such instructions correctly stated the law, they were substantially given in other instructions. The instructions given were correct, and fully charged the jury on the matters of law involved in the case.

[4] In concluding this opinion we deem the occasion opportune to call attention to the provisions of section 954 of the Penal Code, as amended in 1905 (St. 1905, p. 772). This section is clearly intended to permit the charging of different offenses in different counts of the same indictment or information, where different offenses all relate to the same act, transaction, or event. The section as it is now written has been the law of this state since 1905, and yet no case has yet been before this court where the prosecuting officer has availed himself of its provisions. It is certain that, by following the rule prescribed in this section, any excuse for an appeal could be frequently avoided where any doubt may exist as to whether the evidence will disclose a case of larceny, false pretenses, or embezzlement. In charging under this section, it is, of course, necessary that care be taken to make it clearly appear that the offense set forth relates to but one act, transaction, or event (People v. Jailles, 146 Cal. 303, 79 Pac. 965); but, if this be done, no harm can result from charging under different counts so as to meet every plausible view of the facts.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 219

BANK OF VENICE v. HUTCHINSON.

(Civ. 1,091.)

(District Court of Appeal, Second District, California. May 31, 1912. Rehearing Denied June 29, 1912. Denied by Supreme Court July 29, 1912.)

1. Appeal and Error (§ 914*) — Record — Presumption — Summons — Affidavit for Publication.

An affidavit for publication of summons, which Code Civ. Proc. § 412, though not requiring it to disclose its date, clearly indicates must be presented and verified at the time of the application for order of publication, will be presumed to have been made at the time of its presentation, as recited in the order of publication; its recital of occurrences of a month later than the date appearing in the jurat showing such date to have been a mistake.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3693–3698; Dec. Dig. § 914.*]

2. Process (§ 86*) — Publication — Persons Servable by Publication.

Where an attachment is sought against a wife's separate estate, jurisdiction of the husband can be obtained by publication.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. § 86.*]

3. Process (§ 45*)—Alias Summons—Time of Issuance.

Code Civ. Proc. § 408, with reference to the time when an alias summons may be issued, has no reference to service of such a summons when parties are brought in by stipulation, or by order of the court, under section 389.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 42–45; Dec. Dig. § 45.*]

Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by the Bank of Venice against Susan N. De Luna Hutchinson, sued as Susan N. De Luna. Judgment for plaintiff; defendant appeals. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Anderson & Anderson, for appellant. Tanner, Taft & Odell, for respondent.

ALLEN, P. J. The action was against defendant and appellant as guarantor of a promissory note, and was originally brought against Susan N. De Luna, under which name and style she executed the contract of guaranty. The complaint was filed August 1, 1908. Defendant and appellant appeared thereto and subsequently, on December 14, 1908, filed her answer, setting forth, among other things, that she was a married woman; that her husband's name was W. C. Hutchinson; and that her husband was absent from his home temporarily, but that the parties were not living separate and apart. Thereupon plaintiff asked for and obtained leave of court to amend its complaint, alleging the marriage, the husband's name, and asking that he be made a party to said proceeding. This was pursuant to a stipulation, which further agreed that the answer theretofore filed might stand as an answer to the amended complaint. This amendment to the complaint and the stipulation were filed on June 3, 1909. The court, by its order made October 13, 1909, directed the issuance of an alias summons. The original summons was returned and filed November 12, 1909. Thereafter an affidavit for publication of summons was filed, which set forth the time of the filing of the complaint, that the original summons had been returned on the 12th day of November, 1909, the issuance of an order for the alias summons, that the same could not be served upon W. C. Hutchinson, and generally setting forth facts sufficient to authorize the issuance of an order for publication of summons. The jurat attached to the affidavit bears date of October 11, 1909. Due publication and mailing is shown by the record, and the default of Hutchinson duly entered. Thereafter judgment was entered in favor of plaintiff, and against defendant and appellant, and a new trial denied, from which judgment and order Susan N. De Luna appeals upon a bill of exceptions.

[1] Appellant's chief contention is that the affidavit for publication of summons is shown to have been made a month before the order for publication was issued, and, upon the authority of Forbes v. Hyde, 31 Cal. 351, could not be used as the basis for an order of publication. It will be conceded that the affidavit should be with reference to conditions existing at the time of the application for the order; but we are not prepared to say that, under the facts presented by the record in this case, it can be said that such rule has been violated. In the body of the affidavit for publication, it recites occurrences of November 12, 1909. The date appearing in the jurat, we think, was obviously a mistake, and was inserted by the notary inadvertently and carelessly. Reading the affidavit, it is certain that it was sworn to and subscribed on or after the 12th day of November, 1909. Otherwise it would not have been possible to have incorporated therein the occurrences of that date. Section 412 of the Code of Civil Procedure does not provide in terms that the date of the affidavit should be disclosed therein, but does indicate clearly that it must be presented and verified at the time of the application. We are of opinion that, had the jurat omitted any date, and nothing to the contrary appeared, it would be presumed that it was made at the time of its presentation. The order of publication so recites. The case of Hibernia, etc., Society v. Churchill, 128 Cal. 633, 61 Pac. 278, 79 Am. St. Rep. 73, is an authority upon the proposition that, the statute not requiring the date of a summons to be made a part thereof, such summons is not void on account of an improper date being inserted therein; and People v. McDaniels, 141 Cal. 115, 74 Pac. 773, is to the effect that the primary object and purpose of the signature of the officer to the jurat is to witness the signature of the affiant to the affidavit.

[2, 3] We think there is no merit in appellant's suggestions, which she has not dignified by an argument, to the effect that jurisdiction of the husband, where an attachment is sought against the wife's separate estate, cannot be obtained by publication. Section 408 of the Code of Civil Procedure, with reference to the time when an alias summons may be issued, we think, has not reference to the service of such summons where parties are brought in by order of court, or by stipulation, under the provisions of section 389 of the Code of Civil Procedure.

We perceive no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 185

HYNES v. ALL PERSONS et al. (Civ. 940.)

(District Court of Appeal, Third District, California. May 27, 1912.)

1. QUIETING TITLE (§ 34*) — STATUTORY ACTION—AFFIDAVIT.

St. 1906, Ex. Sess. p. 78, providing a special action to quiet title, requires that the action shall be commenced by the filing of a verified complaint, and that plaintiff at the time of filing the complaint shall file with the same an affidavit setting forth the character of plaintiff's estate in and possession of the property, the period during which it has existed, from whom obtained, whether or not he has ever made any conveyance of the property, or any part thereof, or interest therein, and, if so, when and to whom, also a statement of any and all subsisting mortgages, deeds of trust, and other liens thereon, that he does not know and has never been informed of any other person who claims an interest therein or lien thereon, etc. The statute also requires that the complaint and summons contain a particular description of the property. *Held* that, where the summons and complaint particularly described the property in controversy, it was not necessary that it should be again particularly described in the affidavit, but it was sufficient that the affidavit embraced the description in the summons and complaint by reference.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69–72, 76, 77; Dec. Dig. § 34.*]

2. Quieting Title (§ 34*)—Action — Affidavit—Nature of Plaintiff's Estate.

St. 1906, Ex. Sess. p. 78, is remedial in its nature, and should be liberally construed, so that, where the affidavit contains such a full and complete statement of plaintiff's interest as will enable the defendants to verify the same, prevent fraud, and safeguard their own rights, it is sufficient without setting forth every probative fact relating to the derivation of plaintiff's estate.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69–72, 76, 77; Dec. Dig. § 34.*]

3. Quieting Title (§ 34*)—Source of Title —Affidavit.

In an action to quiet title, a statutory affidavit filed with the summons and complaint alleged that plaintiff derived the property from the estate of her father and from deeds from her mother, sister, and brother, all being specifically named; that the property was inclosed by fences and occupied by buildings, and was resided on by plaintiff; that plaintiff and her grantors have been the owners in fee simple, and in the actual and peaceable possession of the same and every part thereof for more than 20 years last past. *Held*, that the affidavit sufficiently set forth the character of plaintiff's estate and the duration of its existence, etc., as required by St. 1906, Ex. Sess. p. 78.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 69–72, 76, 77; Dec. Dig. § 34.*]

4. Pleading (§ 406*)—Nature of Action—Statutes — Affidavit — Objection — Waiver.

St. 1906, Ex. Sess. p. 78, creating a special action to quiet title, provides (section 12) that, except as therein otherwise provided, the provisions and rules of law relating to evidence, pleading, practice, new trials, and appeals applicable to other civil actions shall apply to actions under such act. *Held*, that where defendant appeared and answered in an action under such statute, and went to trial without objection, either by demurrer or answer to the jurisdiction or subject-matter, and the issue of ownership was submitted and decided, and an appeal taken from the judgment on that issue, she thereby waived any right to object that the affidavit required to be filed with the summons and complaint did not sufficiently set forth the nature of plaintiff's estate, the duration of her possession, etc.

[Ed. Note.—For other cases, see Pleading, Cent.Dig. §§ 1355–1359, 1361–1365, 1367–1374; Dec. Dig. § 406.*]

5. Quieting Title (§ 47*)—Judgment—Determination of Interests.

St. 1906, Ex. Sess. p. 78, created a special action to quiet title, and section 11 declared that the judgment should ascertain and determine all estates, rights, titles, interests, and claims in and to the property and every part thereof, whether the same was legal or equitable, present or future, vested or contingent. Defendant in an action under such act filed a cross-complaint, alleging that she was the owner of an estate of inheritance in the property, and was seised in fee in every part thereof, etc. *Held*, that a finding of title in plaintiff, and that defendant and cross-complainant had no right, title, interest, or claim in or to the property described in the complaint or any part thereof, sufficiently disposed of the issues raised by the cross-complaint.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95–97; Dec. Dig. § 47.*]

6. Trial (§ 396*)—Findings—Evidence.

In a suit to quiet title, a finding on the question of rents, issues, and profits was properly omitted where there was no evidence on which to base it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 935–938; Dec. Dig. § 396.*]

7. Quieting Title (§ 47*)—Findings—Sufficiency.

A finding of the fact of title or ownership is good without a finding on the particular facts on which the title or want of title depends.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 95–97; Dec. Dig. § 47.*]

8. Appearance (§ 24*) — Special Action — Summons—Memoranda.

St. 1906, Ex. Sess. p. 78, creating a special action to quiet title, provides (section 4) that there shall be appended to the summons memoranda stating the date of the first publication of the summons, and, second, the names and addresses of such adverse claimants as are disclosed by the affidavit of plaintiff on filing the complaint. *Held*, that the omission of the second requirement was not fatal, where the only adverse party mentioned in the affidavit and interested in having the memoranda noted appeared and disclaimed any interest in the property.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 118–143; Dec. Dig. § 24.*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Action by M. J. Hynes, special administrator of the estate of Frances J. Graham, deceased, against All Persons, etc., interested in certain real property. From a judgment for plaintiff, E. A. Leigh, substituted in the place of Mary S. Knoll, deceased, appeals. Affirmed.

J. J. Dunne and J. Walter Scott, for appellant. Cullinan & Hickey (A. Everett Ball, Sullivan & Sullivan, and Theo. J. Roche, of counsel), for respondent.

CHIPMAN, P. J. This is an action to quiet title to certain two lots or parcels of land in the city and county of San Francisco under the provisions of the so-called McEnerney act. Stats. 1906, p. 78. The action was commenced by Frances J. Graham, and, while yet living, judgment passed in her favor. Subsequently the present plaintiff was substituted in her stead. Defendant Knoll appealed from the judgment and order denying her motion for a new trial. Subsequent to the appeal said defendant Knoll died, and E. A. Leigh, the duly appointed, qualified, and acting executor of her last will and testament, was substituted in her place and stead, and now prosecutes the appeal.

The complaint and affidavit were filed on July 26, 1909, and on October 29, 1909, defendant Knoll filed a general and special demurrer, which was overruled, and on November 15, 1909, she filed her answer.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The complaint appears to set forth, by proper averments, all the facts required to be stated by the McEnerney act, and we do not understand that its sufficiency is now questioned. Defendant denies the averments of the complaint, "and for a further and separate and distinct ground of defense, * * * and by way of cross-complaint, defendant alleges that this defendant is the owner of an estate in inheritance, to wit, an estate in fee simple absolute in and to that real property, situate, lying, and being," etc. (describing parcel 2 of the land mentioned in the complaint). She alleges that she "is the owner and seised in fee of and was at all times herein mentioned the owner and seised in fee of the above-described real property and every part thereof." The answer or so-called cross-complaint was not accompanied by an affidavit as required by section 5 of the act to be filed by the plaintiff, nor does it contain averments "fully and explicitly setting forth and showing the character of his (her) estate, right, title, interest or claim in and possession of the property," as is required to be stated by a plaintiff in his affidavit. It states that defendant has made no conveyance of said lot other than as explained in the cross-complaint, and likewise avers no knowledge of any claim or interest adverse to defendant except as explained. Defendant's prayer is for a decree of the court "quieting the title of said defendant to said real property against said plaintiff and all persons claiming any interest in or lien upon said real property * * * and declaring said defendant to be the owner in fee simple of each and every, all and singular of said real property," and that the deed executed by defendant to plaintiff be declared void and ordering that it be canceled.

The point principally relied on by defendant is "that the affidavit required to be filed at the time of filing the complaint was and is fatally defective." The grounds of this contention are (1) that the affidavit fails to identify any specific real property; (2) that it "fails to set forth and show, fully and explicitly, the derivation of the affiant's asserted title"; (3) that it fails to show in like manner "during what period the affiant's asserted title has existed." The affidavit states, among other things: "(1) That the character of plaintiff's estate, right, title, interest, or claim in, and possession of, the real property described in the complaint in this action and herein referred to, is as follows, to wit: That the plaintiff is the owner in fee simple absolute, and either by herself or by her tenants and agents, or persons holding under her, is in the actual and peaceable possession of all of that certain real property, situate in the city and county of San Francisco, state of California, and particularly described in the said complaint, to which reference is hereby made, and made a part of this affidavit. That the real property described as 'parcel No. 1' and 'parcel No. 2' was derived from the estate of her father, Joseph H. Cording, deceased, and from deeds from Mary S. Knoll, her mother, Alice Leigh, her sister, and Frederick A. Cording, her brother. That all of said real property is inclosed by fences and buildings. Parcel 1 is inclosed by a fence, and parcel 2 is inclosed by fence and occupied by buildings, and is resided upon by affiant. That plaintiff and her grantors have been the owners in fee simple and in the actual and peaceable possession of the same and every part thereof for more than 20 years last past."

[1] The objection that the particular description of the property should have appeared in the affidavit and that the omission was not cured by reference to the complaint made part of the affidavit wherein, as well as in the summons, it was particularly described, we think without merit. The practice is quite common to make exhibits part of a complaint by reference thereto. Under the McEnerney act it is expressly provided that "the action shall be commenced by the filing of a verified complaint" (section 2); but "at the time of filing the complaint, the plaintiff shall file with the same his affidavit" (section 5). The complaint and affidavit are so closely related that we can see no reason why the reference here made to the complaint should not be held sufficient. The statute expressly requires the complaint to contain "a particular description of such real property," as also must the summons. The statute does not require the affidavit to contain a particular description of the property. It necessarily relates to the property, and may properly, and perhaps should, embrace a description of it for identification. But we think this may be accomplished by reference to the complaint. The general rule is discussed in Santa Rosa Bank v. Paxton, 149 Cal. 195, 86 Pac. 193. In Estate of Cook, 137 Cal. 184, 191, 69 Pac. 968, 971, the court said: "We regard the rule as well settled that a necessary allegation in a complaint or petition must be distinctly averred in the complaint or petition, and, if omitted, it cannot be supplied by a reference to an exhibit; but, if the allegation be defective, it may be aided by an express reference to an exhibit for that avowed purpose." The property is mentioned in the affidavit as situated in the city and county of San Francisco and is several times referred to but is not particularly described otherwise than by reference to the complaint. The defect, if any, we think was removed by such reference.

[2] Much attention is given by appellant, in support of his testate's objections to the affidavit, to the alleged unique character of the McEnerney act, and cases which have arisen under it are cited to show that "scrupulous care should be exercised by the

court when examining the sufficiency and regularity of proceedings taken under the act." And it is hence claimed that one who proceeds under a special statute, such as this is, must comply with the conditions necessary to his recovery under that statute, "and no recovery can be had unless the plaintiff alleges exactly those facts which the statute names as the basis for the right conferred." In short, though in its nature remedial, the act must be strictly construed.

On the other hand, respondent contends that, being remedial, it is to be liberally construed. Of the statute, Mr. Justice Lorigan, for the court, in Lofstad v. Murasky, 152 Cal. 64, 67, 91 Pac. 1008, 1009, said: "While it is true that the act in question is of a remedial nature, and should be liberally construed so as to effect the purpose contemplated by it, a court is not warranted under the guise of liberal construction in giving to a term or phrase a different meaning than such as it is generally understood to possess"—this in discussing the meaning of the term "actual possession" used in the act. In Estate of Patterson, 155 Cal. 626, 638, 102 Pac. 941, 945 (26 L. R. A. [N. S.] 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625), the court said of the amendment of 1907 (St. 1907, p. 122) to section 1339 of the Code of Civil Procedure, which relates to the proving of a will "destroyed by public calamity," and refers to the same cause which gave rise to the McEnerney act: "It is remedial in its nature and is designed to preserve the testamentary right. * * * Such laws should be given a liberal construction to promote the purposes for which they are designed." Appellant cites with confidence Potrero Nuevo Land Co. v. All Persons, 158 Cal. 731, 112 Pac. 303. That case was decided on a motion to dismiss for insufficiency of the affidavit which merely stated, as to the source of title: "That said title to said property was sold and conveyed by the state of California to one John Bensley in 1855, and by him, through divers mesne conveyances, conveyed to said plaintiff, who is now the owner and holder thereof, and has been for the last 10 years." Referring to the statute, the court, by Mr. Justice Henshaw, said: "A requirement of a full and explicit showing of the period during which a plaintiff has enjoyed this estate and a full and explicit showing of the person or persons from whom obtained is not met by the affidavit here presented. To say that one has owned an estate for 10 years and more is not fully and explicitly showing how long in fact he has owned and enjoyed it. A statement that one acquired title by 'divers mesne conveyances from one John Bensley, to whom the state conveyed the property in 1855,' is not a full and explicit showing, description or characterization of the person 'from whom obtained.'" The opinion points out that "the provision of the statute requiring a full and complete statement of these particulars is manifestly designed for the benefit of the defendants, in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their rights," and hence the court says, "A full and fair compliance with the provisions is a just exaction from every plaintiff." In a concurring opinion, Mr. Justice Shaw said: "I agree that the procedure prescribed in the act should be followed closely." But how closely? With what degree of minuteness must the plaintiff set forth the history of his title and its enjoyment in order to meet the terms of the statute requiring him to file an affidavit "fully and explicitly setting forth and showing the character of his estate, right, title, interest or claim and possession"? It cannot be reasonably held that the plaintiff must set forth every probative fact relating to what appellant terms "the derivation of affiant's asserted title" and every probative fact showing for "what period the affiant's asserted title has existed," in which respects it is claimed the affidavit is defective. The purpose of a full and complete statement showing the person or persons "from whom obtained" and how long in fact the affiant "has enjoyed the property," as was said in the Potrero Nuevo Case, is "for the benefit of the defendants, in enabling them, by verifying the plaintiff's claim, to prevent fraud and safeguard their own rights."

[3] A statement that meets these requirements is sufficient. The affidavit here is much more explicit than the affidavit in the Potrero Nuevo Case. It shows that plaintiff derived the property "from the estate of her father, Joseph H. Cording, deceased, and from deeds from Mary S. Knoll, her mother, Alice Leigh, her sister, and Frederick A. Cording, her brother"; that the property is inclosed by fences and occupied by buildings, and is resided on by affiant; "that plaintiff and her grantors have been owners in fee simple and in the actual and peaceable possession of the same and every part thereof for more than twenty years last past." It seems to us that there is sufficient here to enable defendants "to verify plaintiff's claim," and "to prevent fraud and safeguard their rights." Unlike the affidavit in the case cited, it is explicit in showing from whom the estate was derived and the period during which plaintiff and her grantors named have enjoyed the estate. A still later expression by the Supreme Court is found in Soher v. Cabaniss, 119 Pac. 911, in which the Potrero Nuevo Case is cited. It throws some fresh light upon the question as to the requirements of the statute in the particulars we have been noticing.

[4] But we have this situation here. Defendant Knoll appeared and answered and went to trial, without objection, by demurrer or answer, either to the jurisdiction of the person or subject-matter. The issue of ownership between the respective parties was submitted, and decided, and the appeal is

from the judgment on that issue. So far as appellant is concerned, the affidavit has performed its office, and she has no cause to complain. The evidence fully and explicitly showed the facts which appellant claims should have more fully appeared in the affidavit.

Section 12 of the McEnerney act provides: "Except as herein otherwise provided, the provisions and rules of law relating to evidence, pleading, practice, new trials, and appeals applicable to other civil actions shall apply to the actions hereby authorized." Appellant appeared voluntarily and answered, which is equivalent to personal service of the summons and copy of the complaint. Code Civ. Proc. § 416. It was said, in the Potrero Nuevo Case, supra, as applicable here: "Defaulting defendants are not adverse parties to other defendants when there is no joint relation alleged between them, and a judgment against each is several and independent. * * * The rules of practice relating to appeals under the McEnerney act are those applicable to other civil actions (section 12)." It was held in Adams v. Hopkins, 144 Cal. 30, 77 Pac. 716, that a defendant who has appeared cannot take advantage of any defect in the service or return of summons; "nor can the appellants avail themselves of defects in the service of summons on other parties." See In re Yoell, 131 Cal. 581, 63 Pac. 913. The doctrine of waiver of irregularities not amounting to nullities is fully discussed in Clapp v. Graves, 26 N. Y. 418. The rule stated by Coleridge, J., in Holmes v. Russell, 9 Dowl. 487, is quoted approvingly: "It is difficult, sometimes, to distinguish between an irregularity and a nullity, but I think the safest rule to determine what is an irregularity, and what is a nullity, is to see whether the party can waive the objection. If he can waive it, it amounts to an irregularity. If he cannot, it is a nullity." What office the affidavit is intended to perform was pointed out in the Potrero Nuevo Case, and we do not doubt that the filing of an affidavit in substantial compliance with the statute is jurisdictional, at least so far as it concerns defendants who do not appear. And if it be conceded that the proceedings would be a nullity as to all defendants for want of jurisdiction, whether appearing or not, where no affidavit is filed, or where the affidavit lacks the essential averments required by the statute, still we think the affidavit was sufficient in the present case to confer jurisdiction.

[5] It is contended that the judgment should be reversed because the court failed to find upon material issues raised by the cross-complaint. Section 11 of the McEnerney act provides: "The judgment shall ascertain and determine all estates, rights, titles, interests and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent." The finding of the court as to plaintiff's title, set out above, is abundantly supported by the evidence and so also the finding as to defendant's title, also given above. But it is urged that there should have been a specific finding negativing defendant's equitable interest claimed in the cross-complaint and also negativing the averments of fraud and undue influence.

It appeared that title to the property in question vested in defendant Knoll, the then wife of Joseph H. Cording, deceased, and mother of plaintiff's intestate, Mrs. Graham. By the decree of distribution, the property of the said Cording was distributed in accordance with his will, half to Mrs. Knoll, then Mrs. Cording, and the remaining half to her in trust, for the support, education, and benefit of the three children, of whom Mrs. Graham was one. The will provided and the decree adjudged that Mrs. Cording should "have full and entire control and right of disposition of all and every part of said property, both real and personal, during her natural life, to sell and convey, lease, mortgage or hypothecate the same or any part thereof without an order of probate, or any other court, or any of the legal proceedings in, about or concerning such matters." It further appeared that, for reasons shown, Mrs. Knoll made a division of this remaining property among her children, conveying to Mrs. Graham the parcel in question, and in this deed the other children joined. This deed was delivered and placed in escrow with a bank in San Francisco under an agreement that it was to be recorded after the death of Mrs. Knoll. Thus far there is no conflict in the testimony. There was evidence that subsequently this deed was, by the written consent of Mrs. Knoll and her children, surrendered by the bank and recorded, and is the deed on which plaintiff relies. It was in evidence that the deed was recorded because Mrs. Knoll was involved in some litigation, and desired to place the title in Mrs. Graham. This deed was one of three deeds by which she undertook to convey this trust property directly to the beneficiaries. There was no evidence that any fraud was attempted to be practiced on her, or that she acted under any undue influence. There was some evidence that Mrs. Graham agreed to furnish a home for her mother, and she testified that she had kept that promise. The principal fact in controversy was whether the deed had been taken out of escrow and recorded by the direction and with the consent of Mrs. Knoll. And all these matters were brought out in support of her claim of title and to disprove Mrs. Graham's title. In fact, the real and only issue presented by the pleadings was that of ownership—both parties claiming a fee simple absolute, and the relief sought by defendant was to quiet such title in her.

The court found title in Mrs. Graham, and "that the defendant Mary S. Knoll, has no right, title, interest, or claim in or to said property described in said complaint, or any part thereof." It seems to us that the ultimate fact involved in the issue presented by the answer is here directly found upon and that no further finding was necessary. The death of Mrs. Knoll has been suggested since the cause was transferred to this court, which has terminated any life estate or interest she may have had in the property.

[6] If a question of rents, issues, and profits should be suggested, suffice it to say that there is no evidence on which any finding could have been made. We do not think the point now urged would warrant a reversal of the judgment. The finding of ownership includes the probative facts. Montecito Valley W. Co. v. Santa Barbara, 144 Cal. 578, 594, 77 Pac. 1113.

[7] A finding upon the fact of title or ownership is good without a finding of the particular facts upon which such title or want of title depends. Cooley v. Miller & Lux, 156 Cal. 510, 523, 105 Pac. 981. See Black v. Black, 74 Cal. 522, 16 Pac. 311; Bulwer Cons. M. Co. v. Standard Cons. M. Co., 83 Cal. 589, 23 Pac. 1102.

[8] Section 4 of the McEnerney act directs that two certain memoranda be appended to the summons on the posting and publication thereof—first, the date of the first publication of summons; and, second, the names and addresses of such adverse claimants as are disclosed by the affidavit of plaintiff upon filing the complaint. The second requirement was omitted. The affidavit showed that the city and county of San Francisco claimed an adverse interest. The city and county of San Francisco appeared by answer and disclaimed any interest in the property. Conceding that appellant could take advantage of this omission, which we doubt (Adams v. Hopkins, 144 Cal. 30, 77 Pac. 712), the appearance of this, the only adverse party mentioned in the affidavit and interested in having the memoranda noted, cured the defect.

Discovering no prejudicial error in the proceedings, the judgment and order are affirmed.

We concur: HART, J.; BURNETT, J.

(19 Cal. App. 197)

DELGER v. JACOBS et al. (Civ. 950.)

(District Court of Appeal, Third District, California. May 27, 1912.)

1. LANDLORD AND TENANT (§ 291*)—FORCIBLE DETAINER — COMPLAINT—SUFFICIENCY.

A complaint in forcible entry and detainer, alleging that plaintiff leased certain premises in writing to defendant J. for five years, at a specified rental; that J. entered under such lease, which contained covenants against assignment and subletting, providing that any assignment or subletting should work a forfeiture at the lessor's option; that J. assigned his interest without plaintiff's consent to certain other defendants, whereupon plaintiff served notice to quit; and that defendants had refused to quit and surrender the premises—was sufficient and not subject to demurrer.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217-1269; Dec. Dig. § 291.*]

2. WITNESSES (§ 219*)—PRIVILEGE—WAIVER.

Where defendant's attorney and a stenographer were permitted to testify with reference to the execution of an assignment of a lease, without objection, defendant was not entitled to have the evidence stricken on the ground that the witnesses were privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

3. WITNESSES (§ 200*)—ATTORNEY—ACTS OF SCRIVENER — CONFIDENTIAL COMMUNICATION.

Where an attorney in preparing an assignment of a lease acted as a scrivener and not as confidential attorney of any of the parties, his evidence as to the execution and delivery of the assignment was not privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 752, 757; Dec. Dig. § 200.*]

4. EVIDENCE (§ 178*)—BEST AND SECONDARY EVIDENCE — ASSIGNMENT OF LEASE — CONTENTS.

Where an alleged assignment of a lease had been lost, its contents could be proved by any witness who had read it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 722-725; Dec. Dig. § 178.*]

5. TRIAL (§ 412*)—RECEPTION OF EVIDENCE—TRANSCRIPT.

In an action of unlawful detainer, plaintiff read in evidence portions of a transcript of the tenant's testimony in a bankruptcy proceeding as containing admissions against interest. Defendants demanded an inspection of the transcript, which plaintiff declined to give because of certain private notes thereon which had not been erased. At defendants' request the whole record was introduced; they being permitted to call the court's attention to such additional matter as they desired, and to inspect it after the notes had been erased. *Held*, that defendants could not complain thereafter of their own failure to inspect such transcript.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 182, 974-977; Dec. Dig. § 412.*]

6. JUDGMENT (§ 580*)—FINAL JUDGMENT—SATISFACTION.

Code Civ. Proc. § 1049, provides that an action is deemed to be pending from the time of its commencement until its final determination on appeal, or until the time for appeal is passed, unless the judgment is sooner satisfied. *Held*, that where a judgment against a tenant in a prior proceeding, to the effect that he had leased the premises in controversy from plaintiff, had been fully satisfied by him, it was not objectionable, when offered in evidence as an estoppel, on the ground that the case had been appealed and that the judgment was not final.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1024; Dec. Dig. § 580.*]

7. EVIDENCE (§ 207*)—ADMISSION AGAINST INTEREST—JUDGMENT.

Where a judgment in a prior action by a landlord against his tenant determined that the tenant had leased the premises in question and was in possession under such lease, the judgment, even though it did not constitute an estoppel, was admissible, in a subsequent action by the landlord against the tenant, as an admission against interest.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 707–712; Dec. Dig. § 207.*]

8. APPEAL AND ERROR (§ 204*)—EVIDENCE—FAILURE TO LIMIT—NECESSITY OF OBJECTION.

Where evidence was admissible as against one of several defendants, the others could not object to its admissibility against them on appeal; they having made no such objection at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1258–1280; Dec. Dig. § 204.*]

9. ESTOPPEL (§ 110*)—EQUITABLE ESTOPPEL—PLEADING.

Proof of an alleged equitable estoppel against plaintiff is inadmissible where estoppel is not pleaded.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 300; Dec. Dig. § 110.*]

10. APPEAL AND ERROR (§ 880*)—RIGHT TO CLAIM ERROR.

Where the tenant did not appeal from an adverse judgment in an action of unlawful detainer, other defendants, to whom the landlord had assigned an interest in the lease, who did appeal, were not entitled to review an issue of fraud raised in the tenant's cross-complaint.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3584–3590; Dec. Dig. § 880.*]

11. TRIAL (§ 387*)—DECISION OF COURT—REQUISITES.

The decision on which the judgment is required to be entered by Code Civ. Proc. § 633, is not the clerk's entry in the minutes, but the decision which by section 632 is to be given in writing and filed with the clerk, prior to which there is no decision on which judgment can be entered, and no authority to enter judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903–907; Dec. Dig. § 387.*]

12. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—USE AND OCCUPATION—DAMAGES FOR DETENTION.

In unlawful detainer, plaintiff is entitled to recover the value of the use and occupation, together with damages for the detention of the property to the date of the findings.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217–1269; Dec. Dig. § 291.*]

13. LANDLORD AND TENANT (§ 291*)—UNLAWFUL DETAINER—PARTIES—JUDGMENT.

Where an action of unlawful detainer was brought to recover rented premises for breach of a lease consisting of an assignment of the tenant's interest therein, without the landlord's consent, in violation of covenant, and it appeared that the assignment was for the purpose of operating a business on the leased premises by means of a partnership or corporation, it was error to order judgment against persons who never became members of the partnership or were in any wise interested in the business.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1217–1269; Dec. Dig. § 291.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Edward F. Delger against Abe Jacobs and others. Judgment for plaintiff, and defendants other than Jacobs appeal. Affirmed in part, and reversed in part.

L. S. Melsted and E. H. Williams, for appellants. Matt I. Sullivan, E. M. Gibson, Sullivan & Sullivan, and Theo. J. Roche, for respondent.

BURNETT, J. This action of unlawful detainer was brought to secure restitution of certain leased premises in San Francisco, a forfeiture of the lease, and for damages in the value of the use and occupation of the property during the period of detention. Besides Jacobs, the lessee, the others were made parties defendant upon the theory that they had entered under and by permission of said lessee and were doing business on the demised premises by his authority. The complaint sets forth: That "on the 15th day of July, 1910, plaintiff, by agreement and lease in writing, leased to said defendant Abe Jacobs" certain premises (describing them) for the term of five years from the 1st day of July, 1910, at the monthly rental of $650, "to be paid on the 1st day of each and every month in advance." That, by virtue of said agreement and lease, the said Jacobs entered into possession and occupation of said property and still continues to occupy the same. That the lease contained certain terms, conditions, and covenants, among which was that: "The lessee shall not sublet said premises, or any part thereof, nor assign this lease or any rights thereunder without the written consent of the lessor. Any assignment of this lease or any right thereunder, either directly or by operation of law, shall work a forfeiture of the same at the option of the lessor." That after the execution of said lease and said entry of Jacobs "and prior to the 1st day of October, 1910, and contrary to the conditions and covenants of said lease, said defendant, Abe Jacobs, without the consent in writing or otherwise of said plaintiff, assigned interests in said lease to said defendants B. T. Molsness, H. A. Moss, and Bristol Commercial Company, a corporation, and let and sublet said demised premises to said defendants." The violation of certain other covenants is also alleged, but this feature of the case we deem unnecessary to notice. It appears further that said defendants "are now, ever since the 1st day of October, 1910, have been, and were at the time of the service of the notice to quit hereinafter mentioned, in the possession of said demised premises"; that plaintiff served upon the defendants "three days' written notice to quit said premises and deliver possession thereof to plaintiff"; that defendants "have refused and neglected and still refuse and neglect to quit said premises or deliver possession thereof to plaintiff." A demurrer interposed by defendants was overruled by the court, and they filed an answer in which they denied positively the making of the lease, that Jacobs entered into possession thereunder, that there was ever any assignment of said lease or any part thereof by said Jacobs, or that he sublet said premises or any part thereof to any person in any form or manner, that any of the defendants violated any of the other covenants of the lease or that defendants B. T. Molsness, H. A. Moss, and Bristol Commercial Company, or any of them, "are now, or ever since the 1st day of October, 1910, have been, or were at any time or at all, in the possession of said demised premises," or that any of the defendants was served with "three days' notice to quit, such as specified in section 1161 of the Code of Civil Procedure or otherwise or at all." There are also some affirmative allegations of fraud against the plaintiff in connection with the leasing of said premises, which will be considered hereafter. From the judgment in favor of plaintiff all the defendants except the said Abe Jacobs have appealed; the last named having filed a waiver of "any and all rights that I may have to move for a new trial of the above-entitled matter, or to prosecute an appeal from the judgment rendered in said matter on the 18th day of November, 1910, in favor of plaintiff and against defendants."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] There can be no doubt that the demurrer to the complaint was properly overruled. It is equally clear that there was sufficient evidence to support the material findings, with one exception hereafter to be noticed.

As to the execution of the lease itself, it may be said that, while apparently disputed in the opening brief of appellants, in their closing brief they declared that "everybody knows and admits that a lease was signed and delivered, but our answer shows that it was secured through fraud," and, to explain the denial of its execution in the answer, it is stated that, "where a lease is secured through fraud, its execution must be denied, for the obvious reason that the meeting of minds essential to the creation of a valid contract does not take place." In view of this statement and of the fact that no evidence of fraud in connection with the lease is exhibited, it is manifestly unnecessary to direct specific attention to the showing made as to this particular finding of the court.

Of the evidence that there was a violation of the covenant of the lease in reference to assignment, it is deemed sufficient to set forth the following: The plaintiff testified that he never gave any consent, in writing or otherwise, to Jacobs to assign any interest in the lease, or to assign the lease itself, or to sublet any of the premises described in the lease, and the court was justified in the inference that, on the 16th day of July, 1910, defendant Jacobs executed and delivered to B. T. Molsness and Henry A. Moss a written instrument in the following form: "San Francisco, July 16, 1910. I hereby certify and declare that the bill of sale taken in my name from Morris Steinberg, covering the saloon known as the 'Bristol' 1001 Market street, San Francisco, also the lease covering the said premises from the owner, and the municipal liquor license which has been taken in my name and has been received by me for the use and benefit of B. T. Molsness, Henry A. Moss and myself the undersigned, each of which parties is entitled to an undivided one-third interest in and to all of said property, and I hereby sell, assign and transfer to each of said B. T. Molsness and Henry A. Moss, an undivided one-third interest in and to all of said property." It is stoutly insisted by appellants that no such instrument was executed; but, in answer to this contention, it is sufficient to set forth the following testimony, which manifestly justifies the court's finding as to the assignment: Mr. Leon E. Prescott, a witness for plaintiff, was interrogated concerning the foregoing purported assignment, and he stated that he dictated it to his stenographer, Miss Whelan, at the request of Mr. Jacobs, "the three gentlemen being present at the time, Mr. Moss, Mr. Molsness, and Mr. Jacobs, and it was transscribed and signed by Mr. Jacobs, and a copy given to Mr. Molsness, and a copy given to Mr. Moss, and Mr. Jacobs kept the third." Miss Whelan testified that she took the dictation of this instrument from Mr. Prescott and transcribed it into longhand and delivered it to the latter in the presence of Moss, Jacobs, and Molsness. Mr. Morris Steinberg testified that, on said July 16th, at his place of business, he had a conversation with Mr. Jacobs in reference to the premises leased by the latter, and that Jacobs said that "he could not sign over the saloon and license and lease, as he agreed, to me for advancing him money, for the reason that Mr. Moss and Molsness compelled him that day to sign over a one-third interest to each of the parties at Mr. Prescott's office," and that Mr. Jacobs handed him the paper which had been executed, and that it was "the same thing in sum and substance" as the aforesaid purported assignment, and that it was signed by Abe Jacobs. The defendants Moss, Molsness, and Jacobs testified that an instrument was executed by Jacobs on said date and one copy delivered to Moss and another to Molsness, but they denied that it constituted an assignment, but claimed that it was simply a mortgage or pledge to secure the repayment of money that had been advanced for the purchase of the saloon fixtures. None of these witnesses, however, could give the contents of the instrument, nor did any of them produce a copy of it or satisfactorily account for its loss. The court was indeed justified in regarding with grave suspicion their testimony upon this point. There are other circumstances, unnecessary to detail, that lend support to the theory of assignment.

[2] In this connection we may notice the claim of appellants that the testimony

of Mr. Prescott and Miss Whelan should have been excluded as privileged for the reason that Mr. Prescott was the attorney for Jacobs, Moss, and Molsness, and Miss Whelan was his stenographer. As a matter of fact, the testimony of these two witnesses showing the execution of said assignment was given without objection, and hence the ruling of the court refusing to strike it out could be justified on that ground. Miss Whelan identified the instrument, marked "Plaintiff's Exhibit 7," as a copy of Mr. Prescott's dictation already referred to. Not only was this evidence received without objection, but it must be plain that to these preliminary matters the rule of privilege would not extend. The essential facts as to the contents of said instrument and its execution and delivery were declared by Mr. Prescott, as aforesaid, in response to questions to which no objection was made. Appellants, to take advantage of the rule, should have objected promptly, of course, to any testimony as to these matters when it appeared that the witness sustained the relation that the law holds inviolate.

[3] But, assuming that the objection was timely, we think the facts take the case without the operation of said rule. It seems clear that the purpose of the meeting of the parties on said July 16th was the preparation and execution of an instrument that would afford Moss protection for the money that he had invested. Nothing transpired in the nature of a confidential communication that the law protects from disclosure. Mr. Prescott acted rather as a scrivener than attorney in the transaction. In 1 Greenleaf on Evidence (16th Ed.) § 239, it is said: "On the other hand, the person must be at the time acting as legal adviser, hence a communication with an attorney merely, as with a lender of money, a friend, or a scrivener, is not privileged."

In Borum v. Fouts, 15 Ind. 50, it is held that "when the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him while thus engaged will not be regarded as privileged."

In De Wolf v. Strader, 26 Ill. 225, 79 Am. Dec. 371, it is held, as stated in the syllabus: "An attorney who is requested to prepare a deed or mortgage, no legal advice being required, is not privileged and may testify as to what comes to his knowledge in connection with such a transaction."

In Hebbard v. Haughian, 70 N. Y. 61, the Court of Appeals declared that: "The objection that the attorney by whom the deed of April 4th was prepared could not give evidence of the directions he received from the parties and of the transaction between them at the time was not well taken. He testified of facts within his knowledge, acquired in the transaction of the business between the parties, and they were not communicated to him as an attorney to enable him to perform his duties to a client. Knowledge acquired under such circumstances is not within the class of privileged communications."

[4] The material question here was whether, at the end of said transaction, an instrument in writing was executed by Jacobs, and, if so, what were its contents. The only disputed point, indeed, was as to what it contained, and, if it had not been lost, the instrument would speak for itself. Having been lost, its existence and contents could be proved by any witness who had read the assignment. Greer v. Greer, 58 Hun, 254, 12 N. Y. Supp. 778; Chapman v. Peebles, 84 Ala. 283, 4 South. 273. "It is a sound public policy which provides that an attorney or counsel should not be allowed to testify to any of the transactions or conversations between himself and his client which led up to the preparation of any document. But, when the document, be it a will or a contract or what not, has been executed, its contents are no longer confidential, the reason for the rule ceases, and the counsel may as well testify to the contents as may any other witness who knows such contents." Fayerweather v. Ritch (C. C.) 90 Fed. 13. We think this position is sound and is amply sustained by the authorities, in this and other jurisdictions.

[5] Appellants complain bitterly of the action of the court in reference to a transcript of testimony in the possession of respondent. They declare that the court denied to them the right to inspect it after it was actually introduced in evidence. They have, however, entirely misconceived the situation. Plaintiff had in his possession what purported to be a transcript of the testimony of Abe Jacobs taken in a certain proceeding in bankruptcy, and respondent read in evidence certain portions of it as containing admissions against interest. Appellants demanded an inspection of the transcript, but respondent declined to give them his copy for the reason that he had written upon it certain private notes that he had not erased. There is no claim made that respondent misread the quotation, or that it was not a correct transcription of said testimony of Mr. Jacobs. We must assume, also, that appellants could have secured a copy from the original source if they had so desired. Besides, on the request of appellants that the "whole record go in," with the exception of the testimony of a certain Mrs. Pyper which was claimed to be "fragmentary," the court said: "I expect that is probably the best course to take, to admit the whole, and then you gentlemen can call my attention to the other part. It will be admitted in evidence and marked as 'Plaintiff's Exhibit No. 8' and considered as read and hereafter

counsel can refer to any part of it." Appellants claim that the "other part" was not called to the attention of the court; but, if they neglected to do so, they have only themselves to blame. After the said order was made, appellants requested the court to "permit us to inspect the copy of that record that he has there," and the court replied: "After he has erased his notes. You do not want to see his notes on it, I presume." It does not appear whether appellants ever inspected that copy, but this circumstance seems unimportant in view of the fact that the whole deposition was received in evidence and is set out in full in the record.

[6] Plaintiff offered in evidence all the papers, including the notice of motion for an order to be restored to possession, in the case of Edward F. Delger v. Abe Jacobs, No. 31,073, tried in the same court and decided in favor of plaintiff, September 2, 1910; his counsel stating in explanation: "There is a judgment against the defendant Abe Jacobs in this case, to the effect that the premises were leased by Delger to Jacobs, and he was in possession under the lease, and that judgment is, of course, an estoppel as to the material averment in his answer here, because he denies in his answer that he ever executed a lease." Appellants objected as follows: "We object to that, if the court please. We have asked to be restored to nothing but our estate there, and so distinctly provided, and we repudiated this lease in that suit, and we repudiate it in this." After said papers were received in evidence, appellants made the particular objection that "that case is on appeal and has not been finally decided, and is not a final judgment of the case, and ought not to be introduced as a part of this record, and that it is incompetent, irrelevant, and immaterial evidence." The objection ought, of course, to have been made before the ruling of the court; but, since the record shows the payment by defendant Jacobs "of the sum of $1,388.50 in full payment, discharge, and satisfaction of the judgment in said action," and the acknowledgment of satisfaction by plaintiff therein, it cannot be said that the action was still pending, and the cases cited by appellant are therefore not in point. As to this it is probably sufficient to quote section 1049 of the Code of Civil Procedure that "an action is deemed to be pending from the time of its commencement until its final determination upon an appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." As we have seen, the judgment was satisfied by Jacobs, and hence the action was no longer pending.

[7] But if we concede that said judgment did not constitute an estoppel, it was, in connection with said satisfaction, at least evidence of an admission against interest upon a material issue and proper to be considered by the court.

[8] If it be admitted that the other defendants in the present action, being strangers to the former suit, might have urged successfully an objection to the consideration of said record as evidence against themselves or have maintained that it be limited in its application to Mr. Jacobs, it is sufficient to say that no such claim was presented to the trial court, and appellants are in no position now to make it, and Mr. Jacobs is presumably satisfied, since he has not appealed.

[9] The court did not err in excluding testimony tending to show a waiver on the part of the landlord of breaches of covenant under the lease. This claim was in the nature of an equitable estoppel, and it was necessary to plead it in order to introduce evidence in its support. Clarke v. Huber, 25 Cal. 593; Etcheborne v. Auzerais, 45 Cal. 125; Newhall v. Hatch, 134 Cal. 273, 66 Pac. 266, 55 L. R. A. 673; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974, 66 Pac. 982. There is no pretense of such plea in the answer. An amendment to the answer was filed in which an attempt was made to plead estoppel as to certain covenants in the lease. This amendment was stricken out by the court. But if we were to consider it as a part of the pleadings, it is not contended that it covers the breach of the covenant not to assign; counsel for appellants having stated to the lower court that: "Under those circumstances, I did not understand that we were to plead against an assignment. We have not pleaded here against an assignment, and we claim that there was no assignment."

[10] The second count of the answer of defendant Jacobs contained allegations of fraud against plaintiff, and there was a prayer for affirmative relief. It is urged that this constituted a cross-complaint and that the court's ruling was erroneous in sustaining an objection to evidence offered to support its averments. But, conceding that it stated a cause of action, it could only be so in behalf of Jacobs himself, and appellants are not aggrieved parties. They are not in any way connected with the purported cause of action, and therefore we are not called upon at their instance to review the alleged error.

[11] Appellants say that: "The court in its minute order holds the plaintiff entitled to judgment against all of the defendants for $650. In its findings it holds that plaintiff is entitled to judgment against all of the defendants except Melsted for $1,020. This is a distinction not justified by any reason, either in law or in evidence." The clerk's entry in the minutes is not the decision of the cause. "The decision upon which by section 633 of the Code of Civil Procedure the judgment is to be entered is that which by section 632 is to be given in writing and filed with the clerk; and until so given and filed there is no decision upon which judgment can be entered, and consequently no authority for entering any judgment." Crim

v. Kessing, 89 Cal. 486, 26 Pac. 1074, 23 Am. St. Rep. 491.

[12] The value of the use and occupation of the premises for one month was $650, and the difference between that amount and $1,020 is accounted for by the fact that the court allowed plaintiff damages for the detention of the property to the date of the findings. This was proper. Nolan v. Hentig, 138 Cal. 281, 71 Pac. 440.

[13] Justification for the judgment against the defendants other than Jacobs is urged by respondent, on the ground that, "under the statute providing for summary proceedings in unlawful detainer, persons may be made defendants who have entered upon or succeeded to the possession of the premises, from or through the tenant between whom and the landlord the conventional relation of landlord and tenant has been established." It is claimed that said defendants are brought within this rule by reason of the fact that they were all in the possession of said premises by consent of the tenant and without the consent of the landlord. There is, probably, no doubt that all of said parties expected to be interested in the use and occupancy of said premises. We think, however, it can hardly be said that any of them except Jacobs and Moss were actually in possession of the property and liable for the value of its use. Mr. Moss testified that, in the beginning, "we expected to make a copartnership or an incorporation"; but, when he found he was the only one who had put up any money, he did not propose "to take Mr. Jacobs or Mr. Molsness in the partnership in a business for which I was paying and they had paid no money whatever." He testified further, substantially, that he discharged Mr. Jacobs, telling the latter "to go back to his tailoring business," and as "a matter of fact there is nobody interested in the actual ownership of the place but me, and my word has been final in every case. There is absolutely not one dollar of anybody else's money in there but mine," and that he had "absolutely the right to exercise control over the place." Without quoting further, we think it should be held that, as far as the judgment awards damages and costs against Molsness and the Bristol Commercial Company and costs against Melsted, it should be reversed, and affirmed in every other respect. The necessity for a new trial, however, upon this issue can probably be avoided if plaintiff will consent to such modification of the judgment in the court below.

We think no other point demands specific attention.

In conclusion, it may be suggested that, while counsel in their briefs have displayed much industry and learning, they are justly subject to censure for their apparent forgetfulness of the dignity and courtesy that should ever prevail in contests like this. It must be manifest that their untoward vituperation affords no credit to themselves and likewise neither entertainment nor enlightenment to the court.

All of said judgment is affirmed except that portion which orders, adjudges, and decrees that plaintiff have and recover from defendants, B. T. Molsness and the Bristol Commercial Company, the sum of $1,020 for the use and occupation of said property and the sum of $100 for attorney's fee and $76, costs of suit, and except that portion which decrees that plaintiff recover said costs of $76 of defendant Melsted.

We concur: CHIPMAN, P. J.; HART, J.

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19 Cal. App. 179

OLDERSHAW v. MATTESON & WILLIAMSON MFG. CO. et al. (Civ. 1,019.)

(District Court of Appeal, Second District, California. May 27, 1912.)

1. Husband and Wife (§ 133*)—Separate Property—Evidence.

Evidence *held* to support a finding that property was the separate property of a married woman, and was not subject to the debts of her husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487–494; Dec. Dig. § 133.*]

2. Appeal and Error (§ 1011*)—Review—Conflicting Evidence.

The trial court trying a case without a jury must weigh the conflicting evidence, and determine whether a fact is established by clear and convincing evidence, and its finding will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

3. Husband and Wife (§ 133*)—Separate Property of Wife—Evidence—Sufficiency.

A finding that property is the separate estate of a married woman must be based on clear and convincing evidence.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 487–494; Dec. Dig. § 133.*]

4. Husband and Wife (§ 131*)—Separate Property of Wife—Presumptions—"Separate Estate."

The presumption as to the character of property arising from the fact that a married woman engages in business is overcome by the fact that the property was purchased with funds derived from moneys owned by her before her marriage or acquired afterward by gift or bequest constituting her separate estate within Civ. Code, § 162, and hence the property is her separate property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 471–483; Dec. Dig. § 131.*

For other definitions, see Words and Phrases, vol. 7, pp. 6413, 6414.]

5. Husband and Wife (§ 149*)—Separate Property of Wife—Contributions by Husband—Effect.

The fact that a husband contributed all his time and skill in the conduct of a business of his wife, or joined in the execution of notes for money wherewith to purchase the business, does not give him any interest in the property, in the absence of any agreement to that effect.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 573, 574; Dec. Dig. § 149.*]

6. Appeal and Error (§ 692*)—Questions Reviewable—Exclusion of Depositions—Record.

Where depositions excluded on the ground that they are incompetent, irrelevant, immaterial, and not proper cross-examination are not incorporated in the bill of exceptions, the ruling is not reviewable on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2905–2909; Dec. Dig. § 692.*]

7. Appeal and Error (§ 1050*)—Harmless Error—Erroneous Admission of Evidence.

Where the issue was whether property was the separate property of a wife, or the property of her husband and subject to the claims of his creditors, and it appeared that the wife was the only member of the marital community who possessed any estate, the error, if any, in permitting officials of a bank which had made loans to the wife to testify that in making loans they recognized her as the party borrowing the money, and extended the credit to her, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153–4160, 4166; Dec. Dig. § 1050.*]

Appeal from Superior Court, Kern County; Paul W. Bennett, Judge.

Action by Annie Cox Oldershaw against the Matteson & Williamson Manufacturing Company and another. From an order denying defendants' motion for new trial, they appeal. Affirmed.

W. B. Beaizley, Louis Luckel, and J. P. Jones, for appellants. W. W. Kaye and Kaye & Siemon, for respondent.

SHAW, J. Appeal from an order denying defendants' motion for a new trial.

By stipulation filed it was agreed by counsel for the respective parties "that no briefs need be printed in the cause, but that the same may be heard and submitted upon the printed briefs filed in the case of W. H. Esdohr, Plaintiff and Appellant, v. Annie Cox Oldershaw and C. D. Oldershaw, Defendants and Respondents, 125 Pac. ——, L. A. No. 2,979, in the Supreme Court, * * * and that printed copies of the briefs in said last-mentioned cause may be filed in the above entitled cause as the briefs of the respective parties." Accordingly, no briefs other than copies of those filed in case No. 2,979 in the Supreme Court have been filed herein. These briefs, however, were not prepared with reference to the record in this case; and, while numerous citations are made therein designating folios and pages of the transcript in the case of Esdohr v. Oldershaw, filed in the Supreme Court, no copy of that transcript has been filed herein or otherwise presented to this court. These briefs are of little value as an aid to the court in reaching a conclusion upon the questions presented, and our consideration of the appeal, in the absence of the presentation of the points, is necessarily independent and based upon what is disclosed by the transcript.

The complaint alleges that in 1897, and prior to the marriage of plaintiff with C. D. Oldershaw, the defendant Matteson & Williamson Manufacturing Company obtained a judgment against the latter in the superior court of Los Angeles county. In November, 1908, 10 years thereafter, said judgment creditor caused an execution to be issued out of said court and placed in the hands of defendant Kelly, sheriff of Kern county, who, as directed, levied the same upon the sum of $310.10 owned by plaintiff, but deposited in the Bank of Bakersfield in the name of C. D. Oldershaw, and which sum, notwithstanding plaintiff's verified claim and demand for the release thereof made to Kelly as sheriff, he collected from the bank and paid to Matteson & Williamson Manufacturing Company, which converted it to its own use; that said sum of $310.10 was the proceeds derived from a grocery business then and for a long time theretofore owned entirely by plaintiff as her separate property, and which she conducted under the name and style of C. D. Oldershaw & Co. The only issue raised by the answer was by a denial of the alleged ownership in plaintiff, defendants claiming that said grocery business, together with the $310.10 so levied upon and converted, was the property of C. D. Oldershaw, the judgment debtor. As to this issue, the court found in favor of plaintiff and gave judgment accordingly.

[1] The chief contention of appellants is that the evidence is insufficient to sustain the finding of the court upon which the judgment was based. Without quoting it at length, it is sufficient to say that the evidence tends to show that the grocery business which produced the $310.10 so converted was purchased by plaintiff with her separate funds, the original source of which was money inherited by plaintiff from an aunt, and which, beginning with 1900, was invested in real estate, plaintiff from time to time selling and re-investing the proceeds of the same, all of which deals appear to have been successful in yielding her a considerable profit. The grocery business was purchased in 1905 by plaintiff and one Wheadon. Of the purchase price plaintiff paid $1,000, which sum she borrowed from the bank, and a short time thereafter she purchased Wheadon's interest for $880, which was paid by check drawn upon her account in the bank. By writing, she authorized the bank to honor checks drawn upon her account by the husband, and also gave the husband a general power of attorney to transact business for her. Sundry notes in various sums were executed to the bank by plaintiff through her husband as attorney in fact, payment of which was secured by mortgage upon the separate estate of plaintiff, and in all of

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which transactions the bank recognized plaintiff as the party to whom it extended credit. The direct testimony of both plaintiff and her husband is that the entire purchase price of the business was paid out of her separate funds, and that he, having no estate of his own, paid no part of the consideration therefor. He farmed her land, superintended the grocery business, and conducted all her business affairs without compensation other than the support of himself and family.

[2] While there may have been evidence and proof of circumstances inconsistent with the testimony of plaintiff and her husband, nevertheless, it was for the trial court to weigh and determine the same, and its finding based thereon will not be disturbed.

[3] While in cases of this nature a finding that property is the separate estate of the wife should be based upon clear and convincing evidence, the question as to whether or not the evidence offered is clear and convincing is for the trial court. Couts v. Winston, 153 Cal. 686, 96 Pac. 357; Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092. Much of the evidence offered on the part of defendants was hearsay, and, at most, tended to prove that plaintiff permitted C. D. Oldershaw to hold himself out as the owner of the property. The judgment upon which the execution was issued was for an indebtedness contracted by the husband long before his marriage with plaintiff, and the record discloses no facts which constitute an estoppel against plaintiff. Nor is there disclosed any act on the part of plaintiff whereby she transmuted her separate estate into community property; indeed, the execution to him of a general power of attorney is inconsistent with such intent.

[4] In our opinion any presumption as to the character of the property arising from the fact of a married woman engaging in business is, in this case, overcome by the fact that it was purchased with funds and the rents, issues, and profits (Civ. Code, § 162; Estate of Higgins, 65 Cal. 407, 4 Pac. 389) derived from moneys owned by plaintiff before marriage, or acquired afterwards by gift or bequest.

[5] Neither the fact that the husband contributed all his time and skill in the conduct of the business, or that he joined his wife in the execution of notes given for money wherewith to make the purchase (assuming that he did), in the absence of any agreement to that effect, gave him any interest in the property. Walsh v. Walsh, 84 Cal. 101, 23 Pac. 1099; Diefendorff v. Hopkins, 95 Cal. 343, 28 Pac. 265, 30 Pac. 549; Flournoy v. Flournoy, 86 Cal. 286, 24 Pac. 1012, 21 Am. St. Rep. 39; Heney v. Pesoli, 109 Cal. 53, 41 Pac. 819; Estate of Pepper, 158 Cal. 619, 112 Pac. 62, 31 L. R. A. (N. S.) 1092; Lewis v. Johns, 24 Cal. 98, 85 Am. Dec. 49; Carle v. Heller, 123 Pac. 815.

[6] Among other errors of law specified is that the court erred in excluding the depositions of C. D. Oldershaw and Annie Cox Oldershaw. It appears that the depositions of these parties were offered in evidence and objection thereto sustained upon the ground that the same were incompetent, irrelevant, immaterial, and not proper cross-examination. The depositions, however, are not incorporated in the bill of exceptions, and hence the record contains nothing upon which the alleged erroneous ruling of the court can be reviewed.

[7] Officials of the bank which made loans to plaintiff were called as witnesses and permitted to testify that in making said loans they recognized plaintiff as the party borrowing the money and extended the credit to her. We perceive no prejudicial error in the ruling, particularly as it was shown that she was the only member of the marital community who possessed any estate whatsoever.

Our examination of the record discloses no error, and, our attention being called to none, the order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 229

WITTMAN v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO. (Civ. 1,011.)

(District Court of Appeal, First District, California. June 1, 1912.)

Limitation of Actions (§ 58*)—Compelling Restoration to Position in Police Department—Accrual of Cause of Action.

Plaintiff, on charges preferred to the board of police commissioners, was found guilty and, by resolution of the board on March 24, 1905, was dismissed from his position as chief of police and as a member of the police department, and thereafter was not recognized as a member of the department. On March 20, 1908, he demanded of the board that they assign him duty as a captain of police, which was refused, and on April 9, 1908, he filed a petition for mandamus to compel his restoration to duty as a captain of police. Code Civ. Proc. § 338, subd. 1, provides a three-year limitation in actions upon a liability created by statute, other than a penalty for forfeiture. *Held* that, as the dismissal was the wrong sought to be redressed, and as the demand to be made as a condition precedent to legal relief could have been made at any time, the cause of action accrued upon dismissal, and the action was barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 324–328, 346, 347; Dec. Dig. § 58.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Mandamus by George W. Wittman against the Board of Police Commissioners of the City and County of San Francisco. Writ denied, and plaintiff appeals. Affirmed.

H. M. Owens, Frank H. Gould, and J. J. Dunne, for appellant. Percy V. Long and John T. Nourse, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HALL, J. This is an appeal from a judgment denying plaintiff's petition for a peremptory writ of mandate, commanding the defendants to restore and assign petitioner to duty as captain of police of the city and county of San Francisco.

Defendants pleaded, among other things, as a defense to plaintiff's action, that the same was barred by the provisions of section 338, subd. 1, of the Code of Civil Procedure. The court made findings of fact in accordance with this contention of defendants, and entered judgment for defendants. It is this finding of the court that presents the only point necessary to be decided upon this appeal.

Appellant was appointed a member of the police department of the city and county of San Francisco in 1885, and subsequently, on the 31st day of July, 1895, he was appointed a captain of police of said city and county. On the 21st day of November, 1901, he was regularly appointed chief of police of said city and county. On the 15th day of February, 1905, charges were preferred against him as such chief of police, to the board of police commissioners, which were heard and examined by said commissioners, who found him guilty thereof, and thereupon, on the 24th day of March, 1905, adopted a resolution in the words following, to wit: "Resolved, that George W. Wittman be and he is hereby dismissed as chief of police of the police department of the city and county of San Francisco and as a member of said department." And since said date defendants have not recognized or treated appellant as a member of the police department. On the 20th day of March, 1908, appellant demanded of defendants, the board of police commissioners of said city and county, that they assign appellant to duty as a captain of police, which demand they refused.

This proceeding to compel defendants to comply with such demand was instituted by the filing of a petition in the superior court for a writ of mandate on the 9th day of April, 1908, which was more than three years after appellant's formal dismissal from the department, but less than one month from the date of his demand to be assigned to duty as such captain of police.

Although the petition in form asks that the board be compelled to assign petitioner to duty as captain of police, the effect of granting the writ prayed for would be to reinstate petitioner in an official position from which he was formally, if not legally, dismissed more than three years before the institution of this action.

The contention of appellant is that the statute of limitations did not commence to run against appellant's cause of action until he made the demand on the 20th day of March, 1908. The argument is that, because, in a petition for a writ of mandate to enforce a private right, it is necessary to allege a demand and refusal, no cause of action in mandate exists until such demand and refusal; and therefore the statute does not begin to run until the date of such demand and refusal.

We cannot accede to this view of the law as applied to the facts of this case. Appellant was in form dismissed from the department on the 24th day of March, 1905, and ever since has been debarred from exercising any of the functions of a member of the department. For reasons not now necessary to be discussed, he claims that such attempted dismissal was illegal and void, and did not have the effect to remove him from his position of captain of police. It is the dismissal from the department that really lies at the bottom of appellant's cause of action. It is this alleged wrong that he seeks to have redressed by the action of the court, invoked more than three years after its commission. The denial of his right to hold a position in the police department occurred when he was formally dismissed by the board of police commissioners from the department. This dismissal occurred at a definitely fixed time, and was an unequivocal denial of his right to longer hold the position of captain of police, or any other position in the department. If his contention as to the illegality of such dismissal is well founded, he could immediately upon his dismissal have perfected his right to the remedy by mandate by making his demand for reinstatement or assignment to duty as such captain of police.

These considerations bring the case within the rule followed and recognized in many cases that, where a right has fully accrued, except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running. Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Harrigan v. Home Life Co., 128 Cal. 531, 548, 58 Pac. 180, 61 Pac. 99; Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696, 79 Pac. 441; San Luis Obispo v. Gage, 139 Cal. 398, 73 Pac. 174; Barnes v. Glide, 117 Cal. 1, 48 Pac. 804, 59 Am. St. Rep. 153. Otherwise, as is pointed out in the cases above cited, he might indefinitely prolong his right to enforce his claim or right by neglecting to make the demand until it suited his convenience so to do.

The judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

163 Cal. 338

McNEILL & CO. v. DOE et al. (S. F. 5,782.)

(Supreme Court of California. July 16, 1912.)

1. Venue (§ 77*)—Change—Exhaustion of Right.

Where defendant's motion, under Code Civ. Proc. § 395, for a change of the place of trial to the county in which he resided was insufficient and properly overruled, and the ruling accepted by him, his right to move in that respect was exhausted.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

2. Venue (§ 77*) — Right to Change — Exhaustion of Right—Revivor.

After defendant had exhausted his right to move, under Code Civ. Proc. § 395, for a change of the place of trial, such right was not revived by an order, entered with plaintiff's consent, that defendant's subsequent motion for a change be argued on briefs.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 59, 134, 138; Dec. Dig. § 77.*]

3. Venue (§ 42*)—Change—Discretion.

Where defendant's affidavit in support of his motion for change of place of trial on the ground of inconvenience to his witnesses was met by plaintiff's affidavit, showing that his witness would be inconvenienced by a granting of a change, denial of the motion was not an abuse of discretion.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 64; Dec. Dig. § 42.*]

4. Appeal and Error (§ 965*)—Venue (§ 52*)—Review—Discretion—Change of Venue.

The granting of a change of the place of trial for the convenience of witnesses rests in the sound discretion of the superior court; and the Supreme Court will not disturb its determination, in the absence of any abuse of its discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3836; Dec. Dig. § 965;* Venue, Cent. Dig. §§ 76, 77; Dec. Dig. § 52.*]

5. Trial (§ 6*)—Setting of Time—Notice.

Code Civ. Proc. § 594, requires merely that the defendant shall have five days' notice of the time set for trial, and does not require that he shall have notice of the intended application to have a day fixed for the trial.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 13–18; Dec. Dig. § 6.*]

Department 2. Appeal from Superior Court, Fresno County; George E. Church, Judge.

Action by McNeill & Co. against John Doe (real name Charles Reick) and another. From an order denying a motion of defendant Reick for change of place of trial, and from judgment against him, he appeals. Affirmed.

T. E. Clark, for appellant. Strother & Aynesworth, for respondent.

LORIGAN, J. This appeal is from an order denying the motion of defendant Reick (sued as John Doe) for a change of the place of trial of the action, and from the judgment entered against him.

The suit was in claim and delivery to recover from defendant Reick possession of a piano, alleged to have been delivered to him by the defendant Hirsch, a piano salesman for plaintiff, in exchange for a secondhand automobile, without authority so to do.

The action was commenced in the superior court of Fresno county, and summons served on defendant Reick in Tulare county on May 17, 1910. On June 9, 1910, defendant Reick filed a demurrer to the complaint, and at the same time served notice and demand for a change of the place of trial from Fresno county to Tulare county, on the ground that he was a resident of the latter county when the action against him was commenced. This demand was accompanied by what purported to be an affidavit of merits. Before the day noticed for hearing of his motion, Reick filed a supplemental affidavit of merits. The motion was denied on June 20, 1910. The order of denial was clearly right, as the original and supplemental affidavits of merits were radically defective in essential particulars. No claim to the contrary is made by appellant. In fact, no appeal has been taken from this order.

On July 5, 1910, defendant Reick filed his answer, and therewith served another notice of demand for a change of the place of trial, on the ground of his residence in Tulare county when the action was commenced, and on the further ground of the convenience of witnesses; this demand also being accompanied by an affidavit of merits. On July 18th this motion, on both grounds, was denied—properly, as applying to the demand for a change on the ground of the residence of defendant, for reasons hereafter to be given, and properly, also, on the ground of alleged convenience of witnesses, as the affidavit of merits contained neither the names of the witnesses, nor any statement of the matters to which they would testify. Nothing, however, need further be said about this order, as no appeal has been taken from it.

On August 27, 1910, defendant again served a notice and demand for a change of the place of trial, both on the ground of his residence in Tulare county when the suit was commenced, and the further ground of the convenience of witnesses, filing therewith an affidavit of merits addressed to both grounds. The plaintiff filed a counter affidavit on the matter solely of the convenience of witnesses. The motion for a change came on for hearing on September 12, 1910, when it was agreed that it should be submitted to the court on briefs; and it was so ordered. Thereafter, on October 10, 1910, the court entered an order denying it. This appeal is taken from this last order, and from the judgment subsequently entered against the defendant.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] The order appealed from, as far as it denied the application for a change of the place of trial on the ground of the residence of the defendant, was correct. Section 395, Code of Civil Procedure, gives to a defendant sued in an action, such as was brought against appellant here, the right to a trial of the cause in the county where he resided when suit was brought. The procedure for securing this right—the filing of a demand that it be had in the county of his residence, made at the time he answers or demurs, accompanied by an affidavit of merits—is provided for by section 396 of the Code of Civil Procedure. Thereunder but one right is given to a defendant to move on that ground, and but one time fixed when he may assert it; and he is only then entitled to an order therefor upon a sufficient showing in his affidavit of merits. The appellant here was required to make his motion for the change when he filed his demurrer, and he did so; but, as his affidavit of merits was entirely insufficient, within the plain requirements of the law, the court properly denied his motion. He accepted this ruling as correct, as it undoubtedly was; and it was conclusive of any right to subsequently renew his motion on his own initiative, and on the same ground. His right to move ended with that denial. Hence, when he made this third motion on the same ground of residence in Tulare county, the court properly denied it, as his right to move in that respect was exhausted with the denial of his original application.

[2] Appellant claims, however, that because counsel on both sides agreed to submit this last motion to the court to be argued on briefs, and the court entered an order to that effect, this operated as a consent on the part of counsel for plaintiff and the court that appellant might renew the motion, and related back so as to revive the original motion. There is nothing in this claim. The court simply entertained the motion because it was made, and it was its duty to do so, and pass upon it; and, as far as the agreement to submit on the part of plaintiff is concerned, it only operated to just the extent it was intended, namely, to permit a written argument on the motion, instead of arguing it orally.

[3, 4] As to the denial of the motion on the ground of the convenience of witnesses. Appellant lays but little stress for a reversal of the order on this point. Whatever other reasons might be assigned in support of the order of the court, denying a change on this ground, it is sufficient to say that, while the affidavits on the part of appellant tended to show some inconvenience in the attendance of his witnesses, should the trial be held in Fresno county, the affidavit of the plaintiff in some degree tended to show a like inconvenience to the witnesses of plaintiff if the trial was changed to Tulare county. The matter of granting a change of the place of trial on the ground of convenience of witnesses is a matter addressed to the sound discretion of the superior court; and this court will not interfere with its exercise, unless it appears that such discretion has been abused, or injustice done by the ruling. The situation presented here does not admit of such a claim.

[5] As to the appeal from the judgment, little need be said on that subject. Under section 594, Code of Civil Procedure, on application of counsel for the plaintiff, and without notice to the appellant, the cause being at issue, the court fixed the day for its trial. Plaintiff served notice on the attorney for appellant of the day fixed therefor by the court, and on failure of the appellant or his counsel to appear on the day set judgment was entered for plaintiff. The claim of the appellant is that he should have had notice of the intended application to the court by counsel for plaintiff to have a day fixed for the trial. But the section does not require it; only that he shall have five days' notice of the time set for trial, and this he fully had. The validity of the judgment is attacked on other grounds; but, as they are of less merit than the point last considered, we do not discuss them.

The judgment and order appealed from are affirmed.

We concur: HENSHAW, J.; MELVIN, J.

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163 Cal. 342

VINCENT et al. v. MOTT et al. (S. F. 6,278.)

(Supreme Court of California. July 17, 1912.)

1. ELECTIONS (§ 52*)—ELECTION OFFICERS—STATUTORY PROVISIONS.

Pol. Code, § 1142, requiring the appointment on boards of elections of persons, half of whom shall belong to each of the two parties casting the highest number of votes at the last election, applies to recall elections held under the Oakland city charter.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 46; Dec. Dig. § 52.*]

2. MANDAMUS (§ 154*)—PROCEEDINGS AND RELIEF—SUFFICIENCY OF PETITION.

A petition for a writ of mandate to require the council of a city to appoint on the election boards for a recall election persons, half of whom belong to each of the two parties casting the highest number of votes at the last election, as required by Pol. Code, § 1142, not alleging that the council threatens to disobey that section, is insufficient.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 296–316; Dec. Dig. § 154.*]

In Bank. Application by Robert Vincent and others for a writ of mandate against Frank H. Mott and others, Mayor, Commissioners, City Council, and Ex Officio Board of Election Commissioners of the City of Oakland. Application denied.

R. M. Royce, for petitioners.

PER CURIAM. [1, 2] It does not appear from the petition presented that the Oakland council has been asked to appoint on the election boards to hold the recall election persons of whom half belong to the Republican party and half to the Democratic party, as required in section 1142 of the Political Code. We think that under the provisions of the charter that section applies to recall elections held under said charter. But because of the failure to aver that the council threatens to disobey that section, the application for mandamus is denied.

(163 Cal. 317)

GOLDNER v. SPENCER et al. (Sac. 1,934.)

(Supreme Court of California. July 13, 1912. Rehearing Denied Aug. 12, 1912.)

1. Appeal and Error (§ 717*) — Review — Written Opinions of Trial Judge.

A court, on appeal, cannot consider written opinions of the trial judge, filed and incorporated in the bill of exceptions, to determine whether or not his findings are sufficiently supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2967; Dec. Dig. § 717.*]

2. Fraudulent Conveyances (§§ 300, 301*)—Evidence — Lack of Consideration — Intent to Defraud.

In an action for foreclosure of a mortgage, evidence *held* to show that the note and mortgage securing it were given for a valuable consideration, and with no fraudulent intent on the part of the mortgagee to hinder or defraud any creditor of the mortgagor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896–903, 904–907; Dec. Dig. §§ 300, 301.*]

3. Fraudulent Conveyances (§ 282*)—Burden of Proof.

Where, in an action to foreclose a mortgage, a valuable consideration therefor was shown, the burden of showing that the mortgagee had knowledge of a fraudulent intent of his mortgagor to make the conveyance to hinder or defraud creditors was on a creditor joining as a defendant, who claimed priority for his later filed judgment lien.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 817, 818; Dec. Dig. § 282.*]

4. Fraudulent Conveyances (§ 295*)—Evidence—Excessive Interest — Conclusiveness.

While the fact that a mortgage sought to be foreclosed, and claimed by a defendant to be in fraud of creditors, secured a note calling for an excessive rate of interest may be evidence tending to show fraud, it is not conclusive; and its importance depends upon the facts of the particular case.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867–875; Dec. Dig. § 295.*]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by Edward C. Goldner against William Crane Spencer and others to foreclose a mortgage. From a judgment directing a foreclosure subject to the lien of Thomas E. Curran, and from an order denying a new trial, plaintiff appeals. Judgment and order reversed.

L. W. Lovey and Meredith & Landis (P. L. Benjamin, of counsel), for appellant. Francis Dunn and Henry N. Beatty, for respondents.

ANGELLOTTI, J. This is an action to foreclose a mortgage on lands in Placer county, alleged to have been given by defendant Spencer to plaintiff to secure the payment of a note for $21,000, dated November 15, 1907, payable one year after date, alleged to have been given by said Spencer to plaintiff. Defendant Curran, administrator, etc., was made a party defendant, because he had an interest in the mortgaged premises, which interest was alleged to be subject to plaintiff's mortgage. Defendant Spencer filed an answer, admitting all the allegations of the complaint, except the allegation as to the amount due, alleging that $500 had been paid on February 19, 1909, on account of the interest that had accrued on the note. This allegation was admitted by plaintiff's attorneys on the trial to be true. Defendant Curran, administrator, filed an answer, denying all the allegations of the complaint as to the note and mortgage, and the allegation that such mortgage was superior to his lien. He alleged his lien on the mortgaged premises to be that of a judgment obtained by him in the superior court of the city and county of San Francisco against said Spencer on March 27, 1908, for $10,946.46 and costs, a certified transcript of which judgment was recorded in the office of the county recorder of Placer county on April 6, 1908. By his amended answer served and filed at the commencement of the trial, he further alleged that said note and mortgage were executed and delivered without consideration, at a time when Spencer was heavily indebted to him and numerous other creditors, and insolvent, and when he had no other property, except the property described in the mortgage, out of which he (Curran) and such other creditors could satisfy their claims against him; that such note and mortgage was executed and delivered for the purpose of defrauding, delaying, and hindering him (Curran) as a creditor of Spencer, and other creditors; that plaintiff well knew that they were executed and delivered for that purpose; and that at no time since their execution has Spencer ever had any other property out of which Curran and other creditors of Spencer can satisfy their claims. By supplemental answer he alleged the sale to himself, on January 11, 1910, on an execution issued on said judgment, of said property for the sum of $10,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The trial court found that the note and mortgage were executed as alleged in the complaint; that at the time of their execution Curran, as such administrator, was a creditor of Spencer on the claim subsequently reduced to judgment; that at such time Spencer was insolvent; that such note and mortgage were without consideration; that said note and mortgage were made, executed, and delivered by Spencer to plaintiff, with intent to hinder, delay, and defraud his creditors; that plaintiff accepted the same knowing these facts, and knowing that Curran was one of said creditors, and with the intent to assist Spencer in his purpose to hinder, delay, and defraud his creditors. Judgment was given, declaring the amount due to plaintiff on his note, namely, $24,388.10, and directing a sale of such portion of the mortgaged premises as had not been released to pay said amount, with interest and costs, subject, however, to the claim and lien of Curran, which was adjudged to be prior to plaintiff's claim. Plaintiff's motion for a new trial was denied. This is an appeal by him from the judgment, and from the order denying his motion for a new trial.

The validity of Curran's claim against the mortgaged premises is not questioned; the only question in regard thereto being whether it is superior to or subject to plaintiff's mortgage. The mortgage was recorded in Placer county on March 18, 1908, while Curran's certified copy of the transcript of his judgment was not recorded in such county until April 6, 1908. The conclusion of the trial court was that the note and mortgage were void as against Curran, because of the matters stated in the findings to the effect that the same were given by Spencer and accepted by plaintiff without consideration, and for the purpose of hindering, delaying, and defrauding Curran and other creditors of Spencer. The principal claim on this appeal is that such findings were utterly without support in the evidence.

[1] It is earnestly urged by plaintiff that it is apparent from written opinions filed by the trial judge on April 29, 1910, and May 19, 1910, which have been incorporated in the bill of exceptions, that he was satisfied by the evidence that plaintiff actually loaned Spencer $21,000, and took the note and mortgage therefor, and that he did not in any way collude with Spencer to defraud any creditor, and that the only reason for holding the mortgage void as against Curran was that he accepted a note and mortgage calling for a higher rate of interest than that to which he was entitled, knowing that Spencer was heavily indebted to Curran and others. But, as has often been said, we cannot consider these written opinions in determining whether or not the findings are sufficiently supported by the evidence. Although, in fact, in the bill of exceptions, they constitute no proper part of the record for any such purpose. The findings of fact filed October 20, 1910, must be taken as embodying the conclusions of the trial court on all questions of fact submitted to it for decision. The only question for us is whether these findings have sufficient legal support in the evidence and such inferences as may reasonably be drawn therefrom. Learned counsel for Curran frankly admit in their brief that "there is practically no conflict in the evidence, i. e., there is no point on which the testimony of one witness was directly contradicted by the testimony of any other witness," and that "the problem of deciding the case reduces itself into drawing the proper conclusions from the facts shown."

Addressing ourselves, first, to the question of want of consideration for the note. Plaintiff and Spencer are half-brothers. Plaintiff, during, and ever since the year 1907, resided in Paris, France. In April, 1907, Spencer went from San Francisco, his place of residence, to Paris, and did not return to San Francisco until October. He was then heavily interested in the California City Rock Company, a rock-quarrying enterprise, and was anxious to obtain money with which to further develop this enterprise, in which he apparently had great confidence. While in Paris, he obtained amounts of money aggregating nearly $30,000. His bank book, containing his account with the bank Société Générale, showed deposits from June 11 to October 18, 1907, aggregating 146,500.65 francs; the last being one of 94,000 francs on October 18, 1907. He testified that he received not exceeding 50,000 francs from his stepfather's estate, and acknowledged that 45,000 francs of the amount so deposited was so received by him. When he returned to San Francisco, he brought at least two drafts for $8,000 each, issued by said bank on October 22, 1907, one of which was deposited in the Crocker National Bank on November 15, 1907, and cashed by the Wells Fargo National Bank on November 16, 1907, and the other of which was paid by the latter bank on January 9, 1908. As to the source from which the money procured in Paris was obtained, he testified positively that amounts aggregating $21,000 were borrowed from plaintiff in Paris; the last item so borrowed being that of 94,000 francs on October 18, 1907, on his promise to send plaintiff a note and mortgage for the whole $21,000 on his return to San Francisco. Robinson, Spencer's attorney, who was with him in Paris, testified that he heard Spencer say to plaintiff that he desired to borrow some money from him, and that plaintiff replied that he "would loan him some money." Spencer testified that his reason for not giving the mortgage while in Paris was that he did not have a description of the real property to be mortgaged at hand. On his return to San Francisco, he prepared and signed the note and mortgage and acknowledged the execution of the mortgage on November 19, 1907, before a notary public; and he testified that he sent the same by mail to plaintiff at Paris, with the suggestion that, if satisfactory, the mortgage be returned to him to be recorded. It was subsequently recorded at Spencer's request in Placer county. He testified that plaintiff did return it to be recorded, and that after recordation he sent it back to plaintiff at Paris. Plaintiff's attorney, Mr. Lovey, testified that in August, 1909, he received both the note and mortgage from plaintiff by mail from Paris, with a letter from plaintiff, stating that no part of the principal or interest had been paid, and directing him to press for collection, and, if necessary, to begin a suit to foreclose the mortgage and buy in the lands, if necessary. This letter was introduced in evidence. The action was commenced September 10, 1909. In reply to a letter of inquiry from Mr. Lovey to plaintiff for definite information as to the circumstances of the loan, written in October, 1907, plaintiff wrote to Mr. Lovey, regretting that no satisfactory settlement had been possible, and regretting the consequent necessity of the expense of a foreclosure suit, and informing him that the money was given to Spencer by his "personal check on my bank, with the exception of 3,500 francs, which he owed me at the time," and giving the items and dates, which corresponded with the last five items in Spencer's French bank book; the last item being that of 94,000 francs on October 18, 1907. Spencer produced in evidence a receipt from himself to plaintiff, which was as follows: "Paris le 18 Octobre, '07. Received from Edward C. Goldner ninety-four thousand francs, being part of the $21,000 note and mortgage to be executed by me on my return to San Francisco. Wm. Crane Spencer."

Spencer testified that he gave this receipt to plaintiff on October 18, 1907, when the 94,000 francs were loaned to him, and that plaintiff returned it to him with the mortgage when he sent the latter to be recorded. When introduced in evidence, it bore the indorsement: "Paid by note Nov. 15–07. Ed. C. Goldner." The genuineness of the signature of plaintiff to this was apparently not questioned, and Spencer testified that he received it from plaintiff so indorsed. Mr. Robinson, Spencer's attorney, testified that in January, 1909, plaintiff, who was in California from about October, 1908, to April, 1909, told him that he had a note and mortgage against Spencer and could not collect his money, and asked him what he could do; and that he (Robinson) told him that he could not act for him, because he was Spencer's attorney, and recommended to him three or four San Francisco attorneys, including Mr. Lovey.

No witness testified directly to anything in conflict with the foregoing. Opposed to it are only certain circumstances, which, respondent claims, warranted an inference on the part of the trial court to the effect that there was no consideration for the note and mortgage. In considering these it must be borne in mind that, by reason of certain facts that cannot be disputed, if, in fact, there was no consideration, plaintiff must have deliberately assisted in the fabrication of evidence, for the purpose of consummating a fraud on Spencer's creditors. That plaintiff accepted the note and mortgage from Spencer, that he indorsed Spencer's receipt of October 18, 1907, to him for 94,000 francs, "Paid by note, Nov. 15–07. Ed. C. Goldner," that he furnished to his attorney a written statement to the effect that he had loaned to Spencer the various sums stated therein, on the dates named, aggregating 105,000 francs, and that he directed the institution by his attorney of the foreclosure action, is absolutely established. These things cannot be reconciled with the idea of want of consideration, except upon the theory that he was actively engaged in a deliberate attempt to defraud. They fully corroborate Spencer in his testimony as to the borrowing of $21,000 from plaintiff, the agreement as to the giving of the note and mortgage therefor, and the claim that such note and mortgage were given in pursuance of such agreement.

The matters relied upon by respondent as warranting a conclusion on this point opposed to plaintiff's claim and to Spencer's direct testimony are all as consistent with honesty on the part of plaintiff as with fraud. Spencer was in need of money. The Curran suit was pending, having been commenced in April, 1907, but no answer was filed therein until February 5, 1908. Outside of his interest in the quarry company, Spencer had nothing, except his Placer county land and some $10,000 that he had just received from his stepfather's estate. These things were probably all known to plaintiff. Plaintiff advanced the money on Spencer's mere request, without any security being given, leaving it to Spencer to send him a note and mortgage on his return to America, and without taking any step to ascertain the condition of the title of the property proposed to be mortgaged. He may have known that the property was not worth to exceed $16,000. He subsequently trusted Spencer to record the mortgage. He subsequently, at the request of Spencer, executed two partial releases covering small portions of the mortgaged property, without receiving any consideration therefor. He never appeared as a witness in this proceeding.

Of course, some of these facts are not reconcilable with the idea that plaintiff, in his dealings with Spencer, was a cold and keen business man, careful to guard himself against loss. But it is to be borne in mind that he was a half-brother of Spencer; that the relations between plaintiff and Spencer had always been most friendly; and that Spencer had the greatest confidence in his rock quarry enterprise, and fully believed that he would make a great deal of money out of it, and had probably imbued plaintiff with the same confidence. Plaintiff was not dealing with a stranger, but with his half-brother, whom he desired to aid financially, and in whom he had every confidence. It would not be at all surprising, under the circumstances, assuming that he was financially well situated, which does not appear to be questioned, had he been willing to advance the money without any security whatever, and it certainly is not a very material circumstance, in view of the relations between the parties, that he was willing to trust Spencer to subsequently furnish him with such security as he had promised to give, and to see that the instrument furnishing such security was properly recorded. The same is true as to the fact that he was willing to take inadequate security for his loan, and also as to the fact that he was willing to execute the partial releases without consideration. All these things are entirely consistent, under the circumstances shown, with perfect honesty and good faith on his part. We are unable to see any sufficient foundation for a conclusion that this action was brought as the result of any collusion between plaintiff and Spencer. His failure to personally appear during the trial is not of any particular importance in view of the facts shown by the record.

[2] We have given these matters very careful consideration, and are unable to find anything therein that warrants the rejection of the clear and uncontradicted evidence as to the actual making of the loan of $21,000 by plaintiff to Spencer upon the promise by Spencer that he would give therefor the note and mortgage in suit here. Even if, as claimed by learned counsel for Curran, the situation was such as to throw the burden on plaintiff to show a valuable consideration for the note and mortgage, the evidence was such, in our opinion, as to compel a conclusion that these were the facts. The circumstances claimed to be opposed to this conclusion cannot be held to constitute such "satisfactory" evidence as justifies a verdict. They are at best "slight evidence." Code Civ. Proc. § 1835.

[3] What we have said applies with equal force to the matter of good faith on the part of plaintiff in the acceptance of the note and mortgage. There was nothing in the nature of evidence sufficient to support a conclusion that plaintiff had knowledge of any intent on the part of Spencer, in giving the mortgage, to thereby destroy, hinder, or defraud any other creditor, if, indeed, such intent did exist on the part of Spencer. If a valuable consideration for the note and mortgage was shown, the burden of showing plaintiff's knowledge of a fraudulent intent on the part of Spencer was on Curran. See Hart v. Church, 126 Cal. 481, 58 Pac. 910, 59 Pac. 296, 77 Am. St. Rep. 195; Roberts v. Burr, 135 Cal. 159, 67 Pac. 46. It may be freely conceded that, if there was satisfactory evidence to show that it was understood between the parties that the loan was in fact to be one without security, and that the mortgage was a mere device to protect the property from other claims for the sole benefit of Spencer, and was not to be enforced against him in any event, a different conclusion could be sustained. But certainly there is not satisfactory evidence of any such understanding. Looking at the evidence in the light most favorable to Curran, we have at most, in the circumstances we have above detailed, some slight evidence affording ground for vague surmise and suspicion as to the motives of the parties, in no degree measuring up to the standard provided by law for what is termed "satisfactory evidence."

[4] Something has been said about the matter of interest. The note called for interest at the rate of 8 per cent. per annum, "compounding quarterly." In the mortgage it was declared that the same was given as security for the payment of $21,000 on November 15, 1908, "with interest thereon at the rate of eight per cent. per annum according to the terms and conditions of a certain promissory note of even date with the mortgage, in words and figures following, to wit;" but the note was not set forth in the mortgage. So far as the record shows, nothing was said at the time of the loan as to the rate of interest; but it does not appear from the record that any point was made in regard to interest, either in the pleadings or at the trial, except in so far as a waiver of interest in excess of 7 per cent. and the written opinions filed by the trial judge indicate that something was said about the matter in argument. At the time of the first submission of the case, April 7, 1910, plaintiff's attorney filed a disclaimer and waiver of all interest "in excess of seven per cent. (7%) per annum upon said note from the date of the execution thereof." The learned trial judge apparently was of the opinion that there was no agreement as to the amount of interest, and that consequently plaintiff was entitled to only 7 per cent. per annum; and, furthermore, that by reason of certain early decisions of this court (Taaffe v. Josephson, 7 Cal. 352; McKenty v. Gladwin, Hugg & Co., 10 Cal. 227), if plaintiff, with full knowledge that Spencer was largely indebted, knowingly and intentionally took a note calling for a larger rate of interest than he had

agreed to accept, or to which he was entitled, the note and mortgage must be held void in toto. It is conceded by learned counsel for Curran that, in so far as the cases cited may be considered as holding that the acceptance by a creditor from a debtor known to be financially involved of an evidence of indebtedness calling for more than is due, either in principal or interest, is conclusive evidence of fraud, they have been overruled. At most such a fact may be evidence tending to show fraud, which is purely a question "of fact and not of law," except as otherwise provided in sections 3440 and 3442 of the Civil Code. Its importance as a circumstance tending to show fraud is necessarily dependent upon the facts of the particular case. In the case at bar, there is not the slightest basis in the facts we have set forth in regard to the matter of interest for a conclusion that there was any fraudulent intent on the part of anybody, and especially on the part of plaintiff. Assuming that nothing was said as to the rate of interest when the money was advanced, which is the most that is claimed by respondent, that matter was simply left to be provided for in the note and mortgage which Spencer agreed to give plaintiff on his return to San Francisco. Plaintiff had the right to assume that the note would provide for interest at a reasonable rate. It cannot be claimed that there was anything unreasonable about the rate of interest prescribed, especially in view of the law as it then was relative to the payment of taxes by the mortgagee. We are utterly at a loss to see how the acceptance by plaintiff of the note and mortgage containing the provision in regard to interest to which we have referred, where nothing had theretofore been agreed upon in regard to the rate, could warrant any inference of a fraudulent intent on his part with relation to the other creditors of Spencer.

From what we have said, it is apparent that our conclusion is that certain findings essential to support the judgment subordinating plaintiff's lien to the lien of Curran's judgment are without sufficient support in the evidence, and it is unnecessary to discuss other points made in the briefs.

The judgment and order denying a new trial are reversed.

We concur: SHAW, J.; SLOSS, J.

(163 Cal. 332)

LAGUNITAS WATER CO. v. MARIN COUNTY WATER CO. et al.

(S. F. 5,778.)

(Supreme Court of California. July 16, 1912.)

1. Injunction (§ 158*) — Injunction Pendente Lite—Effect.

As the granting of an injunction pendente lite is not a matter of right, but within the discretion of the court, and the court, in passing on such an application, is not bound to pass on the merits of the controversy, the denial of it is not a determination of anything as to the merits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 341; Dec. Dig. § 158.*]

2. Injunction (§ 137*) — Injunction Pendente Lite—Discretion of Court.

Where, in an action to establish riparian rights, the only showing of damage which would accrue to the plaintiff from the maintenance of a dam pending the suit was that a tenant of his property would be deprived of water for the use of his cattle, and the opposite parties showed that the plaintiff's tenant had sufficient water for that purpose, independent of the flow of water in the creek in which the riparian right was claimed, the refusal of the court to grant a temporary injunction was a proper exercise of its discretion.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 307, 309; Dec. Dig. § 137.*]

Department 2. Appeal from Superior Court, Marin County; Thos. J. Lennon, Judge.

Action by the Lagunitas Water Company against the Marin County Water Company and another. From an order denying an application for an injunction pendente lite, plaintiff appeals. Affirmed.

A. E. Shaw, for appellant. Jesse W. Lilienthal, for respondents.

LORIGAN, J. This is an appeal by plaintiff from an order denying its application for an injunction pendente lite and dismissing the order to show cause why it should not be issued.

The application for the order was heard upon the complaint and affidavits produced on both sides.

The complaint alleged that plaintiff is the owner of an undivided one-third interest in a tract of land, known as the Berry ranch, in Marin county (particularly described in the complaint), and that said tract is riparian to a natural water course, known as Lagunitas creek; that said creek rises upon the slope of Mt. Tamalpais, flows thence in a northerly direction into the Lagunitas reservoir owned by defendants, and thence through the premises of plaintiff for about seven miles; that the water of this creek at and above the easterly boundary line of the premises of plaintiff flows continuously during the year until the late dry season, when the waters thereof above said point sink and flow underground, coming to the surface again upon the premises of the plaintiff; that said creek, by itself and its tributaries, carries all the waters falling upon the watershed thereof east of the boundary line of the plaintiff, and all said waters falling upon said watershed are accustomed to flow in the channel of said Lagunitas creek in well-defined channels or tributaries thereof, which join said Lagunitas creek above where it enters the land of plaintiff at the eastern boundary thereof, and upon and through the said premises of plaintiff; that said defendants have no right to the waters of said Lagunitas creek, other than the right to impound a sufficient quantity of said waters to fill said reservoir, known as the Lagunitas reservoir, above referred to, which is situated near the headwaters of said creek; that defendants threaten to and will divert from said creek other waters than the said waters to which they are entitled, as aforesaid, unless restrained by decree of court. It is then alleged generally that plaintiff has been greatly damaged and will be irreparably injured by the diversion of said waters by defendants. A decree was asked establishing the right of plaintiff to the waters of said creek as a riparian owner, that defendants by final decree be perpetually enjoined from making such diversion or interfering with such right, and for a restraining order pendente lite.

On filing the complaint and an affidavit on behalf of plaintiff, an order to defendants to show cause why an injunction pendente lite should not issue was made. On the hearing thereof, affidavits were presented on behalf of the respective parties. Those on behalf of plaintiff tended to support the allegations of the complaint, and averred that the particular method of diversion contemplated and threatened by defendants was the construction of a dam to bedrock across the creek near the eastern boundary of the lands of plaintiff, for the purpose of impounding the waters of the creek, the effect of which construction, it was claimed in the affidavits, would be to prevent the flow of the water of the creek in its accustomed channel below the dam and on and through the premises of plaintiff.

The affidavits on behalf of defendants denied that the construction of the proposed dam was intended to or would divert any of the water of the Lagunitas creek or its tributaries, or other waters than storm or freshet waters; averred that the Lagunitas creek was not a living stream, except during the winter or freshet season, and that shortly after the cessation of rains said creek above the site of the proposed dam became wholly dry; denied that any water of the Lagunitas creek, at or above the point where the dam is proposed to be constructed, sinks or flows underground, or comes to the surface on the land of plaintiff, but in fact that such waters as come to the surface on said land come from living springs thereon, the waters of which flow into the Lagunitas below the proposed dam site; further averred that if the waters above the dam were impounded there would still be at all times a sufficient water supply from the feeders upon the Berry ranch to provide all the water for domestic, culinary, or irrigation purposes to which the owners thereof were entitled by virtue of their riparian rights.

In addition to affidavits of persons having official connection with the corporations plaintiff and defendant, there were also presented on behalf of either side the affidavits of expert civil and hydraulic engineers, who had examined the proposed dam site and the locality and water conditions surrounding it. Those offered by plaintiff supported its claim that the watershed above the proposed dam site drained into the channel of the Lagunitas, or into channels of streams tributary thereto, and sunk, flowed underground, and came again to the surface on the land of plaintiff, and that the construction of said proposed dam would cut off such flow through said lands; while those produced on the part of the defendants flatly denied the existence of any such conditions, or that the proposed dam could have that effect.

In addition, defendants offered in evidence a conveyance, made in 1871, by the predecessors in title of plaintiff to the defendant the Marin County Water Company of certain tracts of land, one of which, designated and described as "the Fish Gulch Tract," was conveyed in fee. The other tracts were conveyed for a term of 10 years, with the right, however, granted to said water company, for a period of 50 years, to divert and appropriate all waters flowing on the described tracts, or in gulches or creeks therein. It was asserted by defendants that the waters which they intended to impound by their dam did not include any waters, except such as flowed from the Fish gulch tract or catchment or surface waters on the tracts described in the above conveyance; and that as to those they were entitled to divert or impound them under the deed.

It is proper to say, as to this deed, appellant claimed that it did not convey the lands where defendants contemplate constructing their dam, nor confer any rights to divert the water at that point.

Upon a hearing, the only damage or injury which it was claimed plaintiff would sustain, unless defendants were restrained during the pendency of the action, was with respect to a tenant of plaintiff, who had rented and was in possession of a portion of the land of plaintiff for dairy purposes, and had about 80 head of cattle on the premises. It was averred, as to such tenant, that during the dry months of the year, from about July to December, he depended upon the waters of the Lagunitas creek flowing through the dairy premises for his stock; and that if the construction of the proposed dam was not restrained said tenant would be deprived of the use of said waters for such purpose. It was not claimed that any of the waters of the creek were being used, or ever had been used, to irrigate any of the lands of the plaintiff, or for any other purpose than watering cattle.

Respecting this claim, the showing on the part of defendants was that this tenant of plaintiff never at any time depended upon the waters of the Lagunitas creek flowing above the proposed dam site for watering stock, or for any other purpose; that four springs arose on the land of plaintiff, each running a large volume of water all the year around, which flows into the Lagunitas creek on the land of plaintiff below the proposed dam site, and furnishes, and always has furnished, more than sufficient water to supply the cattle of said tenant, or any cattle which the lands of plaintiff could maintain; that, in addition, two streams, flowing all the year around, the waters of which would not be impounded by the proposed dam of defendants, empty into the Lagunitas creek on the lands of plaintiff, either one of which is sufficient to supply water for all the cattle that could be maintained on the premises.

We refer to this evidence produced on both sides at the hearing for the preliminary injunction to show that the essential facts stated in the complaint, upon which plaintiff based his right of action, as well as all the material facts in support thereof contained in the moving affidavits, as well as the matter of the injury which, it was claimed, would be sustained by plaintiff during the pendency of the action, were denied and disputed by counter affidavits on the part of the defendants.

Counsel for appellant, on the assumption that the superior court, in denying the application for the temporary injunction, did so by deciding against appellant on the merits of the case, discusses at length the affidavits addressed to them on the hearing and the law respecting the right of a riparian owner to enjoin the threatened diversion of a natural water course, whether he has present use for the waters thereof or not, and aside from any question whether present injury may accrue to him thereby.

[1] But on the hearing of this motion it was not necessary for the superior court, in order to warrant a denial by it of the motion of plaintiff, to pass upon the merits of the case. The court may have concluded, as the essential facts were so clearly in dispute, and the right of plaintiff to any relief in doubt, under the showing on the preliminary hearing, that it would decline to grant any injunction at all until the trial on the merits. It is to be borne in mind that the matter from which this appeal is taken was an application solely for a temporary injunction pending the trial of the cause, on the ground that, unless it was so granted, plaintiff would suffer great and irreparable injury. But a preliminary injunction is not a matter of right. It is addressed to the discretion of the court. In denying it the court does not necessarily determine anything as to the merits of the main controversy. It may conclude that from the evidence produced on the application for a preliminary injunction it does not appear that, pending a trial, any possible injury can result to the plaintiff, and may decline to grant an injunction until after the trial of the cause.

[2] Here the only injury which it was claimed by plaintiff it would suffer pending the trial, unless the preliminary injunction was granted, was that a tenant of its property would be deprived of water for the use of his cattle. The showing on the part of the respondents was that no such injury would be suffered, as the plaintiff had an abundant supply of water on the ranch for that purpose, and independent of the flow of any water in the Lagunitas creek, or from its alleged tributaries. It must be assumed that the court found that this only claim of plaintiff to injury during the pendency of the trial was unfounded, and so declined to award any injunction until upon the final hearing. This it was clearly in the discretion of the court to do.

As said in Santa Cruz Ass'n v. Grant, 104 Cal. 309, 37 Pac. 1035: "The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case; and its action upon such application will not be reviewed in the appellate court, unless it shall clearly appear that there was an abuse of its discretion."

In that case the court quoted with approval the language of Chancellor Walworth from a case cited therein that: "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is, in many cases, matter of strict right, and granted as a necessary consequence of the decree made in the case. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted, unless the injury is pressing and the delay dangerous."

As, under the evidence, the court was warranted in concluding that no injury could occur to plaintiff pending the trial on the merits, there was no abuse of discretion in refusing to grant the application of plaintiff.

The order appealed from is affirmed.

We concur: HENSHAW, J.; MELVIN, J.

163 Cal. 328

WRIGHT et al. v. BOARD OF PUBLIC WORKS OF CITY OF LOS ANGELES et al. (L. A. 3,124.)

(Supreme Court of California. July 1, 1912.)

1. Appeal and Error (§ 1138*)—Determination and Disposition — Academic Question.

Where, between the denial of one application for a temporary injunction to restrain a sale of lots to pay assessments for the widening of a street and the making of a second application for such an injunction, which was also denied, the sale of the property sought to be enjoined took place, an affirmance of the orders made was proper.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4456-4461; Dec. Dig. § 1138.*]

2. INJUNCTION (§ 12*) — OBJECTIONS TO RELIEF—INEFFECTIVENESS OF WRIT.

A court properly refused to grant a temporary injunction restraining the sale of lots to pay assessments for the widening of a city street, where, at the time of the making of the application therefor, the sale had already taken place.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.*]

In Bank. Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Injunction by William Wright and others against the Board of Public Works of the City of Los Angeles and others. From orders denying successive motions for a temporary injunction, plaintiffs appeal. Affirmed.

Chase, Overton & Lyman, for appellants. John W. Shenk, for respondents.

SLOSS, J. The plaintiffs appeal from two orders denying successive motions for a temporary injunction.

The plaintiffs are owners of various tracts of land upon which the authorities of the city of Los Angeles undertook, in attempted compliance with the provisions of the street opening act of 1903 (Stats. 1903, p. 376), to levy assessments to pay the damages and costs to be incurred in the widening of Sunset boulevard in said city. The complaint describes the several parcels of land affected, alleges that they are owned by the respective plaintiffs, and states the amount "pretended to be assessed" against each. It then alleges that on February 17, 1911, the plaintiffs herein, together with Constance D. Simpson, brought an action in the superior court of Los Angeles county against the defendants. The purpose of the action, which may be designated as the Simpson suit, was to obtain a decree that the proceedings and assessments under the ordinance for the opening and widening of Sunset boulevard, so far as they affected the properties of the plaintiffs, be declared void and be canceled, and that the defendants be enjoined from asserting any liens or claims against said properties by reason of said proceedings, and from executing deeds of plaintiffs' respective lots. On July 12, 1911, a judgment was entered, granting to plaintiffs in said Simpson suit the relief for which they had prayed. Notice of the entry of such judgment was duly served upon the defendants. Notwithstanding their knowledge of the decree, the defendant members of the board of works thereafter, in August and September, 1911, published a notice that they would, on Friday, September 15, 1911, sell the properties of plaintiffs for the delinquent assessments claimed under the aforesaid proceedings. It is alleged that such sales will be followed by certificates and deeds, which will cloud the plaintiffs' respective titles to their lots, and that such sales and the issuance of such certificates and deeds will be in violation of the injunction in the Simpson case. The prayer is for an injunction restraining the board of works from selling the said properties of plaintiff; that the judgment and decree heretofore rendered be "enforced and rendered effectual"; that the titles of respective plaintiffs be quieted, and the defendants enjoined from asserting any claims under the proceedings mentioned in the complaint.

The record contains a verified answer filed by the defendants. From the pleadings, and from the arguments contained in the briefs, it appears that the principal point of difference between the parties is the construction of the decree in the Simpson case. The contention of the plaintiff is that that decree adjudged to be void all of the proceedings looking to the widening of Sunset boulevard, while the defendants take the position that the decree went no further than to set aside so much of the proceedings as required the support of a due recording of the assessment and diagram; and that, upon a re-recording of these documents, the board of works was authorized to collect the assessments by taking anew the further statutory steps. There is no occasion to consider the soundness of these respective views of the merits of the controversy.

The complaint shows that the defendant board of works had given notice that they would sell the properties of plaintiffs on September 15, 1911. The complaint was filed, and the first application for a temporary injunction restraining such sale made on the same day. The application was denied. The court then issued its order, requiring the defendants to show cause on the 19th day of September why an injunction should not be issued, restraining the defendants from selling the properties described in the complaint. The answer was presented in response to said order to show cause. It alleges that on the 15th day of September, 1911, after the hearing of the first application, the board of works did offer for sale and sell all of the property advertised in the notice of delinquent sale.

[1] It appears, therefore, that the act sought to be restrained has been done since the making and denial of the first application; and that it had already been done at the time the order to show cause came on for hearing. Under these circumstances, neither order should be reversed.

[2] The second application was properly denied, regardless of its merit or want of merit in other respects, on the ground that a court of equity will not undertake to restrain

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the doing of an act, single and complete in its nature, that has already been performed. 22 Cyc. 759; Clark v. Willett, 35 Cal. 534; Coker v. Simpson, 7 Cal. 340; Gardner v. Stroever, 81 Cal. 148, 22 Pac. 483, 6 L. R. A. 90; Ball v. Kehl, 87 Cal. 505, 25 Pac. 679.

And, if it were conceded that an injunction against the threatened sale might or should have been granted when first applied for, on the day the complaint was filed, the order denying that motion should nevertheless be affirmed upon the showing that the sale has taken place since the denial of the order. Where a reversal would prove fruitless, the appellate court will not reverse the judgment or order appealed from. 3 Cyc. 188; Id. 420. The rule has been applied by this court to cases just like the one at bar—cases, that is to say, of an appeal from an order refusing an injunction pendente lite, where, after the order and before the disposition of the appeal, the act sought to be enjoined has been performed. Foster v. Smith, 115 Cal. 611, 47 Pac. 591; Bradley v. Voorsanger, 143 Cal. 214, 76 Pac. 1031. See, also, Horton v. City of Los Angeles, 119 Cal. 603, 51 Pac. 956; Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683. In Foster v. Smith, the court said that: "To re-establish the restraining order, or to issue an injunction pendente lite, would be a vain and frivolous act. Any opinion that we might give upon the merits of the plaintiffs' application to the superior court would not, therefore, be followed by any action on the part of that court, and would not have any binding authority, or constitute an adjudication of the rights of the parties." The disposition of the present appeals from the orders denying a temporary injunction will not, of course, affect the trial of the cause on its merits, in so far as such trial may involve a demand for further relief than that sought by the application for injunction pendente lite. The plaintiffs may, for example, ultimately show that they are entitled to an injunction against the execution of deeds to the purchaser at the sale. But they did not, on the applications under review, ask for any such injunction, and we can, on these appeals, consider nothing more than their right to the injunction for which they applied, which was an injunction against the sale which has actually been made.

In some jurisdictions the courts, upon presentation of a state of facts like that here shown with reference to the first motion, affirm the judgment or order appealed from without consideration of the merits. In California, however, it seems to have been the practice to dismiss the appeal, upon the view that it presents no real controversy, but only a moot or academic question. This was the course followed in Foster v. Smith and in Bradley v. Voorsanger.

The appeal from the order of September 15, 1911, is dismissed. The order of September 19, 1911, is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.

19 Cal. App. 243

GRAY v. BONNELL (MAGNEY, Intervener).

(Civ. 1,097.)

(District Court of Appeal, Second District, California. June 10, 1912.)

1. CONTRACTS (§ 246*)—RESCISSION—ESTOPPEL.

Where an inventor engaged two promoters to sell stock in a corporation to be organized to market his invention, and agreed that 400,000 shares of stock should be placed in escrow until a certain date, or until the corporation should be on a good financial basis, and that at the expiration of the escrow period 100,000 shares should be transferred to the promoters, the act of the inventor in entering into a subsequent written agreement that, in consideration of 50 additional shares of stock to be delivered to the promoters, the 100,000 shares might remain in escrow for a longer period, and then be issued to the promoters, at all events estopped him from contending that the promoters failed to sell stock, as agreed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1131-1138; Dec. Dig. § 246.*]

2. PARTNERSHIP (§ 42*)—CONTRACT WITH THIRD PARTY.

Where, at the time of such second escrow agreement, all partnership matters between the promoters had been adjusted, and the part each was to receive of the 100,000 shares had been determined, such second agreement was not binding on one of the promoters, who refused to consent to it, and made no claim to any part of the 50 shares to be given as consideration.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 57; Dec. Dig. § 42.*]

3. APPEAL AND ERROR (§ 877*)—RIGHT TO COMPLAIN—PARTY IN INTEREST.

An intervener could not complain that a judgment was ineffectual as to a corporation organized by him, or that it was imperfect in respect to parties other than himself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. § 877.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Earl D. Gray against A. O. Bonnell, in which J. P. Magney intervenes. From judgment for plaintiff, the intervener appeals. Affirmed.

George Beebe, for appellant. Geo. E. Cryer, for respondent.

JAMES, J. On the 7th day of May, 1908, the intervener, who is the only appellant herein, entered into a contract with plaintiff and defendant Bonnell; the design of intervener being to obtain the services of Gray and Bonnell in the promotion of a corporation which was to be organized for the purpose of placing on the market a spring tire for use on automobiles and other vehicles, of which intervener was the inventor. The written agreement, after providing for the organization of the corporation, set forth terms under which Gray and Bonnell were to take charge of the selling of the shares of the capital stock of that corporation as fiscal agents thereof, and fixed their compensation of 50 per cent. of the amount to be received from such sales. As additional compensation to be received by Gray and Bonnell, the written agreement, signed by the three parties to this action, provided that 400.000 shares of stock, which were to be issued to Magney, should be placed in escrow until January 1, 1909, "or until such time as that the said company shall, through the sale of stock by parties of the second part [Gray and Bonnell], or through the conducting of its business, be on a good financial basis," and that Magney would transfer and assign 100,000 shares of such stock to Gray and Bonnell when the term of the escrow had expired. The corporation was duly organized, and Gray and Bonnell entered upon the work of making sales of its stock, and did sell a large number of its shares. In December, 1908, Bonnell made a written demand upon Magney, which recited the substance of the agreement respecting the delivery of the 100,000 shares of stock to Bonnell and Gray, and demanded that Magney comply with that agreement. Magney objected to releasing the stock from the escrow, but finally did deliver it to Bonnell, and entered into another agreement with Bonnell, whereby Bonnell on his own part, and also on the part of plaintiff, Gray, agreed, in consideration that Magney would deliver 50 shares of stock in addition to the 100,000, that the 100,000 shares of stock might remain in escrow for a further period of time, and until the 1st day of September, 1909. Gray was not a party to this agreement, and at the time it was made there were no unsettled accounts between himself and Bonnell, except that pertaining to this block of 100,000 shares of stock, of which each was entitled to receive one-half. Gray objected to this latter escrow agreement, and demanded of Bonnell that he deliver him the stock which he had received, and, upon that demand being met with a refusal, brought this action against Bonnell and the Spring Tire Company to obtain the stock to which he was entitled. This action was commenced on the 20th day of August, 1909. The Spring Tire Company made appearance, and, upon its application, the action was dismissed as to it, and Magney was allowed to file a complaint in intervention. In this complaint he alleged that Bonnell and Gray had failed to fulfill the obligations of the first contract made with them, and sought to enforce rescission thereof. On his behalf, it was also claimed that the contract made with Bonnell, requiring that the 100,000 shares of stock be held in escrow until the 1st day of September, 1909, was binding upon Gray, notwithstanding that he had not signed it; this claim being made under intervener's theory that Gray and Bonnell were copartners, and that the act of one was binding upon the other. All of the issues were found in favor of plaintiff, and the intervener appealed from the judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] In our opinion, there is little merit in any of the contentions advanced on behalf of appellant. The question as to whether or not Gray and Bonnell had fulfilled the obligations of their contract in making sales of stock of the Spring Tire Company was determined affirmatively by the trial court in its findings, which were based upon sufficient evidence. Moreover, it seems clearly to appear that Magney estopped himself from contending that there was a lack of performance on the part of Gray and Bonnell when he issued the stock and made the new arrangement with Bonnell to have it held further in escrow. This second arrangement was based upon an entirely new and different consideration, to wit, that 50 shares of stock should be paid to Bonnell and Gray In this second agreement, which was reduced to writing, there was no mention of any other consideration than the delivery of the 50 shares of stock; and it was provided that all of the escrow stock should be held only until the 1st day of September, 1909. So that it then appears that when Bonnell demanded of Magney that he deliver the 100,000 shares of stock, which was to be paid to Gray and Bonnell as part consideration for their efforts in making sales of the capital stock of the Spring Tire Company, Magney complied with that demand, but attempted, by the making of a new agreement, based upon a new consideration, to cause the stock to be held in escrow for an additional definite time, at the expiration of which it was to be issued at all events. Under these facts, no ground for rescission, attempted to be made long after this second alleged agreement was entered into, is shown. It may be noted, also, that the court found, and the evidence sustains the finding, that Magney was cognizant of the methods employed by Gray and Bonnell, and of the quantity of stock which they had effected a sale of at the time the 100,000 shares of stock was attempted to be escrowed under the second agreement.

[2] It was made clear by the evidence that, in so far as the dealings between Bonnell and Gray had partaken of the nature of partnership affairs, all of these matters had been adjusted, and no partnership accounts remained unsettled between the parties. The proportion which each was to receive of this 100,000 shares of stock, to wit, one-half each, had been determined upon, and the plaintiff was entitled, in his own right, to have that stock delivered to him. The agreement, whereby Bonnell attempted to bind Gray, which required that the stock so issued be held further in escrow, was without effect upon the latter, because he had given no consent thereto; and he made no claim, so far

as appears in this action, to any part of the 50 shares of stock agreed by Magney to be delivered as a consideration of the second escrow agreement.

[3] Some argument is made by the intervener that the judgment is ineffectual as to the Spring Tire Company, and not perfect in other respects as affecting the other parties to the action; but of such deficiency or imperfection he is not entitled to complain. The judgment as to him is in plain terms, and sufficiently explicit to enable plaintiff to exact performance thereunder.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

(19 Cal. App. 234)

NATIONAL LUMBER CO. v. WICKLIFFE.

(Civ. 1,095.)

(District Court of Appeal, Second District, California. June 7, 1912. Rehearing Denied by Supreme Court Aug. 6, 1912.)

1. Mechanics' Liens (§ 271*) — Construction of Pleading—Presumption.

It will be presumed, against one seeking to foreclose his lien for materials furnished the contractor, that the contract of the owner did not provide for payment of more than $1,000, and so, though not filed for record and not in writing, was not, under Code Civ. Proc. § 1183, void; his complaint not stating the contract price, and the amendment thereof, made after the sustaining of a demurrer specifically pointing out such defect, not attempting to cure that defect.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494–513; Dec. Dig. § 271.*]

2. Mechanics' Liens (§ 271*)—Enforcement—Complaint.

It appearing affirmatively elsewhere in the complaint of a materialman to foreclose his lien that the purchase was not made by the owner of the premises, but that the goods were sold and delivered to the contractor, the allegation therein that the contractor was acting as the agent for the owner and as such purchased the materials, with the preceding statement that there was never any written contract, or contract filed for record, will be considered not an attempt to allege a sale to the owner through an agent in fact; but as a statement of a conclusion, with reference to Code Civ. Proc. § 1183, providing that where the amount agreed to be paid by the owner exceeds $1,000, the contract, unless in writing and filed for record, shall be void, and materials furnished by all persons, except the contractor, shall be deemed to have been furnished at the personal instance of the owner, and they shall have a lien therefor.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494–513; Dec. Dig. § 271.*]

3. Pleading (§ 54*) — Separate Counts — Repetition of Allegations.

An allegation in the first cause of action, in a complaint by a materialman to foreclose his lien, that there was money in the hands of the owner due the contractor at the time of the delivery of the stop notice and the filing of the lien, not being repeated in the second cause of action, forms no part of it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 118; Dec. Dig. § 54.*]

4. Appeal and Error (§ 934*) — Presumptions.

All intendments being in favor of a judgment, it must be presumed that the contract and papers before the court were such as to justify the judgment for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781, 3782; Dec. Dig. § 934.*]

5. Mechanics' Liens (§ 121*)—Materialmen—Notice.

A building contract having been valid, and the whole of the contract price having been paid under its terms before the filing of notice of lien or stop notice by one who furnished materials to the contractor, nothing remained in the owner's hands on which the notice of lien could operate, regardless of whether the building was completed 97 or 108 days before the filing of such notices, or of the effect which should be given Code Civ. Proc. § 1187, declaring an estoppel to assert a lien has not been filed in time if the owner of a building does not within a certain time after its completion file for record a notice of the completion.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 164; Dec. Dig. § 121.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the National Lumber Company against G. W. Wickliffe. Judgment for defendant. Plaintiff appeals. Affirmed.

R. L. Horton, for appellant. G. W. Wickliffe and P. M. Nash, for respondent.

ALLEN, P. J. The action is one to foreclose a mechanic's lien. The complaint originally set forth two causes of action. Plaintiff dismissed as to the first cause of action, and the case proceeded to trial upon the second. This alleged the ownership by defendant of a parcel of ground; that a contract was entered into between the owner and a certain corporation for the construction of a dwelling on the property for the sum of $———, under and by the terms of which said contractor agreed to furnish materials and labor and perform the contract; that the contractor purchased of plaintiff the materials mentioned in the complaint; that the same were sold to be used and were actually used in the construction of the house; that the house was completed on the 2d day of November, 1908, and no notice of completion has ever been filed; that on January 29, 1909, plaintiff filed its claim of lien, and on the 27th day of January, 1909, served upon the owner a stop notice under section 1184, Code of Civil Procedure. The answer denied the material allegations of the complaint, and upon the trial it was stipulated that the allegations of the complaint were true, except as to the labor done and materials furnished on the 2d of November, 1908, and of the date of the completion of the building. Upon these issues the court found in favor of defendant, and found that the building was in fact completed on the 22d of October, 1908, except for a certain lock for the front door and a certain lock for a sliding door which were furnished by plaintiff and put into said building on the 2d of November, 1908, at the request of defendant, in place of other locks placed therein prior to October 22d, which had also been furnished by plaintiff; that defendant took possession of said building and moved into the same on the 24th of October, 1908; that the changing of the locks on November 2d was the correction of a trivial imperfection in the work. There is evidence in the record tending to support these findings. The court found that plaintiff was not entitled to any lien against the property and gave judgment for defendant for costs. A motion for a new trial was filed, which was denied, and plaintiff appeals from the judgment and from the order denying a new trial, upon a bill of exceptions.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It will be observed that the contract was entered into and all work connected with the construction of the building performed before the amendment to sections 1183 and 1184, Code of Civil Procedure (Laws 1911, p. 1313). As section 1183 stood at the time of this contract and work, no contract of $1,000 or under need be reduced to writing or recorded. To the original complaint a demurrer was filed, specifically pointing out the defect in not stating the contract price. The demurrer being sustained, plaintiff amended its complaint, but made no attempt to cure the defect, and the case proceeded to trial without any matter appearing in the complaint as to the amount of the original contract price, nor does such amount appear in the record. If therefore the contract was for $1,000 or under, which must be presumed under the rule for the construction of pleadings, it was valid, and the only rights possessed by laborers or materialmen was to cause the contract price to be applied to the payment of their demands. In Stockton Lumber Co. v. Schuler, 155 Cal. 412, 101 Pac. 308, it is said: "The lien, in the case of a valid contract, extends to the contract price, and such contract price is the limit of the liability which may be imposed upon the owner or his property."

[2] The second cause of action alleges that there never was any written contract, nor any contract filed for record, which is followed by the statement that the contractor was acting as the agent for the owner in the premises and as such agent purchased the materials set forth. Taking the whole allegation together, it is not an attempt to allege a sale by the plaintiff to the defendant through an agent in fact, but a statement of the condition arising by noncompliance with the statute with reference to the recordation of a written contract where such is required by section 1183, Code of Civil Procedure, and the stipulation that the allegations of the complaint were true can be said to extend no further than that the contract was not in writing and was not recorded, but cannot be construed as an admission of an independent purchase by defendant, for it elsewhere appears affirmatively in the complaint that the purchase was not made by defendant, but that the goods were sold and delivered to the contractor.

[3] There is no allegation in the second cause of action that any sum was in the hands of the owner and due the contractor at the time the alleged stop notice was delivered or the lien was filed. We do find such allegations in the first cause of action, but they were not repeated and formed no part of the second. There was therefore nothing upon which the stop notice could have an effect, if the contract were a valid one.

[4] All intendments being in favor of a judgment, it must be concluded that the contract and papers before the court were such as to justify the court in its rendition of a judgment for the defendant, for the court finds, notwithstanding the failure to file for record, that defendant was entitled to a judgment. This judgment was warranted upon the theory that the contract was valid without recordation.

[5] If the contract were a valid one and the whole amount thereof paid under its terms before filing the notice of lien or stop notice, nothing remained in the owner's hands upon which the notice of lien could operate, regardless of the question of completion of the building, or the effect which should be given to section 1187.

Our conclusion, therefore, is that no facts showing the invalidity of the contract were either pleaded or proven, and the plaintiff's rights depend upon the fact whether or not the owner had any money in his possession belonging to the contractor at the time of the service of notice or filing of lien.

There being no claim in that regard, the judgment and order of the trial court should be affirmed; and it is so ordered.

We concur: JAMES, J.; SHAW, J.

19 Cal. App. 247

KERN VALLEY BANK v. KOEHN.

(Civ. 1,102.)

(District Court of Appeal, Second District, California. June 10, 1912. Rehearing Denied by Supreme Court Aug. 9, 1912.)

APPEAL AND ERROR (§ 194*) — PRESENTATION BELOW—ANSWER TO AFFIRMATIVE DEFENSE.

Where the defendant in an action on a promissory note filed a cross-complaint to which the plaintiff demurred, and the case went to trial without the demurrer being ruled on or any answer to it being filed, he could not on appeal for the first time complain of the want of such answer; the want of a formal answer to an affirmative defense being waived where both parties treat such defense as denied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241–1246; Dec. Dig. § 194.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by the Kern Valley Bank against Charles A. Koehn. From judgment for plaintiff and order denying a new trial, defendant appeals. Affirmed.

See, also, 157 Cal. 237, 107 Pac. 111.

E. L. Foster (E. J. Emmons, of counsel), for appellant. Geo. E. Whitaker, for respondent.

SHAW, J. Action to recover upon a promissory note. Judgment went for plaintiff in accordance with the verdict of a jury to which the issues were submitted for trial. Defendant appeals from the judgment and an order of the court denying his motion for a new trial.

The execution of the note was admitted. As an affirmative defense it was alleged the note was made without consideration, and that it was given in renewal of a former note made and executed by defendant to plaintiff, which first note at the time of executing the note herein involved had been paid by the transfer to the bank of certain personal property which, though transferred as a pledge to secure payment of said first note, was, in case defendant failed to pay the same at maturity, to be accepted by the bank in full payment and satisfaction of the indebtedness evidenced thereby. He made default in the payment thereof, and notwithstanding the alleged agreement he gave the new note herein sued upon which he says was requested by the bank as a matter of form only in order to balance its books. It is apparent from the verdict of the jury that it gave little weight to the meager evidence offered in support of these allegations.

Defendant with his answer filed a cross-complaint wherein, besides reiterating the affirmative defense set up in his answer, he asked to have a statement, whereby the plaintiff certified that the bank held certain personal property as security for the payment of the note in question, reformed so as to state that the bank had received the personal property in payment of said note. Plaintiff interposed a demurrer to the cross-complaint, and, as shown by the record, the parties went to trial without any ruling of the court thereon or the filing of any answer thereto. Appellant insists that, by reason of plaintiff's failure to file an answer thereto, the allegations of the cross-complaint should be deemed admitted. Plaintiff was not in default in not answering the cross-complaint for the reason that its demurrer was pending. Both parties, however, appear to have deemed the allegations of the cross-complaint in issue, and evidence touching the truth of the allegations was offered, without objection, as though there had been a formal denial of the same. Under these circumstances, appellant will not on appeal for the first time be permitted to raise the question of the want of an answer to the cross-complaint. Conant v. Jones, 3 Idaho (Hasb.) 606, 32 Pac. 250; Netcott v. Porter, 19 Kan. 131. The rule is well established that where both parties treat an affirmative defense as denied, the want of a formal answer thereto will be deemed waived.

An examination of the instructions given disclose no error which upon this record could have misled the jury to the prejudice of defendant.

The court properly excluded from evidence a letter of the bank wherein it was stated that it held certain personal property as collateral security for the payment of the note. The record discloses no theory upon which the statement could be deemed material or competent evidence.

The appeal is wholly without merit, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 238

BAXTER v. BAXTER et al. (Civ. 1,108.)

(District Court of Appeal, Second District, California. June 8, 1912. Rehearing Denied by Supreme Court Aug. 7, 1912.)

1. Fraudulent Conveyances (§ 110*)—Reservations for Benefit of Grantor—Conveyance for Future Support.

Where a grantor conveyed all her property in consideration of the grantee's contract to support her during her lifetime, she had an interest in the property which was subject to execution on a judgment against her, at least in so far as the value of the property exceeded the value of the support already given; a conveyance of all one's property in consideration of future support being void and presumptively fraudulent as to existing creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 352–359; Dec. Dig. § 110.*]

2. Fraudulent Conveyances (§ 225*)—Conveyance for Future Support—Estoppel.

While a creditor, who agrees to his debtor's conveying all her property to another in consideration of future support, is estopped to enforce his claim against the property conveyed, mere knowledge by the creditor that the conveyance is to be made, and his failure to object, do not create such an estoppel, although the grantee enters upon his contract without being aware of the debt, especially where the creditor did not know that the conveyance was to include all the debtor's property.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 653–657; Dec. Dig. § 225.*]

3. Fraudulent Conveyances (§ 282*)—Presumptions—Future Support.

A grantee, who promises future support to the grantor in consideration of the conveyance, is presumed to know that the transaction is fraudulent as to existing creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 817, 818; Dec. Dig. § 282.*]

4. Fraudulent Conveyances (§ 225*)—Estoppel.

A grantee, who accepts a deed given in consideration of a promise of future support, cannot invoke the doctrine of estoppel against the grantor's creditor who is seeking to enforce his claim against the property conveyed, where he has acted in reliance upon the validity of the deed, and not upon any act or omission of the creditor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 653–657; Dec. Dig. § 225.*]

Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by William A. Baxter against J. A. Baxter and another. From a judgment for plaintiff, defendant named appeals. Reversed.

Valentine & Newby, for appellant. Edw. F. Wehrle, for respondent.

SHAW, J. On March 9, 1906, one E. M. Baxter by deed conveyed all her property, consisting of certain real estate of the value of $5,000, to plaintiff herein; the consideration therefor being an agreement on the part of plaintiff to keep, maintain, and care for her during her lifetime. Upon the execution of the deed plaintiff entered upon the duties imposed upon him by his agreement. At the date of the transaction E. M. Baxter was indebted to J. A. Baxter in the sum of $669.83, for which sum, in an action instituted on October 17, 1906, a judgment was duly recorded against her. Thereafter, by virtue of an execution issued upon said judgment, the sheriff levied upon all interest of the judgment debtor in the real property so conveyed by her to plaintiff and advertised the same for sale to satisfy such execution. This action was brought to perpetually enjoin the sale of the property. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant J. A. Baxter appeals.

[1] It clearly appears that the effect of the conveyance was a transfer of the property to the use of the grantor, and since she possessed no other property out of which payment of the judgment so rendered could be enforced, she, in so far at least as the value of the property exceeded the value of the support theretofore given, had an interest therein subject to execution. As against existing creditors, one cannot transfer all his property in consideration of future support, and thus defeat the creditor in enforcing his claim. Under such circumstances, the law presumes the act to be done with fraudulent intent to hinder and delay the creditor in the collection of his debt. Harris v. Brink, 100 Iowa, 366, 69 N. W. 684, 62 Am. St. Rep. 578; Davidson v. Burke, 143 Ill. 139, 32 N. E. 514, 36 Am. St. Rep. 367; Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Harting v. Jockers, 136 Ill. 627, 27 N. E. 188, 29 Am. St. Rep. 341.

[2] At the close of the evidence plaintiff, by leave of court, filed an amendment to his complaint wherein, among other matters pleaded by way of estoppel, it was alleged that defendant "agreed and consented that the plaintiff should take said property; that the same should be conveyed to him by said E. M. Baxter in consideration of such care and maintenance." This alleged fact, denied by the answer, tendered a material issue which, if found in favor of plaintiff and relied upon by him, would estop defendant from enforcing his claim against the property. The court, however, failed to make any finding thereon. As to other allegations, the court found: "That on said 9th day of March, 1906, and prior to the execution of the deed described in the complaint on file herein, wherein and whereby E. M. Baxter deeded, granted, bargained, sold, conveyed, and confirmed unto W. A. Baxter all the property described in the complaint, the defendant J. A. Baxter had knowledge and notice that the said E. M. Baxter contemplated and intended to convey said property to said W. A. Baxter, the plaintiff herein, in consideration of the plaintiff agreeing to care for and maintain the said E. M. Baxter for and during the term of her natural life, and said J. A. Baxter did not object to such conveyance of said property; that immediately after the execution of said deed, and before the plaintiff entered upon the performance of his agreement and contract to so maintain said E. M. Baxter, the defendant J. A. Baxter had notice and knowledge of the execution of said deed, for the purposes hereinbefore mentioned; that he, the said W. A. Baxter at no time prior to a few days before the commencement of that certain action brought in the superior court of the county of Los Angeles, state of California, by the defendant J. A. Baxter against E. M. Baxter, being action No. 53,853 of said court, wherein a judgment was rendered on or about the 8th day of March, 1907, in favor of the defendant J. A. Baxter, had no notice or knowledge that the defendant J. A. Baxter had any claim against the said E. M. Baxter, or that the defendant J. A. Baxter made any claim that said E. M. Baxter was indebted to him, said J. A. Baxter, in any sum whatsoever; that plaintiff informed said J. A. Baxter of the execution and delivery of said deed on the day the same was executed and delivered, and the defendant J. A. Baxter made no objection of any kind or nature to the same; that plaintiff closed his business in the city of Monrovia, Cal., and then and there took charge of said E. M. Baxter and devoted the greater part of his time to her care; that it was impossible for plaintiff to care for said E. M. Baxter under the terms of his contract so executed with her without closing and discontinuing his said business in the city of Monrovia, Cal., aforesaid; that defendant J. A. Baxter had notice and knowledge of all of the foregoing facts; that the defendant J. A. Baxter did not at any time give plaintiff herein any notice of any claim against said E. M. Baxter until a few days before the commencement of that certain action brought by J. A. Baxter against said E. M. Baxter

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

hereinbefore referred to; that plaintiff, relying upon said deed so made and executed by said E. M. Baxter, entered upon the performance of his said contract, and ever since said date has been and now is caring for and maintaining said E. M. Baxter; that plaintiff, prior to and before he had any notice or knowledge of any claim of said J. A. Baxter against said E. M. Baxter, had for many months cared for and maintained said E. M. Baxter and had disposed of and closed his said business to enable him to carry out the terms of said agreement so made between plaintiff and said E. M. Baxter for her care and maintenance."

The effect of an estoppel, since it denies the owner's right to assert his claim, is to transfer his property to another. Hence, in order to justify a court of equity in decreeing an estoppel, there must not only be some degree of turpitude in his conduct, but it must appear: "First, that the party making the admission by his declarations or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." Boggs v. Merced M. Co., 14 Cal. 368. Measured by the rule thus laid down the findings disclose no facts upon which to predicate the claim that defendant is estopped from enforcing the collection of his debt against the property. All that appears therefrom is that, prior to the execution of the deed, defendant knew of the intention of E. M. Baxter to transfer the real estate to plaintiff in consideration of the latter's promise to support her for life, and that when informed of the execution of the deed he interposed no objection to the transaction; that at the time plaintiff did not know that defendant was a creditor of E. M. Baxter; and that defendant, with knowledge that plaintiff had entered upon the performance of his duties pursuant to the contract, did not acquaint him with the fact that he was a creditor E. M. Baxter until a short time before instituting suit against her for the collection of the debt. There is nothing in the facts found to show any degree of turpitude in defendant's conduct.

[3] As a matter of law, plaintiff is presumed to have known the transaction was fraudulent as to existing creditors; hence it was his duty, since he had the means of acquiring such knowledge, to make inquiry and ascertain whether or not there were existing creditors. Neither is it made to appear that defendant knew that E. M. Baxter, his debtor, was divesting herself of title to all her estate. If she had other property sufficient to pay his debt, then such transfer was not a matter which concerned him. Harting v. Jockers, supra.

[4] Moreover, the findings clearly show that plaintiff did not rely upon the silence of defendant in failing to give him notice of the fact that he was a creditor of E. M. Baxter, but it is expressly stated that he relied upon the validity of the deed whereby he acquired the property. Since plaintiff relied upon the deed, rather than upon anything done or omitted to be done by defendant, and without which reliance there can be no estoppel, he cannot claim to have relied upon the doctrine of estoppel. Powell et al. v. Rogers, 105 Ill. 318. Certainly it cannot be said that a creditor of one who fraudulently transfers his property will, as against the fraudulent grantee, be estopped from asserting his claim because, having knowledge of the proposed transfer, he fails to act affirmatively and notify such grantee that he is a creditor.

The facts found are insufficient to constitute an estoppel against defendant, and the judgment and order are therefore reversed.

We concur: ALLEN, P. J.; JAMES, J.

163 Cal. 343

In re BERTHOL'S ESTATE.

MOUSNIER v. TAYLOR. (S. F. 6,037.)

(Supreme Court of California. July 26, 1912.)

1. Wills (§ 403*)—Contest—Costs to Executor—Good Faith.

Under Code Civ. Proc. § 1720, which provides that the superior court may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate, as justice may require, the discretion of the court, while it may be exercised in favor of an unsuccessful proponent of a will, should be exercised only in his favor where he has acted in good faith.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 876; Dec. Dig. § 403.*]

2. Wills (§ 403*)—Contest—Costs to Executor.

Under Code Civ. Proc. § 1720, the superior court sitting in probate has no jurisdiction to make an order allowing expenses to an executor resisting the contest of the will, on application pending his appeal from a judgment denying probate of the will, since it is only upon a final judgment that the court can properly determine whether it would be justified in making the allowance.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 876; Dec. Dig. § 403.*]

Department 2. Appeal from Superior Court, Alameda County; F. B. Ogden, Judge.

Application to the Superior Court by Joseph Morcel, a nominated executor under the will of Therese Berthol, deceased, for an allowance of expenses incurred in resisting a contest against the probate of the will, prosecuted, after Morcel's death pending the application, by E. K. Taylor, as executor of his last will. From an order granting the application, Elsie Mousnier, administratrix of the estate of Therese Berthol, appeals. Reversed.

R. B. Tappan, for appellant. E. K. Taylor, for respondent.

LORIGAN, J. This is an appeal from an order allowing respondent's testate, who was one of the nominated executors under the last will of Therese Berthol, deceased, expenses incurred by such executor in resisting a contest against the probate of her will. Said nominated executor—Joseph Morcel—was made the principal beneficiary under the will and petitioned for its probate, whereupon a contest against the probate was filed by the daughter and only next of kin of deceased on the ground of alleged undue influence exercised by said Morcel upon the deceased to procure the execution of the will in his favor. The verdict of the jury on the trial of the contest was in favor of the contestant on that ground, and the judgment was entered denying probate of the will therefor. Thereafter the motion of said Morcel for a new trial being denied, he appealed therefrom and from the judgment. Subsequently, an administratrix of the estate of said Therese Berthol having been appointed, said Morcel applied to the superior court for an allowance out of her estate of his expenses incurred as nominated executor in the contest of the will on the ground that these expenditures were made in good faith. Pending this application, Morcel died, and respondent, as executor of his will, thereafter proceeded in the matter. Appellant, while admitting the expenditures in the sum claimed—$849.90—resisted the granting of the order, setting up in opposition thereto the verdict and subsisting judgment denying the probate of the will on the ground of undue influence of Morcel. The court granted the application and made the order from which this appeal is taken.

[1] The authority of the superior court sitting in probate to allow the costs and expenses of Morcel incurred in the contest of the will is based on section 1720 of the Code of Civil Procedure, as follows: "When it is not otherwise prescribed under this title the superior court * * * may, in its discretion order costs to be paid by any party to the proceedings or out of the assets of the estate as justice may require." While this provision of the Code places the matter of allowing costs and expenses within the discretionary power of the court, and permits it to be exercised in favor of an unsuccessful proponent of a will, still this discretionary power should be exercised only in his favor "as justice may require," where he has acted in good faith, and such discretion can be properly exercised only upon the final determination of the litigation.

[2] When the order here appealed from was made, there was no final determination of the controversy respecting which this allowance was claimed. It is only then that the court can properly determine whether it would be justified in making the allowance or not. In that respect the principle is declared in Estate of Yoell, 160 Cal. 741, 117 Pac. 1047, where there was under consideration an allowance for expenditures in the contest of a will, and where, in reversing the order, this court said: "The final determination of the litigation, consequently, must have a weight in influencing the court in the exercise of the discretion to award costs with which the law has vested it, and not until the final determination can that discretion be properly exercised."

In applying this principle, the merits of the application upon which an order purports to be based are not involved. Hence we make no discussion of them here. The court is simply without discretion to make any order until the final determination of the controversy. Under this view the superior court should have declined to entertain or act on the application in behalf of the nominated executor Morcel until the litigation was ended and the probate of the will finally allowed or rejected.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The order appealed from is reversed.

We concur: HENSHAW, J.; MELVIN, J.

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163 Cal. 346

CITY AND COUNTY OF SAN FRANCISCO v. HYATT, Superintendent of Public Instruction. (S. F. 5,988.)

(Supreme Court of California. July 26, 1912. Rehearing Denied Aug. 23, 1912.)

SCHOOLS AND SCHOOL DISTRICTS (§ 19*)—APPORTIONMENT OF FUNDS ACCORDING TO SCHOOL ATTENDANCE—AUTHORITY OF STATE BOARD OF EDUCATION—STATUTES.

Pol. Code, § 1532, subd. 4, required the state superintendent of public instruction to apportion the school fund as provided by section 1858, which, as amended by St. 1911, p. 527, adding subdivision 5, provided that according to the number of teachers, calculating one teacher for every district having 35 units of average daily attendance, and defined such unit as the total number of days' attendance divided by the number of school days, and a school day as that part of a day or night in which one-twentieth of the work of a school month was performed. Pol. Code, § 1617, gave local school boards the same authority to prescribe rules as that possessed by the state board of education over the public schools of the state. Section 1697 declared 20 days, or 4 weeks of 5 days each, to be a school month. Section 1673 provided that no school should be in session more than six hours a day. Section 1663, subd. 2, required city or county boards to prescribe the course of study in day and evening schools. Sections 1543, 1664, 1665, 1771, and 1874 authorized such boards to prescribe and enforce a course of study and to amend or change it, and enumerated the branches to be taught in public schools. Section 1874 made it the duty of the state board to select text-books in such enumerated branches, to be used by the local boards in prescribing courses of study. And section 1861 provided that state school funds should be used only to pay salaries of teachers of the day and night elementary schools. The state board of education, empowered by Pol. Code, § 1521, to adopt rules for public schools not inconsistent with the laws of the state, adopted a rule that the minimum school day for schools sharing in state funds on a basis of average daily attendance should be four hours, each hour to be estimated as one-fourth of a day, which operated to cut down the apportionment to evening schools, in which the attendance averaged only two hours a day, to one-half the apportionment to day schools, averaging four to five hours a day. *Held* that, there being no statute expressly limiting the power of the state board or expressly conferring such power upon the local boards, the rule was valid as being within the general powers of the state board.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 34–37; Dec. Dig. § 19.*]

In Bank. Mandamus by the City and County of San Francisco against Edward Hyatt, Superintendent of Public Instruction of the State of California. Writ denied.

Percy V. Long, City Atty., and J. F. English, Asst. City Atty., for petitioner. U. S. Webb, Atty. Gen., John H. Riordan, and W. H. Cobb, for respondent. J. D. Fredericks, Dist. Atty. of Los Angeles County, and Byron C. Hanna, Deputy Dist. Atty. of Los Angeles County, amici curiæ.

LORIGAN, J. This is a petition for a writ of mandate, and involves particularly the validity of a rule of the state board of education providing a minimum of four hours as the attendance necessary in the elementary schools of this state to constitute a school day's work in the matter of the apportionment of the state school funds to the different school districts.

Preliminary to quoting the rule adopted by the board and as bearing on the question of its validity, certain sections of the Political Code must be referred to.

Section 1532 of that Code, subdivision 4 thereof, requires the state superintendent "to apportion the state school fund" and "in apportioning said fund he shall apportion to every county and to every city and county two hundred fifty dollars for every teacher determined and assigned to it on school census by the county or city and county school superintendent for the next preceding school year as required of the county or city and county school superintendent by the provisions of section 1858 of this Code, and after thus apportioning two hundred fifty dollars on teacher or census basis, he shall apportion the balance of the state school fund to the several counties or cities and counties according to their average daily attendance as shown by the reports of the county or city and county school superintendents for the next preceding year." This section 1858, referred to in said section 1532, as it stood prior to the session of the Legislature of 1911, read as follows: "The school superintendent of every county and city and county must apportion all state and county school moneys for the primary and grammar grades of his county or city and county as follows: (1) He must ascertain the number of teachers each school district is entitled to by calculating one teacher for every district having seventy or a less number of census children and one additional teacher for each additional seventy census children, or fraction of seventy not less than twenty census children, as shown by the next preceding census." Provision is further made that any moneys remaining after the apportionment on the census basis should be apportioned to the several districts in proportion to the average daily attendance for the preceding school year. This section was amended in 1911 (Stats. 1911, p. 527), and as now in effect reads, as to the apportionment of all state and county school moneys by the school superintendent of every county and city and county for the elementary grades therein as follows: "(1) He must ascertain the number of teachers each school district is entitled to by calculating one teacher for every district having thirty-five or a less number of units of average daily attendance and one additional teacher for each additional thirty-five units of average daily attendance, or fraction of thirty-five not less than ten units of average daily attendance as shown by the annual school report of the school district for the next preceding school year; and two additional teachers shall be allowed to each district for every seven hundred units of average daily attendance," etc. At the same session a new subdivision was added to this section as follows: "(5) Units of average daily attendance wherever used in this section shall be construed to be the quotient arising from dividing the total number of days of pupils' attendance in the schools of the district by the number of days school was actually taught in the district. A school day is hereby construed and declared to be that portion of the calendar day or night in which school is maintained and in which one twentieth of the work of a school month may be performed. The attendance of pupils present less one fourth of any day shall not be counted for that school day and pupils present for one fourth of a day or for more than one fourth of a day shall be counted as present for one fourth of a day, one half of a day, three fourths of a day, or for a whole day, as the case may be."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Subsequent to the taking effect of these amendments to section 1858, the state board of education adopted the following rule, the validity of which is the main point in controversy: "The School Day: Computing Average Daily Attendance. The minimum school day for any school sharing in state funds on a basis of average daily attendance shall consist of not less than four hours of actual work and attendance exclusive of recesses. Each school day shall be divided into four approximately equal parts. One-fourth of a day's attendance shall consist of actual work and attendance for not less than one hour, exclusive of recesses; one half of a day's attendance shall consist of actual work and attendance for not less than two hours exclusive of recesses; three fourths of a day's attendance shall consist of actual work and attendance for not less than three hours, exclusive of recesses. In no event shall attendance by any individual on one calendar day be construed as more than one day's attendance. The word hour as used in this rule means a sixty minute hour. This rule shall govern the computation of average daily attendance in day and evening elementary and high schools, polytechnic, industrial, agricultural, and all other schools drawing state money on a basis of average daily attendance."

The powers of the state board of education as far as involved here are enumerated in section 1521 of the Political Code: "The powers and duties of the state board of education are as follows: (1) To adopt rules and regulations not inconsistent with the laws of the state for its own government and for the government of the public schools and district school libraries. * * *"

The substantial allegations of this petition for a writ of mandate are that, under the law, respondent state superintendent is required to give, and has always heretofore given, in computing the average daily attendance in elementary schools consisting of day and night schools, for the purpose of determining the annual apportionment of state school funds thereto, credit to the elementary night schools on an equal basis with the elementary day schools, making no discrimination between them; that he has calculated a night session of such night schools as being the equivalent of a day session for that purpose; that said respondent threatens and intends to now follow said rule of the state board of education fixing a minimum school day in making an apportionment of state funds to the elementary day and evening (night) schools; that by said rule the minimum for a school day is fixed at not less than four hours daily work and attendance; that the average attendance in evening elementary schools of the city and county of San Francisco and elsewhere in the state is, and necessarily will continue to be, an average period of two hours each night, while the average daily attendance in day elementary schools in said city and county and throughout the state is, and will continue to be, a period of from four to five hours; that under the rule adopted credit will only be given by said respondent for elementary work done in night schools in the various school districts upon the basis of one-half or less of the credit given to day elementary schools in said districts; and that the application of such rule to the apportionment would cut down the appropriation to which the elementary schools of the city and county of San Francisco claim they are entitled, to the extent of $16,759.

The claim of petitioner is that the state board of education had no authority to adopt the rule in question because under certain sections of the Political Code to be referred to, taken in connection with subdivision 5 of section 1858, it is asserted that the power to determine the length of time to constitute a minimum school day for the purpose of apportioning the school funds has been left exclusively to the local boards of education.

As a special basis in support of this position certain sections of the Political Code other than we have mentioned are relied on by petitioner. Section 1697 thereof declares that "a school month is construed and taken to be twenty days or four weeks of five days each, including legal holidays." Section 1663, subdivision 2, provides that "the county or city and county boards of education must, except in incorporated cities having boards of education, on or before the first day of July of each year, prescribe the course of study in and for each grade of the day and evening schools for the ensuing school year," and provisions of the city charter of the city of San Francisco are to the same effect. Section 1771 confers power on county boards of education "to prescribe and enforce in the public schools a course of study," and section 1543 requires the county superintendent of schools of each county "to enforce the course of study." Section 1673 provides as to the duration of school sessions that "no school must be continued in session more than six hours a day. * * *"

Under these sections it is insisted by petitioner that, while the Legislature has fixed the maximum school day (by section 1673 just quoted) to be six hours, it has never established any minimum school day, but has left that to the local boards as incident to their right to determine the course of study; that authority to establish the course of study necessarily confers power on them to prescribe also the hours of study thereof—in effect to fix the minimum school day—and hence, when any local school board has determined what shall constitute a month's school work in said courses and has fixed the length of daily or nightly session in which one-twentieth of the school month work may be performed, such session, under subdivision 5 of section 1858, shall, for the purpose of apportioning school funds, be considered a school day's work, no matter what the hours less than the maximum may be which the local board has fixed; and that this authority cannot be interfered with by the state board of education under a rule making an average of four hours' daily attendance a minimum school day, with the result that in apportioning funds to the school districts the school work in the night schools, which necessarily cannot exceed two hours, shall only be credited with one-half the amount which is allowed for a day's work in a day school.

As against this claim, the position of respondent is that the authority to fix a course of study given the local boards of education confers no exclusive power upon them to prescribe whatever hours they see fit less than the maximum as constituting a minimum school day, and that subdivision 5 does not imply the existence of any such right, nor does it define of itself what shall constitute such school day. Hence it is claimed that as the local boards have not the authority asserted, and the Legislature has not specified in subdivision 5 of section 1858, what shall constitute a minimum school day, since it only defines a school day generally, it was the intention of the Legislature to leave the matter of fixing the length of the minimum school day session to the state board of education, particularly as it had theretofore declared what should constitute the maximum school day.

We are of the opinion from a consideration of the various sections referred to, particularly the later amendment of section 1858 which reflects the obvious intention of the Legislature, that the position of the respondent is correct.

It is apparent, we think, under the general power conferred on the state board of education "to adopt rules and regulations not inconsistent with the laws of this state * * * for the government of public schools," that it has the authority to define what shall constitute a minimum school day for any purpose, even for the apportionment of school funds, in the absence of any law defining it, or power elsewhere conferred to do so. The conference of this general power upon the state board of education is in harmony with the constitutional provision (article 9) requiring the adoption of one system of common schools which shall be applicable to all the common schools of the state, and the term "system" itself imports a unity of purpose, as well as an entirety of operation. Kennedy v. Miller, 97 Cal. 429, 32 Pac. 558. Aside from general legislation designed to secure this entirety of operation and with a view to promote it, power to do so is expressly conferred on the state board, and unless there is some law which otherwise governs, it would appear that as this rule fixing the minimum school day operates in the apportionment of the state school funds equally and uniformly throughout the state without discrimination, it is within the power of the state board to prescribe it.

If the rule adopted by it, in question here, is unauthorized it can be so only because, as contended by petitioner, the various sections of the Code upon which it relies, taken in connection with subdivision 5 of section 1858, confer exclusive power upon the local school boards of education to regulate the length of the school day for all purposes, and the existence of this power precludes the state board from attempting to exercise any authority upon the subject of the regulation for the apportionment of school funds. But certainly no section of the Code referred to by petitioner confers any such power on the local boards, or places any such limitation on the authority of the state board, nor impliedly requires any such construction.

Particular reliance is placed on those sections of the Political Code cited, which require the local boards to prescribe "the course of study" for each grade in the schools, and the argument is that the power to prescribe the course of study necessarily confers the power to determine the hours of daily or nightly session for the study thereof—therefore authority to determine the minimum school day. It is quite clear, however, what is meant by the "course of study" which these local boards shall prescribe through reference to section 1665 of the same Code, in which the various branches to be taught in the public schools and which shall constitute the course of study therein are specifically enumerated. The requirement that the local boards shall prescribe a course of study is a mandate that they shall establish a course which shall embrace the enumerated branches. While in doing so some measure of discretion is given to the local boards as to the extent of the course and authority also given them to amend or change it whenever they deem it necessary (section 1664, Pol. Code), this discretion is still to a degree controlled by the state board of education, as it is given the right and made its duty (section 1874, Pol. Code) to select the line of textbooks in these enumerated branches which must be used by the local boards in prescribing the course of study in the schools and the use of which the state board must enforce. In the section relied on, no power is expressly given to do anything else than to prescribe this course; nothing conferring on them the exclusive authority to fix the time or hours per day when any one of the prescribed branches shall be studied, or the length of the school day which shall be devoted to their study as a course. It may be conceded that, from the duty enjoined on the local boards to prescribe a course of study, it must logically follow that the local boards are authorized to determine the daily session for the study of such course; but still it does not legally follow that this amounts to an exclusive right to determine that this session shall constitute a minimum school day for all purposes under the school laws, or even confer exclusive right to determine what shall constitute a minimum school day for the study of the course in the schools where required. There is nothing inconsistent in requiring the local boards to prescribe a course of study and, on the other hand, empowering the state board of education to determine what shall constitute a minimum school day for its study. The Legislature in the first instance, in requiring the local boards to prescribe such a course, and using the same language now found in the sections, might have in addition declared what should constitute a minimum day for the study thereof. It would be the duty of the local boards thereunder to prescribe a course, the study of which should engage the minimum school day as so fixed. Only the same result would follow under the power conferred on the state board to do so and the exercise of it.

It may not be questioned but that, in the absence of any statute or rule of the state board on the subject, the local board could exercise the right to regulate the school day sessions in their respective cities or counties. This power exists, however, not by virtue of their right to prescribe a course of study, but under section 1617 of the Political Code, which gives them the same authority over the schools in their district that is conferred on the state board over the public school throughout the state, namely, "to prescribe and enforce rules * * * for the government of schools" within their districts. But the exercise of this power is subject to the control of the state board on that subject, because in this same section it is declared that such rules must be "not inconsistent with law or those prescribed by the state board of education." It is apparent from this section that, except as to those matters where express power is conferred on the local board to act exclusively, it was the intention of the Legislature to make their action, relative to public school matters, secondary and subsidiary to the control of the state board. Under the section last referred to, the local boards might fix the session of the schools in their district, and hence determine what should constitute a minimum school day therefor; but the power in that respect was subsidiary to that of the state board and subject to control and regulation by it at any time that it deemed it proper to act in the matter, and the regulation of the state board would abrogate any rule which might have been adopted by the local boards for a minimum school day, if in conflict with that prescribed by said board.

It is of no moment, in considering the power of the state board, that it had not deemed it necessary heretofore to exercise control over the local school boards in the matter of school sessions or to fix a minimum day therefor. It simply indicates that the public school system throughout the state, in the matter of daily sessions of schools as heretofore prevailing, was so established by the local boards as to render any rule of the state board on the subject unnecessary. In fact, as to such a session the state board has not undertaken now to interfere with its regulation by the local school authorities, but simply to define a minimum school day for the purpose of apportioning the school money under the new system of apportionment. Under the old system the apportionment was made on the basis of the number of census children in the school district, whether they actually attended the schools thereof or not, and the remaining money was apportioned on the basis of the average daily attendance, regardless of how long the pupils remained at the school session or how long a session of school was prescribed. The school day under that system was of no importance except to ascertain the average daily attendance for the purpose of distributing the surplus money after the apportionment on the census basis, and the length of the school session was of no importance for any purpose.

Under the new system provided for by the amendment to section 1858, making the "unit of average daily attendance" the exact basis of apportionment, the minimum school day became an important factor in calculating the apportionment, and, on the assumption that no such day had been fixed by the Legislature, or power vested elsewhere to determine it, the state board undertook to fix it. Having the general power to regulate for the public schools throughout the state, it could pass any rule or regulation for that purpose which it deemed necessary, unless constrained by some statutory provision. It cannot be said that the fixing of a minimum school day for the purpose of apportioning state school funds is not a proper part of the government of the public school system. Nor do we understand petitioner to claim that the powers conferred upon the state board are not comprehensive enough to embrace authority to fix a minimum school day for all purposes, including the apportionment of the school funds, in the absence of any legislation on the subject. The claim only is that the power has been exclusively conferred on the local boards, and the daily school session as fixed by them is recognized in subdivision 5 as a minimum school day for the purpose of apportioning the state school fund. This claim of exclusive power vested in the local boards, for the reasons given above, we deem untenable, and, unless there is some merit in the claim of petitioner under subdivision 5, we are satisfied that the state board, in the exercise of its paramount authority respecting the public schools of the state, had the right to adopt the rule in question declaring what should constitute a minimum school day.

As to subdivision 5 of section 1858: The purpose of adding this subdivision to the section will be readily observed. While this amended section made the "unit of average daily attendance" the basis of apportionment for the state funds, it did not define what was meant thereby, and subdivision 5 was added for that purpose. In so defining it, it is stated therein that "a school day is hereby construed and declared to be that portion of the calendar days or nights in which one-twentieth of the work of the school month may be performed." Petitioner contends that thereby the minimum school day was fixed; that the declared intention of the Legislature was to make the unit quantity of daily work as fixed by the local boards govern as to such day for the purpose of apportionment. But if this was its intention, certainly the language used does not clearly or definitely express it, or really express it at all. All that is declared is that a school day is that portion "in which one-twentieth of the work of the school month may be performed," and after the definition has been read the inquiry still presents itself, What is the minimum school day? There is nothing clear or determinative on the subject in the language used. The most that can be said for it is that it defines a school day generally. When the Legislature had occasion to define a maximum school day, it defined it plainly and on a basis of hours, and if it had intended to itself define a minimum school day in this subdivision 5, we would naturally expect to find it defined on a similar basis of time. If it was intended to depart from this standard previously employed and provide for some other, we would look to find some clear expression of that intention. In other words, if it was intended that the quantity of a school day's work, as it might be variously fixed by the different local boards throughout the state, should constitute a minimum school day, we would expect to find something definite to that effect. But we find in the subdivision nothing of the kind. It contains no expression of intention to define the minimum school day on the basis of quantity of daily work as fixed by the local school boards, or on such a basis at all; nor, on the other hand, does the language contain the slightest suggestion that time or hours of daily session be made the basis. It simply does not define the minimum school day at all, nor declare any standard—whether the unit quantity of work or the unit of time—whereby it shall be fixed. If it had intended to define a minimum day itself, or to declare that the unit quantity of daily work, as the local school boards throughout the state might variously determine the period for its daily performance, should constitute a minimum school day, or that the time or hours as the unit of the basis should not be employed for that purpose, it was a very easy thing for the Legislature to have plainly said so. An entire absence of any statutory declaration, or the presence of any language from which it can be reasonably inferred, strongly implies that it did not intend to declare anything on the subject of a minimum school day, or provide any standard under which it should be determined, but to leave the whole matter to that body which, in the absence of any direct legislation on the subject, was empowered to deal with it, namely, the state school board. It doubtless concluded that the board charged with the duty of regulating the public schools would be in a much better position than itself to regulate that subject. It was not necessary for the Legislature to provide all the details in its legislation on the new system of apportionment. Having legislated on that subject as far as it deemed reasonably practical, it could leave the matter of the length of daily sessions of the schools—or the fixing of the minimum day—to the discretion of the state board.

That its purpose was to do so we think is quite apparent when we consider the intention of the Legislature in establishing the new system of apportionment of the state funds. Under the old method, the apportionment thereof was based on the number of census children in the district, whether they attended the schools or not, and the surplus distributed on the basis of average daily attendance, independent of any consideration of the time the pupils spent in school. Under this system, in the more populous districts of the state, where census children attended private schools and did not attend the public schools, these children were, however, enumerated and entered into the basis upon which such districts, to that extent, unnecessarily participated in the state school fund, to the disadvantage of less populous districts and where the schools were better attended, while under the same system distribution of the surplus fund was made on a basis of average daily attendance, irrespective of the length of time the children spent at the daily sessions or how long those sessions lasted. Under the new system the basis of apportionment is radically changed, and but one basis provided for, namely, the unit of average daily attendance. The general intention of the Legislature was to establish a more definite and exact and apparently a more fair and equitable method or basis of apportionment than previously obtained; to apportion the funds to the schools in proportion as the necessary cost and expense of their maintenance as represented by the unit of average daily attendance. While providing generally a basis to attain that end, no standard by which the unit of attendance should be measured was fixed by the Legislature. As we have said, it was not necessary that it should legislate as to the details, for a board existed, empowered to further the intent by its separate action, and in making the rule in question the state board did so by establishing a minimum school day based upon time as the unit under which the apportionment should be made. There can be no question but that this standard was a proper and definite one. It is that which is generally employed in educational matters where, as pointed out by respondent, high school pupils are credited to the state university, and that university itself credits its students upon "units," signifying so many hours of work in the classroom during the term. This is a proper, adequate, and definite standard, capable of being sustained on various considerations, if it were necessary here to do so. In fact, the complaint is not that it is not a definite or proper standard, but that it is too definite as applied to the night schools. But definiteness and exactness as to all schools was the very matter which the Legislature contemplated; to remove under the new system the laxity which prevailed under the old, by precluding particular schools throughout the school districts or classes of schools therein which are maintained either daily or nightly for but one or two hours, or even a less period of session, from receiving the same apportionment as those conducted for longer hours or for the maximum time. While it is true that under the Constitution the day and night elementary schools are placed on an absolute equality, this, as far as the apportionment of school funds for their maintenance is concerned, only means that no discrimination should be made between them. This rule of the state board makes none. It operates equally and uniformly upon all schools upon the basis of average daily attendance calculated under the established minimum school day. On the theory of petitioner, as the day schools are conducted for at least four hours and night schools, admittedly, for not exceeding two, the former, in order to get the same apportionment as the latter, would be compelled to maintain a session of twice the length. This would create a decided lack of uniformity and constitute a discrimination in favor of the night as against the day schools which it was designed by the Legislature under the new system of apportionment to prevent, and which is effectually prevented under the rule of the state board.

The beneficence of night schools is unquestioned; but it is to be noted that they exist almost entirely in the large cities, are for the benefit particularly of the residents thereof, and, in the nature of things, as their sessions do not exceed two hours, the expense of their maintenance cannot equal that of the day schools having sessions of twice that length. Under section 1861 of the Political Code, "the state school fund must be used for no other purpose than the payment of the salaries of teachers of primary and grammar schools," being the day and evening elementary schools. The principal element in the expense of the maintenance of schools is the salary of teachers, to pay which the state fund must be devoted, and this expense is based on the duration of their employment. Necessarily, this cannot be the same as between teachers employed in the night and day schools, and, in the ordinary course of things, the teacher employed but one-half the time that another is employed receives but one-half the compensation.

Under these circumstances, we would hardly expect to find the Legislature in subdivision 5 declaring, either expressly or impliedly, that the unit quantity of school work prescribed to be daily or nightly performed by the local school board, no matter how limited its sessions for the performance thereof might be, should constitute a minimum school day for the purpose of equal apportionment of the school funds, with schools holding longer sessions or impliedly declaring against the fixing of the minimum school day on the time or hour basis.

It is of no moment, on the question of the authority of the state board to fix such school day for purposes of apportionment, to consider how the rule adopted has affected the efficient maintenance of the night schools. No such question is involved. It is simply one of power and authority of the board to make the regulation, and in the absence of any express legislation on the subject or authority vested in the local boards to determine it, we are satisfied that the state board had this authority and that the rule in question is valid.

The application for the writ is denied.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

19 Cal. App. 286

LAMB et al. v. WILKE. (Civ. 1,100.)

(District Court of Appeal, Second District, California. June 19, 1912. Rehearing Denied by Supreme Court Aug. 16, 1912.)

1. Appeal and Error (§ 1010*)—Review—Questions of Fact.

Where there is some competent evidence to support each finding of the trial court, it is not within the province of the Court of Appeal to weigh the testimony, thereby substituting its judgment for that of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

2. Evidence (§ 269*) — Admissibility—Declarations.

In an action to set aside a deed of a decedent for fraud, undue influence, and lack of mental capacity, declarations of the decedent some time before its execution with reference to the disposition he intended to make of his property was competent as bearing on his mental condition, but not to prove fraud or undue influence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1063–1067; Dec. Dig. § 269.*]

3. Evidence (§ 501*) — Opinions — Mental Condition.

In an action involving the mental condition of a deceased person on a particular date, an intimate acquaintance may express his opinion of his mental condition when followed by a statement of the facts upon which his opinion is based tending to show his mental condition at that time, for months preceding, and on the day following the date in question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2292–2305; Dec. Dig. § 501.*]

4. New Trial (§ 108*)—Newly Discovered Evidence—Materiality.

A new trial should not be granted for newly discovered evidence unless it is of such a character as to render a different result probable on the new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.*]

5. Appeal and Error (§ 981*)—Discretion of Trial Court—New Trial.

On a motion for a new trial on the ground of newly discovered evidence, the trial court exercises a discretionary power which will not be interfered with except when manifest abuse is apparent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by A. W. Lamb and others against Frederick G. Wilke. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. T. Morrow and A. R. T. Truex, for appellant. Joseph Scott, James L. Irwin, and Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondents.

ALLEN, P. J. Action to set aside a deed executed by one James D. Watson, deceased, to appellant while deceased was of unsound mind and acting under undue influence of appellant. Plaintiffs and respondents are nephews and nieces of the deceased. The action was tried by the court, which finds all of the material allegations of the complaint to be true; that Watson was of the age of 76 years at the time of the execution of the deed and was of unsound mind and incompetent to make a contract; that at such time he did not possess a mind sufficiently clear and strong to enable him to know and understand the nature of the act in which he was then engaged, or to know and recollect those who were the natural objects of his bounty; that at the time of the execution of the deed he was sick and suffering from a disease causing his death two days thereafter; that he was upon his deathbed when the deed was signed; that deceased had no independent advice, but acted solely upon the inducement and advice of defendant; that no consideration was paid for the deed; that at the time of the conveyance of said property, and for some time prior thereto, Watson implicitly confided in and trusted defendant and wholly depended upon defendant's advice and counsel in matters of business, and a relation of trust and confidence existed between them; that said deed was delivered and recorded on the 24th day of January, 1908, the day succeeding the date of its execution and the day preceding the date of the death of the grantor; that defendant immediately took possession of the property; that Watson did not know the nature or consequence of his act and was incapable of understanding its force and effect at the time of the execution of the deed, and was not then of sound and disposing mind. The court set aside the deed, and from this judgment and an order denying a new trial defendant appeals.

[1] The principal specifications presented by appellant relate to the insufficiency of the evidence to justify the findings. No good purpose would be served by incorporating herein a résumé of the evidence. We think it sufficient to say that a careful examination of the entire record demonstrates that there was some competent evidence before the court justifying each and every finding by the court made. The cause was tried by a learned jurist, competent to weigh the testimony and consider the force and effect which should be given the statements of witnesses. These witnesses, whose statements were conflicting and irreconcilable, were before the trial court, and it determined to what statements credit was due, and it is not within the province of this court to weigh the testimony, thereby substituting its judgment for that of the trial court.

[2] Appellant claims prejudicial error on account of the action of the trial court in permitting the witness Lundregan to testify to conversations had with the deceased some time before the execution of the deed with reference to making a disposition of his property. It may be conceded, "where the testator was, beyond question, of sound mind, such statements were entitled to no weight at all, in the absence of proof of influence as to the very testamentary act." In re Mc-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Devitt, 95 Cal. 17, 30 Pac. 101. While such declarations are not admissible to prove undue influence or fraud charged, they are, however, admissible to prove the state of mind or mental capacity. One of the chief allegations, the thing most relied upon, was the matter of the grantor's soundness of mind at the time of the execution of the deed. As said in Estate of Arnold, 147 Cal. 593, 82 Pac. 256: "The external facts constituting the exercise of undue influence must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state, and give a picture of the condition of his mind contemporaneous with the declarations themselves." See, also, In re Calkins, 112 Cal. 301, 44 Pac. 577. The whole narrative objected to went more toward establishing the mental condition of deceased than that of anything else, and, in so far as it tended to establish his mental condition, it was in our opinion, competent evidence.

[3] It is also claimed the court erred in permitting the witness Lundregan, who was shown to have long been a familiar and intimate acquaintance, to testify as to his opinion of the mental condition of deceased on the day preceding the execution of the deed. This opinion was followed by a statement of facts upon which such opinion was based, not only tending to show his mental condition on that day, but for months preceding and upon the day succeeding the execution of the deed. We think there was no error which intervened on account of the admission of such evidence.

[4, 5] It is finally claimed by appellant that the court erred in denying his motion for a new trial based upon affidavits disclosing newly discovered evidence. The most that can be said of these affidavits is that they tended to show that upon a new trial defendant would be able to establish that the statement of plaintiffs' chief witness as to the amount Watson received from a certain crop was untrue, and that the statements made by Watson to such witness as to the ownership of certain horses were untrue. Under the rule that newly discovered evidence should be of such character as to render a different result probable upon a new trial, and such question being one to be determined by the trial court in the exercise of a discretionary power, which power will not be interfered with except when manifest abuse is apparent (Oberlander v. Fixen & Co., 129 Cal. 692, 62 Pac. 254), we are unable, as said by the court in People v. Buckley, 143 Cal. 392, 77 Pac. 176, to say "that it is clear that the proposed evidence would render a different result probable." We are of the opinion that the entire record develops evidence in support of the findings, that such findings are sufficient to support the judgment, and that no prejudicial error intervenes.

Judgment and order affirmed.

We concur: JAMES, J.; SHAW, J.

(19 Cal. App. 280)

PEOPLE v. SCHENONE. (Cr. 180.)

(District Court of Appeal, Third District, California. June 17, 1912.)

1. FALSE PRETENSES (§ 16*)—LARCENY (§ 14*)—DISTINGUISHING ELEMENTS.

An instruction that the distinction between larceny and obtaining money by false pretenses turns on the question of title, that if, when the taking is consummated by the use of a trick, artifice, or device, the complaining witness being deceived by the act or representations of the defendant parts not only with the possession, but also with the title to his property, the offense is obtaining property by false pretenses, but if the complaining witness only parts, and only intends to part, with the possession of his property and not with the title, the offense is larceny, was correct.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 20, 25; Dec. Dig. § 16;* Larceny, Cent. Dig. §§ 34–38; Dec. Dig. § 14.*]

2. FALSE PRETENSES (§ 16*)—LARCENY (§ 14*)—CONFIDENCE GAME—EVIDENCE.

Complainant intrusted his money to defendant with the understanding that defendant and his confederate B. were each to contribute a like sum to a common fund to be used for the advantage of all. Neither defendant nor B. contributed anything to the enterprise, but retained complainant's money. *Held* that, until contributions had been made by defendant and B., the title to complainant's money remained in him and was the subject of larceny, and hence the withholding thereof constituted larceny and not false pretenses.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 20, 25; Dec. Dig. § 16;* Larceny, Cent. Dig. §§ 34–38; Dec.Dig. § 14.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Manuel Schenone was convicted of grand larceny, and he appeals. Affirmed.

Webster & Webster and S. N. Blewett, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

BURNETT, J. The defendant, having been convicted of grand larceny, appeals from the judgment and the order denying his motion for a new trial.

The principal contentions of appellant are that the court erred in the matter of instructions and that the defendant was entitled to an acquittal for the reason that the offense, if any, was that of obtaining money by false pretenses, instead of grand larceny.

[1] Appellant concedes that "it would be very difficult for us to point out the specific particulars wherein the instructions prejudice the substantial rights of the defendant." As might be expected from this statement, we find no less difficulty in the premises.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The point to which special attention is directed—that is, the importance of instructing the jury clearly in reference to the distinction between these two different offenses—received due consideration from the court. For instance, it was declared: "The distinction which the law makes between larceny and obtaining money by false pretenses turns on the question of title. If, when the taking is consummated by the use of trick, artifice, or device, the complaining witness, being deceived by the acts or representations of the defendant, parts not only with the possession, but also with the title to his property, the offense is that of obtaining property by false pretenses; but if the complaining witness only parted and intended only to part with the possession of his property, and not with the title, the offense is larceny." This proposition was somewhat elaborated in other instructions, and the jury were expressly charged that: "The burden is upon the prosecution in this case to prove the offense charged, and if the prosecution fails to prove that the defendant committed the crime of larceny, even though the evidence may tend to prove some other offense, you must find the defendant not guilty, and if you believe from the evidence that at the time the complaining witness, G. Saloni, parted with the possession of the $137, he also at the same time parted with the title to the same, although the same was induced by fraud, misrepresentation, or artifice on the part of the defendant, nevertheless I instruct you to acquit the defendant." Indeed, the jury were fully and correctly instructed upon every phase of the case necessary for their enlightenment, and no error was committed in refusing certain instructions proposed by the defendant.

[2] It is equally clear that the verdict finds support in the evidence. It was a reasonable inference from all the facts, as implied in the verdict, that the complaining witness did not intend, at the time of the transaction, to vest in the defendant the title to the money in question, and that it was the defendant's purpose at all times to obtain possession of the money by trick and device and afterwards appropriate it to his own use. The money was intrusted to the defendant with the understanding that he and his confederate, one Ballo, were each to contribute a like amount to the common fund to be used for the advantage of all. It is probably unnecessary to add that neither the defendant nor Ballo contributed anything to the common enterprise, and until they did so the title to the money remained in the prosecuting witness and was the subject of larceny. The principle governing such cases is fully discussed in People v. Delbos, 146 Cal. 737, 81 Pac. 131, and People v. Arnold, 17 Cal. App. 68, 118 Pac. 729, and we deem it unnecessary to add to what is therein stated.

The case here, in brief, is that of a slick swindler who, by means of cajolery, misrepresentations, and dalliance with an easy victim's weakness for liquor, secured, with the fraudulent intent of appropriating to his own use, the money of the prosecuting witness; the latter consenting to the change in its possession for a certain purpose that was never consummated and never intended by the defendant to be consummated. The proof of guilt is entirely satisfactory and the record should not be examined with a miscroscope to discover abstract error.

The fact is, though, that the defendant was legally and fairly tried, and the judgment and order are affirmed.

We concur: CHIPMAN, P. J.; HART, J.

19 Cal. App. 283

MARTLAND v. BEKINS VAN & STORAGE CO. (Civ. 986.)

(District Court of Appeal, First District, California. June 18, 1912. Rehearing Denied by Supreme Court Aug. 16, 1912.)

1. CARRIERS (§ 197*)—LIEN FOR CHARGES—ENFORCEMENT—RIGHT OF POSSESSION.

While a person agreeing to transfer furniture and household goods from a certain place "to and within a dwelling house" specified has a lien thereon for his services, under the express provisions of Civ. Code, § 3051, he has no right to refuse to complete the transfer by placing the goods in the house until paid, where the owner promises to pay if he will complete the delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891–900; Dec. Dig. § 197.*]

2. CARRIERS (§ 197*)—LIEN FOR CHARGES—WAIVER OR DISCHARGE.

A person agreeing to transfer furniture and household goods and deliver them in a dwelling house does not, by placing them in the house, surrender his possession so as to destroy his lien, where, upon such delivery, the owner refuses to pay for his services, but may remove the goods, and, if prevented, bring an action in claim and delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 891–900; Dec. Dig. § 197.*]

3. REPLEVIN (§ 80*) — DAMAGES — COUNSEL FEES.

The prevailing party in claim and delivery cannot recover counsel fees which have not been paid, although he has become liable therefor.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 310; Dec. Dig. § 80.*]

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by R. W. Martland against the Bekins Van & Storage Company. Judgment for plaintiff, and defendant appeals. Modified.

Wm. H. Chapman, for appellant. F. V. Meyers, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of the plaintiff in an action in claim and delivery.

For a given rate the defendant orally agreed to carry and transfer the furniture and goods of the plaintiff from a certain place "to and within a dwelling house" on Fifth avenue, San Francisco. Defendant delivered and placed all the goods in said house, except a piano. As to that article, defendant transported it to the entrance of the place of delivery, but refused to deliver it until paid the amount of its charges, to wit, $28. At the time of such refusal, plaintiff questioned the correctness of the bill, but informed defendant's employés that he would pay it if they would perform the contract and place the piano within the house. Subsequently he renewed this offer in writing.

Under the provisions of section 3051 of the Civil Code, the defendant had a lien on the goods of plaintiff for the services rendered in the carriage thereof, dependent upon possession.

[1, 2] The trial court found that the defendant was not entitled to be paid until the piano was delivered within the house. This accords entirely with our view of the case. Under the attending circumstances, the plaintiff insisting, as he did, that the defendant place the piano in the house, and promising to pay upon the performance of such act, it was clearly the duty of defendant, we think, to comply with plaintiff's demand, and thus fully perform its contract, in order to be entitled to payment of its charges, or to the benefit of its lien as carrier. We do not believe that if the defendant had placed the piano in plaintiff's home, and then and there demanded payment, and payment was refused, this would have been such a delivery as to deprive it of the right of possession for the purpose of preserving its lien. It would have had the right at once to remove the piano, and, if prevented, it could have brought an action in claim and delivery. Bigelow v. Heaton, 6 Hill (N. Y.) 43; Id., 4 Denis (N. Y.) 496; 5 Am. & Eng. Ency. of Law, 412.

In Bigelow v. Heaton, the defendant declined to pay the plaintiff's freight for carrying a cargo of flour until the flour should be delivered, but promised to pay all charges upon delivery. The flour was thereupon delivered; but defendant refused to pay, unless the plaintiff would make a certain deduction from his freight for pretended injuries to the flour, which he claimed were caused by the manner of delivery. The plaintiff disaffirmed the act of delivery and demanded restitution of the goods. This being refused, he brought an action of replevin. It was held that the action was maintainable.

[3] The finding of the court that the plaintiff became indebted to his counsel for bringing this action in the sum of $75, and for services in connection therewith, and that therefore he was entitled to damages in such sum, cannot be sustained. Counsel fees, not paid, cannot be recovered as damages by the prevailing party in an action of claim and delivery. In Murphy v. Mulgrew, 102 Cal. 547, 36 Pac. 857, 41 Am. St. Rep. 200, it was held that the giving of a note by the plaintiff to his attorney for his services in a claim and delivery action would not support a finding of money expended by plaintiff in pursuit of the property.

In Hays v. Windsor, 130 Cal. 230, 235, 62 Pac. 395, in a similar case, the court held the same way, strongly intimating that in no case of claim and delivery would the prevailing party be entitled to attorney's fees as damages incurred in the pursuit of the property.

The judgment is therefore modified by striking therefrom the provision awarding the sum of $75 as damages to the plaintiff, and, as thus modified, the judgment is affirmed, appellant to recover from respondent the costs of this appeal.

We concur: LENNON, P. J.; HALL, J.

19 Cal. App. 253

LAPIQUE v. MONROE, Judge, et al.

(Civ. 1,103.)

(District Court of Appeal, Second District, California. June 14, 1912. Rehearing Denied by Supreme Court Aug. 13, 1912.)

ACTION (§ 50*)—CAUSES OF ACTION—PARTIES—MISJOINDER.

Where plaintiff sought to allege a cause of action for malicious prosecution as a first cause of action, and attempted as a second to state a cause of action under Pen. Code, § 1505, providing a penalty if a judge, on proper application, refuses to grant an order for a writ of habeas corpus, or if the officer to whom it is directed refuses obedience thereto, and various persons, including the sheriff and his bondsmen, and ministerial officers of the court were made parties to the second cause of action, the complaint was demurrable for misjoinder of causes of action, as well as parties defendant.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 511–547; Dec. Dig. § 50.*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by John Lapique against Charles Monroe, Judge, and others. From an order sustaining demurrers to the complaint, plaintiff appeals. Affirmed.

John Lapique, in pro. per. Henry T. Gage, W. I. Foley, E. J. Fleming, James S. Bennett, and D. K. Trask, for respondents.

ALLEN, P. J. The first cause of action is one for malicious prosecution; that is to say, the matters alleged approach more nearly a statement of a cause of action of that character than of any other. In substance, it is alleged that certain of defendants conspired together to charge and prosecute plaintiff for a public offense of which he alleges he is innocent. He was, however, bound over by the magistrate, tried by a jury, and convicted, which judgment was subsequently reversed by this court. A second cause of action is attempted to be stated under section 1505 of the Penal Code, which section provides a penalty if a judge, after proper application, refuses to grant an order for a writ of habeas corpus, or if the officer to whom it is directed refuses obedience thereto. Various persons, including the sheriff and his official bondsmen, and ministerial officers of the court are made parties to this second cause of action. The writ was issued, and no disobedience of same is made to appear. Another attempted cause of action is against the superior judge and officers of the court connected with his trial and conviction, claiming that he was improperly convicted by reason of perjury on the part of certain witnesses and improper conduct upon the part of the court and officers. Separate demurrers were interposed by all of the parties upon about every ground recognized by statute, and the same were sustained. Plaintiff not desiring to amend his complaint, judgment was entered for defendants, from which plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

We see no error in the action of the trial court. The misjoinder of causes of action, as well as of parties defendant, is apparent, and the ambiguities and uncertainties pointed out by the demurrers are obvious. Aside from this, no cause of action was stated, or attempted to be stated, against a large number of demurring defendants.

Judgment affirmed.

We concur: JAMES, J.; SHAW, J.

19 Cal. App. 276

FLEMING v. SHAY. (Civ. 1,005.)

(District Court of Appeal, First District, California. June 17, 1912.)

1. Trusts (§ 365*)—Enforcement—Delay—Laches.

When for a great length of time a trustee treats the trust property as his own, with knowledge of the beneficiary, who makes no assertion of his conflicting claim, and the delay works a substantial prejudice to the trustee, or to third persons, and is unaccounted for, equity, acting independently of the statute of limitations, will refuse relief on the ground of laches.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568–573; Dec. Dig. § 365.*]

2. Trusts (§ 365*)—Enforcement—Delay—Laches.

Prior to the year 1895, plaintiff intrusted intestate with various sums of money to be invested, the income to be divided equally between them. In that year an accounting was had, in which it was found that intestate owed plaintiff $5,000; whereupon it was agreed that the same should be reinvested on the same terms. Intestate never thereafter made an accounting, but acknowledged his holding of the trust funds for plaintiff, and told her that it was producing good returns, and that it would be for her benefit to allow the money to remain, which she did until after his death. *Held*, that plaintiff was not barred by laches from enforcing the payment of the trust fund from intestate's estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 568–573; Dec. Dig. § 365.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by J. T. Fleming against Frank Shay, administrator of the estate of William Hale, deceased. From a judgment entered on an order sustaining a demurrer to plaintiff's amended complaint, he appeals. Reversed, with directions to overrule the demurrer.

S. J. & H. J. Hankins, for appellant. Frank W. Shay, for respondent.

KERRIGAN, J. This is an appeal from a judgment entered upon an order sustaining a demurrer to an amended complaint.

Substantially, and so far as material, the allegations of the amended complaint are as follows: That prior to the year 1895 the plaintiff had intrusted to William Hale, for the purpose of investment, various sums of money, which, it was agreed, should be held by William Hale in trust, and the profits divided equally between them; that in said year an accounting was had, and upon such accounting it was agreed and determined that Hale at that time had in his hands, in trust for the use and benefit of plaintiff, the sum of $5,000, and that it was further agreed that this sum should remain in the hands of Hale, to be reinvested under the same conditions and trust as before, to wit, Hale to retain in trust for the benefit of plaintiff the $5,000 and one-half of all the profits arising out of or on account of said fund; "that from time to time since the said year of 1895, up to the time of the death of said William Hale, said William Hale, deceased, as trustee, acknowledged and stated to the said plaintiff that the said $5,000 held in trust by the said William Hale, deceased, for the use and benefit of said plaintiff, was invested in and used for various purchases of real property; that said $5,000 was producing good returns; and that the said trust fund of $5,000 and the one-half of all the profits accruing from the investments of said $5,000 would be paid over to the plaintiff herein whenever he (the said plaintiff) so demanded, but that it would be to the benefit of the said plaintiff if he (the said plaintiff) would allow the said money to remain in trust with the said William Hale, deceased, and to be used by said William Hale, deceased, and invested as aforesaid;" that by reason of the request of Hale plaintiff allowed the trust fund to remain in the latter's hands for the purpose just set forth; that Hale never repudiated said trust, and no demand was ever made on him by plaintiff for an accounting; and that the trust fund was in his hands at the time of his death in the year 1908; that the fund was so commingled with the moneys and property of Hale as to make it impossible for plaintiff to trace the fund; that plaintiff presented a claim against the estate of Hale, which was rejected. Thereupon the present action was brought.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A demurrer to the amended complaint was sustained, and, upon the plaintiff refusing to further amend, judgment was entered against him, from which this appeal is taken. The demurrer was based upon several grounds; but the only one relied on here by the respondent presents the question of whether or not the plaintiff was guilty of laches.

[1] When for a great length of time a trustee acts toward trust property as if it were his own, with knowledge of the beneficiary, who makes no assertion of his own conflicting claim, or when it appears that the long delay of the beneficiary in asserting his rights works a substantial prejudice to the trustee, or to third persons, and the delay is unaccounted for, equity, acting independently of the statute of limitations, will refuse to grant relief on the ground that the cestui que trust has been guilty of laches. 16 Cyc. 158, 167, 174; Kleinclaus v. Dutard, 147 Cal. 245, 81 Pac. 516; 18 Am. & Eng. Ency. of Law, 99 et seq.

[2] In the present case it does not appear that the trustee's estate has been injured by the delay, unless it be by his supervening death; nor does it appear that the trustee, with the knowledge of the plaintiff, or at all, handled or dealt with the funds in any way hostile to the claim of plaintiff; nor was the delay unexplained, for plaintiff alleges that the deceased never disavowed the trust, and from time to time up to his death acknowledged the same, and stated that the fund was producing a good profit, and that the whole sum due would be paid over on demand at any time. Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077; 16 Cyc. 174; Cooney v. Glynn, 157 Cal. 583, 589, 108 Pac. 506; 18 Am. & Eng. Ency. of Law, 111. The last authority cited lays down the rule in this regard in the following language: "When positive evidence exists, which proves that the defendant has all along recognized the plaintiff's right, delay on the part of plaintiff in bringing the suit will be excused."

"The continued acknowledgment," reads 16 Cyc. 174, "by the defendant of plaintiff's right is generally sufficient to account for delay by plaintiff in bringing suit to enforce it."

In the case of Peebles v. Reading, 8 Serg. & R. (Pa.) 484, 494, it was held that 14 years would not be a reasonable time to enforce a trust, unless the trust was kept up by declarations from time to time.

A similar declaration to the one here was considered in the case of Kleinclaus v. Dutard, supra; but there it appeared that Dutard for 35 years had "dealt with all the property acquired as absolutely his own. He carried on a produce and commission business in his own name. He invested and reinvested the profits thereof in his own name in all kinds of property, in several different states, accumulating a great fortune. He never recognized any other person as having any interest therein." For those and other reasons stated in the opinion, the court said that the complaint, taken as a whole, presented a case "where every act of the alleged trustee was openly and notoriously hostile to the claim of plaintiff;" that consequently no such relation between the parties was evidenced by the complaint as justified the plaintiff in disregarding those acts and relying upon any declaration of Dutard.

The complaint in the present case reveals nothing inconsistent with the alleged acknowledgment of the trust. We think the complaint does not show laches on the part of the plaintiff.

The judgment is therefore reversed, and the trial court is directed to overrule the demurrer to the amended complaint.

We concur: LENNON, P. J.; HALL, J.

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19 Cal. App. 250

MOTT et al. v. SCANLAN et al. (Civ. 968.)

(District Court of Appeal, First District, California. June 13, 1912.)

MUNICIPAL CORPORATIONS (§ 187*)—POLICE DEPARTMENT—PENSION FUND—INDEMNITY—"UNMARRIED SISTERS."

Act March 4, 1889 (St. 1889, p. 56) as amended by Act March 31, 1891 (St. 1891, p. 287), provides that whenever any member of the police department of a city after 10 years' service shall die from natural causes, his widow or children, or if there are no widow or children then his mother or "unmarried sisters," shall be entitled to $1,000 from a fund created by the act. *Held*, that the words "unmarried sisters" as so used did not mean never having been married, but included sisters of the officer who were widowed at the time of his death.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 518-521; Dec. Dig. § 187.*

For other definitions, see Words and Phrases, vol. 8, pp. 7196, 7197.]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Action by Frank K. Mott and others against Theresa Scanlan and others. Judgment for defendant Theresa Scanlan, and plaintiffs and defendant Louise B. Edes appeal. Reversed.

W. S. Angwin, for appellants. Fitzgerald & Abbott, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

KERRIGAN, J. This is an appeal from a judgment on the pleadings entered in favor of Theresa Scanlan, one of the defendants. The action springs from a statute entitled "An act to create a police relief, health and life insurance fund in the several counties, cities and counties, cities, and towns of the state," approved March 4, 1889, and amended March 31, 1891. Stats. 1889, p. 56; Stats. 1891, p. 287. Section 7 thereof provides: "Whenever any member of the police department of such * * * city * * * shall, after ten years of service, die from natural causes, then his widow or children, or if there be no widow or children, then his mother or unmarried sisters, shall be entitled to the sum of $1,000.00 from said fund."

On September 10, 1910, John P. Scanlan, who had been at that time a member of the police department of the city of Oakland for more than 10 years, died from natural causes. At the time of his death he left surviving him no widow, children, or mother, but left three sisters, one of whom, Theresa Scanlan, had never been married, and two of whom, Louise B. Edes and Mary O'Neill, were widows. With more detail these facts were set forth by the plaintiffs in a complaint against the defendants, demanding that they interplead, and both sides submitted the case for judgment on that complaint. The question presented for solution is: Were the widowed sisters of the deceased unmarried sisters? Appellants contending that they were, and respondent taking the view, as did the trial court, that the word "unmarried," as used in the statute, means never having been married.

This act making provision, as it does, for those dependent and near and dear to police officers, is intended to provide a reward for long, courageous, and faithful performance of duty. A widowed sister is equally close to a brother as one who has never entered the state of matrimony, and the common experience of mankind teaches us that there is little difference, if any, as to their necessities and ability to earn a living. Hence it would seem that the Legislature intended to make no distinction between them. No such difference as is here contended for by respondent was held tenable in the case of In re Will of Kaufman, 131 N. Y. 620, 30 N. E. 242, 15 L. R. A. 292, when the court, passing on a statute providing that "a will executed by an unmarried woman shall be deemed revoked by her subsequent marriage," held that this provision was not restricted in its application to women who have never been married; the court saying: "The unmarried woman referred to by the statute must be defined according to that rule of statutory construction which requires that the words used in legal enactments shall be understood and taken in their ordinary and familiar significance. So read, the unmarried woman of the statute is the woman who is not in a state of marriage. That the Legislature could have had any other idea is both inconceivable and unreasonable."

In the case of Est. of Conway, 181 Pa. 156, 37 Atl. 204, the testator gave his residuary estate to his "spinster or unmarried nieces." Six of his nieces had never been married, and two of them were widows. While the court held that the word "or" was used conjunctively, and that therefore both classes of nieces were entitled to share in the residuary estate, in the course of the opinion the court said: "The spinsters and widows stood in the same relation to the testator; their actual condition was that of single or unmarried women, and no reason for discriminating between them appears in the will or in the circumstances presented by the case. This construction relieves the testator * * * from an arbitrary discrimination between those standing in the same degree of relationship to him, and works equality in the distribution of the estate."

So a divorced daughter was held to be an "unmarried daughter," and protected in her homestead rights after the death of her parents. Anderson v. McGee (Tex. Civ. App.) 130 S. W. 1040, 1043.

There is a line of cases in conflict with those just adverted to, in which the term is held to mean, as contended by respondent, "never having been married." 39 Cyc. 837. But it must be conceded that slight circumstances will be sufficient in any case to give the word its other meaning of not having had a husband or wife at the time in question. Peters v. Balke, 170 Ill. 304, 312, 48 N. E. 1012; Muller v. Balke, 167 Ill. 154, 47 N. E. 355; In re Oakley, 67 App. Div. 493, 74 N. Y. Supp. 206; Frail v. Carstairs, 187 Ill. 310, 58 N. E. 401; 29 Am. & Eng. Ency. of Law, 347.

Section 56 of the Civil Code provides that "any unmarried male of the age of eighteen years * * * and any unmarried female of the age of 15 years, etc., are capable of consenting to * * * marriage." Section 1300 of the same Code, prior to the amendment of 1905, provided that a will executed by an unmarried woman shall be deemed revoked on her subsequent marriage. * * *" In neither of these instances did the Legislature, by the word "unmarried," intend to designate only one who had never entered the state of matrimony; and we are aware of no instance where the Legislature in this state has employed the term in its narrow sense.

No reason suggests itself why the lawmaking power should have intended to prefer one class of sisters to the other; and, as the Legislature has on other occasions used the word to mean not being married at the particular time, we feel justified in so construing it in this act.

The judgment is reversed.

We concur: LENNON, P. J.; HALL, J.

163 Cal. 360

WHALEN et al. v. SMITH, Judge. (S. F. 6,018.)

(Supreme Court of California. Aug. 1, 1912.)

1. Appeal and Error (§ 1180*) — Appeal From Part of Judgment—Reversal—Effect as to Part Not Appealed From.

Where an appeal is taken from a specific part of a judgment, as authorized by Code Civ. Proc. § 940, a reversal would ordinarily leave the parts of the judgment not appealed from unaffected, unless the part appealed from is so interwoven with the remainder, or so dependent thereon, that the appeal from part of it affects the other parts, or involves a consideration of the whole, so as in effect to amount to an appeal from the whole judgment, and if a reversal is ordered it would extend to the entire judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626–4631, 4658, 4659; Dec. Dig. § 1180.*]

2. Appeal and Error (§ 1180*)—Part of Judgment—Reversal—Effect.

Plaintiffs, prior to the distribution of an estate, instituted a proceeding authorized by Code Civ. Proc. § 940, to determine heirship, the ownership of decedent's estate, the interest of each respective claimant, and the persons entitled to distribution. The petition presented two issues: First, that decedent had only one brother and one sister, both of whom were dead, and that plaintiffs were the only descendants; and, second, that, as such, they were entitled to one-half of the estate under the will. The heirs and successors of decedent's widow denied that plaintiffs were the descendants of the brother and sister, and claimed that they, as heirs and successors of the widow, were entitled to succeed to three-fourths of the estate. The judgment found for plaintiffs on the first issue, but held that they were only entitled to one-fourth of the estate, and that certain of the defendants were entitled to the remaining three-fourths. From this portion of the judgment only, plaintiffs appealed, and, the court holding that plaintiffs were entitled to one-half of the estate, the judgment was reversed generally. *Held*, that the issue on which the judgment was reversed was separable from the issue determined in plaintiffs' favor, from which no appeal was taken; and hence such part of the judgment was final and conclusive, and not affected by the reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4626–4631, 4658, 4659; Dec. Dig. § 1180.*]

Henshaw and Melvin, JJ., dissenting.

In Bank. Application for writ of mandamus by Martin Whalen and others against Frank H. Smith, Judge of the Superior Court of San Joaquin County. Granted.

A. H. Carpenter, for petitioners. Max Crimm, for respondent.

SHAW, J. This is a proceeding to compel the defendant, as judge of the superior court, to render judgment in the matter of the action to determine heirship in the estate of George Roach, deceased, entitled "Martin Whalen et al. v. Joshua B. Webster et al.," in accordance with the decision of this court on appeal therein, as reported in 159 Cal. 260, 113 Pac. 373, and without taking further evidence upon the issue as to the number of surviving children of Thomas Roach, a deceased brother of said George Roach.

The contention of the petitioners is that the appeal in Whalen v. Webster, supra, was from a part only of the judgment in the proceeding—a part which presented but one question, namely, whether the language of the will of George Roach gave to the descendants of his brothers and sisters one-half of his estate or only one-fourth thereof; that all other matters determined by the judgment remained unaffected, and are finally adjudicated, and, hence, that this court on said appeal had no jurisdiction to reverse the whole judgment, or any part of it, except the part appealed from; and that the mandate of reversal, although general in terms, can apply only to the part appealed from. And, further, they claim that, even if the Supreme Court had jurisdiction to reverse the entire judgment on appeal from a part only, yet, in view of the record in the case, the nature of the proceeding, the judgment rendered, and the narrow question presented by the appeal, the general mandate should not be construed to apply to the whole judgment in the proceeding below, but only to that part from which the appeal was taken.

[1] There are doubtless cases of appeals from a part of a judgment where the part appealed from is so interwoven and connected with the remainder, or so dependent thereon, that the appeal from a part of it affects the other parts, or involves a consideration of the whole, and is really an appeal from the whole, and if a reversal is ordered it should extend to the entire judgment. The appellate court, in such cases, must have power to do that which justice requires, and may extend its reversal as far as may be deemed necessary to accomplish that end. The Code provides that a party may appeal

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from a specific part of a judgment. Code Civ. Proc. § 940. Ordinarily such an appeal would leave the parts not appealed from unaffected, and it would logically follow that such unaffected parts must be deemed final, being a final judgment of the facts and rights which they determine. The decisions are to the effect that upon such an appeal, where the parts not appealed from are not so intimately connected with the part appealed from that a reversal of that part would require a reconsideration of the whole case in the court below, the court upon such partial appeal can inquire only with respect to the portion appealed from. Thus, in Early v. Mannix, 15 Cal. 150, it was said that a plaintiff in forcible entry could appeal from an order denying his motion for treble damages and, in the meantime, enforce his judgment for restitution of the premises. In Pacific Mutual L. I. Co. v. Fisher, 106 Cal. 237, 39 Pac. 758, it was said that the Supreme Court is not at liberty to review a part of a judgment which is not appealed from. In Estate of Burdick, 112 Cal. 391, 44 Pac. 734, the court below made a decree, upon the executor's petition, settling his final account and making distribution of the estate. He appealed from all of the decree, except the part thereof settling his final account. Upon the appeal he applied to review the order settling the final account; but the court refused to consider the question of its accuracy, saying: "We must not interfere with it. To attempt to do so would be an arbitrary proceeding without authority." In Ricketson v. Richardson, 26 Cal. 154, there were several defendants, and one alone appealed. A reversal as to all of the defendants was asked. The error consisted of a defective service of summons and affected the appellant only. A reversal as to the other defendants was refused; the court saying that it was bound to presume that there was no error as to them, since they had not taken any appeal. In Kelsey v. Western, 2 N. Y. 505, the court said: "It is well settled that only that part of a decree which is appealed from is brought before the appellate court for review." In Bush v. Mitchell, 28 Or. 92, 41 Pac. 155, the court referring to an appeal from a part of a judgment, quoted the following language from Shook v. Colohan, 12 Or. 243, 6 Pac. 503: "The trial of the suit anew would be confined to a trial of the case affecting the part of the decree specified in the notice of appeal." In that state the appellate court had power to try the suit anew. The following cases recognize and apply the general principle that an appeal from a distinct and independent part of a judgment does not bring up the other parts for review in the appellate court, and that a reversal of the part appealed from does not affect the portions not dependent thereon, but that they will stand as final adjudications: Ikerd v. Postlewhaite, 34 La. Ann. 1235; Nelson v. Hubbard, 13 Ark. 253; Scutt's Appeal, 46 Conn. 38; Ervin v. Collier, 3 Mont. 189; Hess v. Winder, 34 Cal. 270; Sands v. Codwise, 4 Johns. (N. Y.) 602, 4 Am. Dec. 305; In re Davis' Estate, 149 N. Y. 548, 44 N. E. 185; Leavison v. Harris (Ky.) 14 S. W. 343; Meadow, etc., Co. v. Dodds, 6 Nev. 261; Robertson v. Bullions, 11 N. Y. 245; Moerchen v. Stoll, 48 Wis. 307, 4 N. W. 352.

[2] This principle is decisive of the case. If the decree appealed from in Whalen v. Webster had been a decree distributing the estate, it might plausibly be argued that the distribution was the final judgment, and that the decision as to the persons who are the heirs at law was a mere finding of fact, upon which the final judgment followed as matter of law, in which case a general order of reversal would open the whole matter for a new trial as to the facts. But that proceeding was instituted under section 1664 of the Code of Civil Procedure. This section provides a special proceeding for the purpose of ascertaining and determining, in advance of distribution, the persons who have succeeded to the estate and the portions inherited by or devised to each of them. Upon the trial thereof, the court must "determine the heirship to said deceased, the ownership of his estate, and the interest of each respective claimant thereto or therein, and persons entitled to distribution thereof." No other judgment is to be rendered, and no disposition whatever is to be made of the estate. It is a determination, first, of the persons entitled as heirs, devisees, or legatees, or as their successors, if any have died; and, second, the interest of each one in the estate of the decedent.

The will of George Roach gave an interest in his estate, after the death of his wife, to be equally divided among his brothers and sisters or their descendants. The petition of Whalen and others, plaintiffs in the proceeding, alleged: First, that the decedent had only one brother and one sister, both of whom were dead, and that plaintiffs were the only descendants; and, second, that, as such, they were entitled to one-half of the estate under the will. The heirs and successors of the widow of the decedent appeared and answered, denying that plaintiffs were descendants of the brother and sister, and claiming that they, as heirs and successors of the widow, were entitled to succeed to three-fourths of the estate. The judgment therein declared, first, that the plaintiffs were the devisees and heirs at law of Roach, the descendants of his brothers and sisters referred to in his will and the persons entitled to take as devisees under his will; second, that each of them was entitled to a specific interest, the aggregate of all of them being only one-fourth of the estate; and, third, that certain named defendants, as successors of the widow, were entitled to the remaining three-fourths. There is nothing in the record to indicate that there was any claim that there were other descendants of the brothers and sisters. The principal dispute was upon the question of law whether the fourth clause of the will gave the plaintiffs one-half of the estate or only one-fourth thereof. The plaintiffs appeal only from that part of the judgment which declared that they were entitled to take only one-fourth, and that certain defendants were entitled to three-fourths of the estate. No appeal was taken from the part declaring that the plaintiffs were persons entitled, as descendants of the brother and sister, to take as devisees under the will. The question whether or not said brother and sister left other descendants, and whether or not there were other brothers and sisters, was in effect determined in the negative by the judgment. The plaintiffs were satisfied with that determination, no one appeared to dispute or question it, and its accuracy was not reviewed, considered, or discussed by this court in its opinion on the appeal; nor was it presented for review by the record. The only question discussed or decided was whether the fourth clause disposed of one-half of the estate or one-fourth thereof. The decision was that it gave one-half, and the judgment on that subject was accordingly reversed. The mandate did not go into specific particulars, but consisted simply of the words, "The judgment is reversed." The part of the judgment appealed from determined no question of law, except the proper construction of the will. No question of fact was involved in the appeal. The determination of the construction of the will did not require any inquiry concerning the persons who were entitled as members of the class described as descendants of the brothers and sisters of the decedent. The court was therefore without authority to consider the latter question, and it did not make any attempt to do so. In view of these considerations, the words of the mandate should be understood and construed to refer only to the part of the judgment appealed from—the part which the Supreme Court had jurisdiction to review—and to reverse that part only, without affecting the other parts not specified in the notice. It follows that the court below has no authority to retry the question whether there were other descendants of the brothers and sisters than those included in the decree previously rendered. The decision left no matter of fact to be determined, and the only duty of the court below upon the going down of the remittitur was to enter judgment in the proceeding in accordance with the facts previously found and with the decision of the Supreme Court on appeal.

It is therefore ordered by the court that a writ of mandate issue, directing the superior court of San Joaquin county to enter judgment in the proceeding of Whalen v. Webster upon the facts found in accordance with the opinion of the Supreme Court, and without proceeding to retry any issues of fact determined upon the former hearing in that court.

We concur: BEATTY, C. J.; ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.

HENSHAW, J. I dissent. The *power* of this court to reverse the whole of a judgment, when a part only has been appealed from, is conceded by the prevailing opinion to exist.

The judgment delivered by this court in Whalen v. Webster, 159 Cal. 260, 113 Pac. 373, is in the following language, "The judgment is reversed." Language so plain and so free from ambiguity neither requires explanation nor permits construction. It either means what it says, or it means nothing. It follows, therefore (the power of the court so to do being conceded), that this court deliberately reversed, not a part, but the whole, of the judgment appealed from; for, as is said in Glassell v. Hansen, 149 Cal. 511, 87 Pac. 200, where a similar question was presented: "In reversing the case, this court might have directed what issues should again be tried, and what should be deemed finally settled by the first trial; however, it did not do so, and the judgment was merely in the general terms, 'The judgment and order are reversed.' This clearly left the whole case to be tried anew, as if it had not been tried before. Falkner v. Hendy, 107 Cal. 54 [40 Pac. 21, 386]." In Cowdery v. London, etc., Bank, 139 Cal. 298, 73 Pac. 196, 96 Am. St. Rep. 115, this court, in effect, refused to put any construction upon a judgment such as the one here under consideration, or to attempt to modify its plain meaning in any way. The judgment of this court in the Cowdery Case was: "The judgment * * * is reversed and the cause remanded, with directions that the trial court enter judgment in accordance with the views here expressed." Says this court: "The legal effect of the order of the Supreme Court was to reverse and vacate the judgment, and not merely to modify it. Upon a decision of the Supreme Court that there was material error in the action of the court below, that court may direct the character of the subsequent proceedings in the lower court, and its mandate will vary according to its views as to the proper course to be pursued. It may conclude not to reverse the judgment, but to modify it, by eliminating some portion, or by adding something to it, leaving the remaining part of the judgment below to stand affirmed and in full force and effect from the date of its original entry or rendition; or it may reverse the judgment, which means to entirely vacate it, and may remand the cause for a new trial; or, if a new trial is not necessary, it may upon the reversal remand it, with directions to the lower court to enter a particular judgment."

What this court is here doing is changing in essential particulars a judgment which it has solemnly given, which judgment by lapse of time has passed from its control and become an absolute finality. It is doing this under the guise of construing language so plain as to forbid construction. The direct consequence, the legal effect, of this is to impair, without warrant of law, the stability and security of every judgment which this court has rendered. If this court in one case can say that its formal decree reversing the whole of the judgment of a trial court means merely the reversal of some portion of that judgment, it may say so in any case.

The judgment which this court rendered in 159 Cal. 260, 113 Pac. 373, was either mistaken or not mistaken. If it was not mistaken, there is no need for its correction. If it was mistaken, this is not a legal method for its correction. Nothing but hopeless confusion in the law and a just contempt for the law can follow, if its highest interpreters, under conditions such as those here present, shall be permitted to say that their own deliberately chosen language does not mean that which alone the words must mean to any comprehending mind. I therefore dissent under the conviction that the prevailing opinion and judgment are not alone without the sanction of the law, but are a dangerous innovation upon the law.

I concur: MELVIN, J.

(163 Cal. 368)

PEOPLE v. HATCH. (Cr. 1,706.)

(Supreme Court of California. Aug. 2, 1912. Rehearing Denied Aug. 31, 1912.)

1. Criminal Law (§ 1032*)—Appeal—Presentation of Grounds of Review in Court Below.

An objection to the indictment, which was not taken by demurrer in the trial court, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2627, 2628, 2642, 2653; Dec. Dig. § 1032.*]

2. Embezzlement (§ 11*)—Demand—Necessity.

To support a conviction for embezzlement, it need not be shown that after the fraudulent misappropriation of the money a demand was made on defendant.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 9, 10; Dec. Dig. § 11.*]

3. Embezzlement (§ 44*) — Demand — Evidence—Sufficiency.

In a prosecution for embezzlement, evidence *held* sufficient to show that a demand was made on defendant for the money appropriated.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 67–70; Dec. Dig. § 44.*]

4. Criminal Law (§ 563*)—Evidence—Corpus Delicti.

The corpus delicti need not be proved beyond a reasonable doubt by evidence other than the admissions and declarations of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1269; Dec. Dig. § 563.*]

5. Embezzlement (§ 6*)—Essentials.

Where accused had control over money or a bank check which could be converted into money, he may be convicted of embezzlement for his fraudulent misappropriation, although he did not take possession of actual currency.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 4; Dec. Dig. § 6.*]

6. Criminal Law (§ 1170*)—Appeal—Harmless Error.

The erroneous rejection of a note offered in evidence is not prejudicial, where every fact which could have been shown by it has been shown by the uncontroverted testimony of the witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. § 1170.*]

7. Criminal Law (§ 670*)—Trial—Waiver of Errors.

In a prosecution for embezzlement, where defendant sought to introduce a note, and the court, not being fully advised in the matter, sustained an objection, but expressed a willingness to permit the note to be introduced, if connected with the case, and accused rested his case without making any attempt to connect the note, he waived the error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593–1596; Dec. Dig. § 670.*]

8. Criminal Law (§ 1169*)—Appeal—Harmless Error.

In a prosecution for embezzlement, where all of the facts upon which a witness' conclusions were based had been admitted in evidence and were before the jury, and the witness' conclusions were the only reasonable ones, the admission of his conclusions was not harmful.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137–3143; Dec. Dig. § 1169.*]

9. Criminal Law (§ 371*) — Evidence of Other Offenses—Embezzlement.

While evidence of independent crimes which have no tendency to prove a material fact in connection with the particular crime for which accused is being prosecuted is inadmissible, yet evidence of other offenses is admissible to prove motive or intent, or where the evidence of the crime is intermixed with the evidence of other crimes; and hence, in a prosecution for embezzlement, where accused had for a long time acted as agent, and had received and disbursed money, and had refused to account for a large sum of money, evidence of those facts was admissible in a prosecution for the embezzlement of a selected item.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 907, 972–976; Dec. Dig. § 371.*]

10. Criminal Law (§ 713*)—Trial—Arguments of Counsel.

In a prosecution for embezzlement, where accused, who had for a long time acted as agent, refused to give any account of what had become of his principal's money, a statement by the district attorney in his argument, that it was the duty of a trustee to exercise the highest good faith toward his beneficiary in matters concerning the trust, was not erroneous, being applicable to the case in question and a correct statement of law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1678; Dec. Dig. § 713.*]

11. Criminal Law (§ 822*) — Trial — Instructions.

Where the instructions, read as a whole, did not incorrectly state the law, and are not contradictory, a new trial cannot be claimed because some particular instruction is not complete.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

12. CRIMINAL LAW (§ 807*)—TRIAL—INSTRUCTIONS.

Argumentative instructions are properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.*]

13. CRIMINAL LAW (§ 814*)—TRIAL—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a prosecution of an agent for embezzlement of the funds of his principal, where accused offered no evidence that the relation between him and his principal was that of debtor and creditor, an instruction on that theory was properly refused, not being applicable to the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979–1985, 1987; Dec. Dig. § 814.*]

14. CRIMINAL LAW (§ 822*)—TRIAL—READING LAW TO JURY.

In a criminal prosecution, where the instructions regarding the degree of certainty required for conviction, were clear and full, and, taken as a whole, could not have conveyed any other impression than that the prosecution was bound to prove every element of the crime beyond a reasonable doubt, the reading of Code Civ. Proc. § 1826, providing that the law does not require such a degree of proof as, including possibility of error, produces absolute certainty, but that moral certainty only is required, is not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1990, 1991, 1994, 1995, 3158; Dec. Dig. § 822.*]

15. CRIMINAL LAW (§ 881*)—TRIAL—VERDICT—SUFFICIENCY.

In a prosecution for embezzlement, where the indictment charged accused with the embezzlement of $37,000, and at the outset the district attorney selected as the item to be proved the amount of $4,000, a verdict, finding accused guilty of embezzlement as charged in the indictment and elected by the people as the substance of offense to be proved, is sufficient; the election of the people appearing from the minutes of the trial, which, under Pen. Code, § 1207, are a part of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent.Dig. §§ 2089, 2093; Dec. Dig. § 881.*]

Melvin, J., dissenting.

In Bank. Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Jackson Hatch was convicted of embezzlement, and he appeals. Affirmed.

See, also, 13 Cal. App. 521, 109 Pac. 1097.

Rehearing denied; Beatty, C. J., dissenting.

Frank Freeman, O. D. Richardson, and H. I. Stafford, for appellant. U. S. Webb, Atty. Gen., Raymond Benjamin, Chief Deputy Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. This appeal from the judgment, and from an order denying defendant's motion for a new trial, comes to this court in consequence of the inability of the Justices of the District Court of Appeal for the First appellate district, to which the appeal was taken, to agree upon a judgment. Two of the Justices of said court were of the opinion that the judgment and order should be reversed on account of errors in the admission and rejection of evidence, while the third Justice expressed the view that the rulings in question, if erroneous, were not prejudicial to the appellant. All three Justices agreed that, except with regard to the particular rulings just referred to, the record disclosed no error affecting any substantial right of the defendant.

The following opinion, in which we express the views of this court upon the questions raised by the appeal, is taken, virtually in its entirety, from the two opinions filed in the District Court of Appeal.

This is the second appeal in the case. Upon the first appeal the judgment against the defendant was reversed, and the cause remanded for a new trial. The retrial resulted again in the conviction of the defendant, and this appeal is from the judgment and order denying his motion for a new trial.

Upon this appeal the appellant again presents the point that the court erred in overruling his demurrer to the indictment, for the reason, as he claims, that the indictment charges appellant with two offenses. It is sufficient to say that this point was decided against the appellant upon the former appeal. People v. Hatch, 13 Cal. App. 521, 109 Pac. 1097. However, in addition to People v. Thompson, 111 Cal. 242, 43 Pac. 748, cited in the opinion upon the first appeal, we may cite People v. Shotwell, 27 Cal. 401; People v. Frank, 28 Cal. 507; People v. Sheldon, 68 Cal. 434, 9 Pac. 457; People v. Leyshon, 108 Cal. 440, 41 Pac. 480.

[1] It is further urged that the indictment does not conform to the requirements of section 954 of the Penal Code, as amended in 1905 (St. 1905, p. 772), in that the "different statements of the same offense" are not set forth in different counts. This point is not raised by the demurrer, which is simply that more than one offense is charged in the indictment. In thus disposing of the argument of counsel, we do not wish to be understood as intimating that his point would be good, if properly raised by the demurrer.

Appellant urges that the evidence is not sufficient to support the verdict of the jury, finding the defendant guilty as charged. We have carefully read all the evidence in the case, and find no merit in this contention. We do not deem it necessary to discuss the evidence in detail, but shall consider it only in regard to certain particulars, in which it is claimed to be deficient.

[2, 3] It is claimed that no demand was shown to have been made upon defendant for the money involved with which it was his duty to comply.

In the first place, the guilt or innocence of defendant does not necessarily depend upon the question whether or not any demand had been made upon him for the money involved. The real question is, Does the evidence show a fraudulent appropriation by defendant of the money involved? Neither People v. Page, 116 Cal. 387, 48 Pac. 326, nor People v. Royce, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524, lays down the rule that a demand is necessary, as a matter of law, to constitute an embezzlement. In each of these cases the court discussed the evidence, and held that it was insufficient to support a verdict of guilty, and in so doing adverted to the fact that no demand had been made, and in each case also adverted to the fact that it had not been shown that the defendant had in fact, or at all, appropriated the money involved to his own use, or that he did not have it on hand at all times to meet any demand, if one had been made. "No doubt embezzlement may be established under certain circumstances without proof of a demand, as where other evidence clearly shows an appropriation by an employé of his employer's funds, with intent to do so fraudulently and feloniously." People v. Royce, supra. In some cases, in the absence of other sufficient proof, a demand may be necessary to fix the fact of the fraudulent appropriation; but the real test always is: Does the whole evidence establish the crime charged; that is, a fraudulent appropriation as charged in the indictment. People v. Ward, 134 Cal. 301, 66 Pac. 372.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In the second place, there is ample evidence in the record of a sufficient demand. At the outset of the trial, the district attorney selected, as the item upon which he would rely for a conviction, the sum of $4,100.55, received by appellant for property belonging to the prosecutrix, Mrs. Sage, known as the Lyon street property, sold by him under her instructions in June, 1907. He had been her agent for a number of years. In January, 1907, he furnished her a statement, which on its face showed that he had in his charge as her agent money loaned and bearing interest in the sum of $34,509, aud four pieces of real estate; one of them being the property above referred to as sold in June, 1907. In November, 1907, on the day following Thanksgiving day, Mrs. Sage called with her son, L. A. Sage, upon defendant and told him she would like to turn over all her affairs to her said son. The son, L. A. Sage, requested the defendant at his earliest opportunity to turn over to him all the properties and accounts of his mother in defendant's charge. Defendant stated that it would take some time to do this, as the accounts were mixed, but in effect promised to do so as soon as possible. L. A. Sage thereafter called on defendant several times, urging a settlement, but was put off with excuses. However, about the 1st of January, 1908, defendant did turn over or cause to be delivered to Mr. Beasley, who seems to have been acting as attorney for Mr. and Mrs. Sage, some notes, the face value of which did not exceed $5,000, while the evidence shows that he should have had in his possession at that time either money or securities to the amount of upwards of $35,000. Thereafter, on January 8, 1908, L. A. Sage and his attorney, Mr. Beasley, had an interview with defendant in the office of Mr. Beasley concerning the affairs of Mrs. Sage. At this time Mr. Sage asked Mr. Hatch to turn over to him all securities and moneys that he held in his possession belonging to Mrs. Sage. Defendant answered, saying: "You have got to rest satisfied with my statement that there are no securities, and the money is all gone." He refused to state what had become of the money or securities. Subsequently, and before the indictment was found, Mr. Sage served on the defendant a written demand, together with a certified copy of a power of attorney from Mrs. Sage to L. A. Sage. This demand was in three parts. One part, signed by Mrs. Sage, demanded that he turn over and deliver to her son, Louis A. Sage, all moneys, notes, securities, and other evidences of indebtedness in defendant's possession belonging to Mrs. Sage. Another part demanded $38,298.21, and the third part demanded in detail various sums of money, itemized and described, including one for $4,356.85, described as received by defendant from the sale of the Lyon street property.

We have no doubt that the above matters show, not only one demand, but more than one demand, quite sufficient to make it the duty of the defendant to turn over all money and securities in his charge belonging to Mrs. Sage, including the money selected as the basis for his prosecution. He knew, or should have known, exactly what money and securities he held that belonged to her. As her agent, he was bound to act toward her in the utmost good faith. He had in effect been instructed by her as early as November to turn over all her property in his possession to her son. It was clearly his duty to comply with this instruction, which was a sufficient demand to charge him with compliance therewith.

[4] It is claimed that the corpus delicti was not proved by evidence outside of the declarations and admissions of defendant. It must be remembered that the rule does not require that the evidence, other than the admissions and declarations of defendant, establish the commission of the offense beyond all reasonable doubt. People v. Jones, 123 Cal. 65, 55 Pac. 698; People v. Ward, 134 Cal. 306, 66 Pac. 372; People v. Rowland, 12 Cal. App. 7, 106 Pac. 428. We are satisfied that the record presents substantial and sufficient evidence, besides the admissions and declarations of the defendant to establish the commission of the crime charged.

[5] The appellant makes the point that the verdict cannot be supported, because the evidence does not show the appropriation of *lawful money* of the United States, nor, as it is claimed, of any money at all.

We find no merit in this contention. Defendant received a check for $4,100.55 in San Francisco. He brought this to San Jose and received therefor three certificates of deposit, one for $2,000, and two each for $1,000. The money called for by these certificates of deposit thus came into the control of the defendant. It may be that he never had the money in specie in his hands; but it was in his control. This meets both the language of the statute and of the indictment. The certificates of deposit which he received for the check were in form as follows: "* * * Jackson Hatch had deposited in the First National Bank of San Jose, Cal. $1,000.00, one thousand dollars, payable to the order of self on return of this certificate properly endorsed. * * *"

The money represented by such certificates was in his control, though in the possession of the bank. That the money represented by such certificates was lawful money of the United States is also sufficiently shown. When we speak or contract with reference to dollars in this country, we mean lawful money of the United States. No other sort of dollars could have been rightfully or lawfully paid in discharge of the obligations represented by the certificates of deposit. The money that came into his control by this transaction was necessarily lawful money of the United States. Again we say, after a careful examination of the evidence, we are satisfied that it is sufficient to support the verdict.

One of the matters most strongly relied upon by appellant upon this appeal concerns the ruling of the court in refusing to admit in evidence a certain promissory note for the sum of $5,000, and executed by Mrs. Sage.

The prosecution had introduced evidence showing that on the 12th day of June, 1907, defendant had received in payment of the purchase price of the Lyon street property, sold by him for Mrs. Sage, a check for $4,100.55. The check was drawn payable to one Murray F. Vandall, and was indorsed by him payable to the order of defendant. The evidence for the prosecution showed that defendant, on the 14th day of June, 1907, indorsed and delivered said check to the First National Bank of San Jose at San Jose, and received therefor from said bank, as previously stated, three certificates of deposit, one for $2,000, and two for $1,000 each, all payable to the order of defendant, and a credit to his personal account in the sum of $100.55, thus making up the full amount of the sum of $4,100.55. This is the amount and represents the item selected by the district attorney as the basis of the charge upon which he asked for a conviction. It was the theory of the prosecution that the defendant had fraudulently appropriated said sum of money and the whole thereof to his own use, and it had introduced evidence tending to support such theory.

After proving that the note in question was signed by Mrs. Sage, defendant further proved by Mr. Knox, an officer of the Commercial & Savings Bank, the payee in said note, that defendant had fully paid the principal of said note in five payments, as well as all interests, amounting to over $500. One of these payments was shown to have been made by indorsing over to the payee in said note, on June 15, 1907, the certificate of deposit for $2,000, above referred to, and which represented $2,000 of the money selected as the basis of the charge against defendant.

[6] Appellant offered the note in evidence, and the court sustained the objection of the district attorney to its admission. This action of the court affords no sufficient ground for reversal, for the reasons:

(A) The error in excluding the note was not prejudicial, inasmuch as every material fact which could have been shown by the paper had already been testified to by the witness, and there was no attempt to contradict any of such facts.

[7] (B) The error in sustaining the objection to the offer of the note was waived by the appellant. When the note was first offered, the objection was sustained. It appears, however, from a colloquy which followed the ruling that the court had not fully understood the testimony of the witness Knox. It having been explained that a $2,000 payment on the note had been made out of the proceeds of the Lyon street property (but no attempt being made to connect any of the other payments with the transaction under inquiry), the court expressed its willingness to permit the note to go in, if it were proper to admit a document which had been thus connected in part only. After some further discussion, the court stated that the ruling excluding the note would stand; whereupon the defendant rested. The discussion was so protracted that we cannot set it forth at length here. It is, however, quite apparent from a reading of the entire matter that the court intended to defer a final ruling until it could investigate the propriety of admitting in evidence such parts of the document as were connected with the transaction in controversy, and that the defendant prevented such investigation by his prompt, not to say precipitate, action in resting his case before the court was prepared to finally rule. Even after the defendant had rested, the court in effect gave him an opportunity to renew his offer of those parts of the note that had been properly connected; but no response was made to this suggestion. Under these circumstances, we

are satisfied that the error, if any, should be held to have been waived.

[8] The court permitted E. L. Peterson, the exchange teller of the First National Bank of San Jose, and a witness for the people, to testify concerning certain checks, certificates, and deposit slips. In each instance the witness was shown a deposit slip and a certain check or certificate, and was asked to explain if there was any connection between the two papers. In each case, after an examination of the papers, he stated, over the objection of the defendant, that this question called for the conclusion of the witness that the slip disclosed that the check or certificate had been deposited to the credit of the defendant. All the facts upon which the witness' conclusion were based had been admitted in evidence and were before the jury; and, as the conclusion given by the witness appeared to be the only one that could be reasonably reached, it is difficult to see how any substantial right of the defendant was prejudiced.

The appellant contends that the court erred in admitting much evidence tending to prove embezzlements other than the one for which defendant was being tried.

[9] Over the objection of defendant, the court permitted the district attorney to prove that the defendant, at various times while he was acting as the agent and attorney of Mrs. Sage, collected and received for her and as her agent various sums of money, which he deposited in bank to his personal account and never paid to Mrs. Sage or to her use. Some of this money was received before and some after the money selected as the basis of the charge for which he was being tried.

The testimony as a whole tended to show that when defendant was called upon to turn over all property and money in his hands belonging to Mrs. Sage he should have had in his charge money or securities to an amount upward of $35,000. He did turn over securities to an amount of less than $5,000, and a day or so afterwards, when asked by Mr. Sage, the son and authorized agent of Mrs. Sage, to turn over all the securities and money in his charge belonging to Mrs. Sage, he replied that there were no securities, and the money was all gone.

While it is true that independent crimes, the evidence of which has no tendency to prove some material fact in connection with the particular crime charged, may not be proven against the defendant, this rule does not exclude evidence of such other crimes, when the evidence thereof does tend to prove some material element of the crime for which the defendant is on trial. This well-recognized exception to the general rule finds frequent application in cases where evidence of the crime tends to prove a motive for the commission of the crime charged, and where, a fraudulent intent being a necessary element in the crime charged, the evidence of the other crimes tends to establish and fix the existence of such intent, and in cases where the evidence tending to establish the crime charged is intermixed with the evidence of the other crimes.

We think the character of the offense charged here and the facts of the case bring it within the two latter conditions. Money ordinarily has no earmarks, and it is frequently impossible to prove the specific act of appropriation of a designated item of such money. Especially is this true where, as here, the agent has collected and disbursed various and large sums for his principal during an agency extending over a long period. In the case at bar, it was indeed shown that defendant had collected the specific item of $4,100.55 selected as the basis of the charge, and had deposited it to his individual account. While the fact that he thus deposited it to his individual account might be considered by the jury as tending to prove that in so doing he intended to fraudulently appropriate it to his own use, the district attorney had a right to support such inference of a fraudulent purpose, as well as the fact of the appropriation by other evidence that would legitimately tend to such support. Evidence that defendant had collected for his principal divers moneys which he had deposited to his individual credit, and that when the total which he ought to have had on hand or under his control amounted to upwards of $35,000, including the $4,100.55, a demand was made upon him to settle, to which his only reply in substance was that it was all gone, all tended to prove that the $4,100.55 had been by him *fraudulently appropriated*, and that the deposit thereof to his individual credit was for the purpose and intent to so *fraudulently appropriate* it. The evidence of the *fraudulent appropriation* of the $4,100.55 was intermixed in logic and in fact with the evidence as to the other items which he said were *all gone*.

If the evidence as to the collection of the other items and their deposit to the credit of defendant, and total amount, and the admission or statement of defendant that they were all gone, had not been furnished the jury, we doubt not that an argument to the effect that it had not been proved that the $4,100.55 had been fraudulently appropriated, or appropriated by defendant at all, would have been given much weight. Instances where evidence of other embezzlements have been allowed are found in Edelhoff v. State, 5 Wyo. 19, 36 Pac. 627, People v. Rowland, 12 Cal. App. 7, 106 Pac. 428, and People v. Gray, 66 Cal. 271, 5 Pac. 240, all of which cases support what we have said as to the rule to be applied in this case. See, also, the cognate cases of People v. Sanders, 114 Cal. 216, 46 Pac. 153; People v. Tomalty, 14 Cal. App. 224, 111 Pac. 513.

The facts of this case bear little resemblance to the facts in the case of People v. Bartnett, 15 Cal. App. 89, 113 Pac. 879, cited by the appellant. In the Bartnett Case the charge of embezzlement was based upon the sale of certain identified bonds, and, as is pointed out in the opinion, the evidence as to the sale of other bonds at a prior time was in no way interblended with the evidence of the sale selected as the basis of the charge. The court did not err in permitting evidence of the other offenses.

[10] It is contended by appellant that the district attorney was guilty of misconduct in stating to the jury in the course of his argument the law concerning the duty of a trustee to act in the highest good faith toward his beneficiary in matters concerning his trust. It is not contended, and it cannot be successfully contended, that the district attorney in his remarks misstated the law in the abstract; but the contention of the appellant seems to be based upon the proposition that the law as stated has no application to a criminal case, and that such remarks as were made by the district attorney in this connection have no place in the argument to a jury, where an agent is charged with the embezzlement of the funds of his principal. This contention seems to be based upon a misapprehension of the effect of what was said by the District Court of Appeal in this case with regard to an instruction given by the court upon the first trial of this case.

Upon such trial the defendant was a witness, and claimed that the money which he was charged to have embezzled had been loaned to him by his principal, Mrs. Sage. Upon cross-examination he was obliged to admit that at the time he claimed he had obtained the alleged loans he was insolvent, but made no disclosure of such condition to Mrs. Sage. This fact had been much emphasized in the cross-examination. The court in its charge, without explanation or limitation, after stating, "You will observe that the essential element of the offense of embezzlement of which defendant is charged is the fraudulent conversion or misappropriation by the defendant of property received by him in a trust capacity," proceeded to state the rule as to the good faith required of an agent or trustee in dealings with his principal. The District Court of Appeal in its opinion pointed out the circumstances under which the instruction was given, and its tendency, in the manner in which it was given, to mislead the jury, and concluded with the statement that "under the condition of the evidence as above indicated, and in the connection in which the latter part of the instruction was given, it was erroneous, and, we think, clearly prejudicial to the rights of the defendant." As a reading of the opinion will show the conditions under which the instruction was given were exceptional, and the instruction came from the court without such explanation as would limit it in its proper application, no such conditions exist upon this appeal. What the district attorney said was correct as a principle of law, and had a just application to the circumstances of the case. Especially did it have application to the conduct of defendant in refusing in effect at the interview with Mr. Sage, at the office of Mr. Beasley, to give any account of what had become of the money of Mrs. Sage, except to say that it was all gone. The rule stated by the district attorney was correct, both in law and in good morals, and was a very proper subject to call to the attention of the jury in discussing the conduct of defendant in his dealings with Mrs. Sage and her property intrusted to him as her agent. Nothing that is found in the opinion upon the former appeal, when read in its true connection, justifies the criticism of the district attorney made by appellant concerning this particular matter.

The district attorney, evidently in the heat engendered by a hotly contested trial, did make some comments that should have been omitted. Thus, although the defendant did not become a witness, the district attorney made a remark in a discussion with the court to the effect that he (the defendant) could testify to a certain matter. The court, however, promptly, upon objection being made, correctly admonished the jury in regard to such remark. Some other remarks were made which might better have been omitted; but none of them were of sufficient importance to justify a reversal.

[11] Appellant also contends that the court erred in refusing to give certain instructions requested by defendant, in modifying others, and in giving certain instructions upon its own motion. The instructions given are long and, we think, quite complete, and properly guarded the rights of the defendant. Some particular instructions, when read alone and without regard to their connection, may be subject to some criticism; but the instructions must be read as a whole, and if, when so read, they do not incorrectly state the law, and are not contradictory, a new trial should not be ordered because some particular instruction is not in itself a complete statement of the law.

[12, 13] Defendant complains of the refusal of the court to give several instructions, based upon the theory that there was evidence in the case that tended to support the theory that the relations between Mrs. Sage and defendant were those of debtor and creditor. Most of these instructions are argumentative, and for that reason objectionable. Furthermore, we find nothing in the record that tends to support the theory upon which they were based. There is nothing in the evidence that in any way tends to show that the relations between Mrs. Sage and the defendant were those of creditor and debtor, except in so far as it may be said that every agent who receives money for his principal and

converts or withholds it becomes indebted to his principal for the amount thereof as for money had and received for the use and benefit of his principal.

There is in the record one statement, and one statement only, rendered by defendant to Mrs. Sage of receipts and disbursements by him for her. The receipts are listed under the heading "Receipts," and the disbursements under the heading "Disbursements." There is absolutely nothing in the statement to indicate anything other than the ordinary relation of principal and agent. The terms "credit" and "debit" do not even appear in the statement; nor does it appear from such statement that any of the money collected for Mrs. Sage was, either with her knowledge or without such knowledge, mingled with the money of defendant. By this statement we do not mean to suggest that such fact would be important if it did appear. This statement tends to show that defendant was dealing with the moneys and property of Mrs. Sage as agent, and not otherwise.

Appellant in his brief has several times stated that defendant rendered to Mrs. Sage between 60 and 70 statements. He has not pointed to any place in the record where such fact appears, and we have been unable to find it. Certain it is that it nowhere appears what the statements contained. If they were of the form of the one that was introduced in evidence, they would not tend to support any such theory as that upon which the rejected instructions were based. It is not error for the court to refuse to give an instruction that is predicated upon a theory that finds no support in the evidence.

[14] We think the jury could not have been misled to defendant's prejudice by the action of the court in reading section 1826 of the Code of Civil Procedure. The instructions regarding the degree of certainty required for a conviction were clear and full, and the charge, taken as a whole, could not have conveyed any other impression than that the prosecution was bound to prove every element of the crime charged beyond a reasonable doubt.

[15] Appellant contends that the verdict returned by the jury is not sufficient in form to support the judgment, and that defendant is entitled in consequence to be discharged. We find no merit in this contention. The verdict returned by the jury is as follows: "We, the jury in the above-entitled action, find the defendant guilty of embezzlement [a felony] as charged in the indictment and elected by the people as the substantive offense to be proved herein." The indictment charged the defendant with the embezzlement of $37,075.42, and at the outset of the trial the district attorney selected as the item to be proved, as constituting the basis of the charge, a sum of money in the amount of $4,100.55, received by defendant in June, 1907, from the sale of the Lyon street property. This appears from the minutes of the trial, which are a part of the record of the action. Pen. Code, § 1207. The verdict must be read in the light of the facts disclosed by the "record of the action," and so read it is in no way uncertain or indefinite.

Other points are made by the appellant, but none of them seem to us to be of sufficient consequence to require discussion. Upon the whole record we think the defendant was properly convicted of the offense charged, and that no error substantially affecting his rights was committed.

The judgment and order appealed from are affirmed.

BEATTY, C. J., and LORIGAN, J., do not participate in the foregoing.

MELVIN, J. I dissent. I think the court erred in refusing to admit in evidence the note signed by Mrs. Sage and paid by defendant, and I do not think that the error was waived by the failure of the defendant to assent to the admission of parts of the note only. I agree with the opinion prepared by Mr. Justice Hall, in which Mr. Presiding Justice Lennon concurred, wherein this matter is discussed as follows:

"Appellant offered the note in evidence, and upon the objection of the district attorney the court sustained the objection. The defendant was thus denied the right to prove the direct evidence that a portion at least of the money which he was charged with embezzling had in fact been applied to the payment of an obligation of Mrs. Sage. Furthermore, the other payments on this note tended to account for some of the money that the prosecution claimed and proved had been received by defendant as the agent of Mrs. Sage. The evidence of Mr. Knox showed that defendant had made payments on the instrument, which was then exhibited to him, in the amount of over $5,000, and that over $4,000 of this was paid shortly after the receipt by defendant of the $4,100.55, which he was charged with fraudulently appropriating to his own use. But by the ruling of the court, made at the insistence of the district attorney, the defendant was prevented from proving that the payments were made to discharge an obligation of Mrs. Sage.

"This was a vital matter. The important fact to be established in regard to these payments was that they were made for the benefit of Mrs. Sage and in discharge of her debt. It is not for the court to say that the offered evidence would not establish a completed defense. If it tended to meet and overcome any portion of the evidence presented by the prosecution, the defendant was entitled to have it placed before the jury. The ruling of the court deprived the defendant of the benefit of important and material evidence.

"The note, in connection with the evidence of payments made thereon by defendant, given by the witness Knox, directly tended to account for a portion of the $4,100, as well as for other sums of money received by defendant for Mrs. Sage. The evidence of these payments was of practically no value without the introduction of the note. It was the note that would supply the important evidence that these payments were made to discharge an obligation of Mrs. Sage. It is thus manifest that the court erred in a vital matter to the prejudice of appellant in sustaining the objection of the district attorney to the introduction of the promissory note of Mrs. Sage."

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19 Cal. App. 326

MARRON v. MARRON et al.

(Civ. 1,008.)

(District Court of Appeal, First District, California. June 24, 1912. Rehearing Denied by Supreme Court Aug. 23, 1912.)

1. Trial (§ 165*)—Motion for Dismissal—Evidence Considered.

On motion for nonsuit, only the evidence tending to prove plaintiff's case, with the fair inferences and presumptions deducible therefrom, disregarding contradictions, is to be considered.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.*]

2. Deeds (§ 196*)—Undue Influence—Evidence.

Evidence, in a suit to set aside a conveyance by one having a wife and child, to whom he was fondly attached, of practically all his property, of the value of $15,000, for a consideration of $10, that his mind was weakened by years of drinking, is sufficient to raise the inference of undue influence, putting on the grantee the burden of showing its absence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 587–593; Dec. Dig. § 196.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Nellie Marron, administratrix of Thomas J. Marron, deceased, against Mary Marron and another. Judgment for defendants, and plaintiff appeals. Reversed.

Edward C. Harrison and Daniel A. Ryan, for appellant. Lewis F. Byington and R. V. Whiting, for respondents.

KERRIGAN, J. This is an appeal from a judgment following the granting of a motion for nonsuit in an action brought by the plaintiff to set aside a transfer of real and personal property.

On and prior to the 22d day of April, 1907, Thomas F. Marron was the owner of certain pieces of real property situated in the city and county of San Francisco. He was married and had one child, aged four months. On the above-mentioned date, he made a deed and an assignment, purporting to convey to Mary Marron, one of the defendants, the real and personal property described in the complaint. About three months thereafter he died, and subsequently the plaintiff, his wife, was appointed the administratrix of his estate; whereupon she brought this action to set aside the deed and bill of sale to said properties, upon the grounds that Thomas F. Marron was of unsound mind at the time the instruments of conveyance were executed; that they were procured from him by undue influence and by fraud practiced upon him by the defendant Mary Marron.

After the plaintiff had closed her case, the court granted a motion for nonsuit, on the ground that plaintiff's evidence failed to show that, at the time of making the instruments, the deceased was incompetent, or that the execution of those documents was the result of fraud or undue influence exercised upon him as charged in the complaint. Upon this order judgment was regularly entered. Plaintiff excepted to the ruling granting the motion, and now assigns that ruling as error. We think the ruling cannot be sustained.

[1] A motion for nonsuit assumes as true every fact which the evidence, and presumptions fairly deducible therefrom, tend to prove, and which was essential to entitle the plaintiff to recover. Estate of Arnold, 147 Cal. 583, 84 Pac. 252. On such motion the evidence must be taken most strongly against the defendant. Contradictory evidence must be disregarded (In re Daly, 15 Cal. App. 329, 114 Pac. 787), and the motion denied, if there is any substantial evidence tending to prove plaintiff's case without passing on the sufficiency of such evidence. Zelmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Vermont Co. v. Declez, 135 Cal. 579, 67 Pac. 1057, 56 L. R. A. 728, 87 Am. St. Rep. 143. The rules as to a nonsuit are the same, whether the trial is by the court or by a jury. Freese v. Hibernia S. & L. Co., 139 Cal. 394, 73 Pac. 172.

In the case of the Estate of Arnold, supra, where the court passed upon a motion for nonsuit at the close of plaintiff's case in a will contest, Mr. Justice Shaw, after declaring that in a motion for nonsuit the same rules obtain in proceedings to contest a will as apply in civil suits, said: "Every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced must be considered as facts proved in favor of contestants. When evidence is fairly susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to contestants. All the evidence in favor of contestants must be taken as true; and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove, in favor of the contestants, all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] Following the doctrine laid down in those cases, and therefore disregarding contradictions, and considering only the evidence tending to prove the allegations of plaintiff's complaint, and the fair inferences and presumptions deducible therefrom, the facts in the case are these:

On April 22, 1907, in consideration of the sum of $10, the deceased made a deed and assignment to his mother of property estimated to be of the value of about $15,000, and being nearly all of his real and personal property. He was then about 33 years of age. "He was fragile, and a man of very nervous temperament;" was married, and had a child, a girl, about four months old. At the time of his marriage in February, 1901, he was accustomed to drink occasionally intoxicating liquor, and in the spring of the following year commenced to drink such liquor to excess, and continued to do so until the time of his death. In February, 1907, at the request of his wife, he took a solemn pledge to abstain from the use of all such liquor for one year. Between this date and the date of making the deed and assignment, he had been in several medical institutions for treatment for alcoholism. His craving for liquor was so strong that he broke his pledge the day he took it. On the way home from one of the hospitals where he had been treated for his unfortunate habit, he obtained and drank liquor. It was his custom for several months prior to making the transfers in question to take whisky or beer to bed with him to drink during the night. In brief, according to testimony introduced by plaintiff, he had become an habitual drunkard. On the day he made the deed and assignment, he was drunk, stupid, and appeared irrational. "He was not in his right mind, and he didn't know what he was doing." His mother and other members of her family were probably present when he executed the instruments, but his wife, whom he held in high regard, was absent, and knew nothing about the transaction until several days afterwards. The notary before whom the acknowledgment was made, believing that the deceased was conveying his property to his wife, explained to him that "under the instrument his wife could sell the property if she wanted to," and he made a note of such explanation in his official record. The deceased made no answer to this explanation. The family of the deceased was very unfriendly to the plaintiff, and had accused her of many delinquencies, among others of being a drunkard and of caring nothing for her husband. She had never had any trouble with her husband, and was kind and devoted to him. He always expressed himself as fond of her and of his little girl. On the morning of April 25th, three days after the documents were executed, a sister and two brothers of the deceased forced an entrance into the plaintiff's home by smashing the back door, for the purpose of handing to plaintiff's husband, as they told her, a telegram, and collecting 25 cents for its transmission. On that occasion they took deceased away with them, and the plaintiff never afterwards had an opportunity to confer with her husband alone; for he was always accompanied by some member of his mother's family or a caretaker, presumably employed by them. From the date of the instruments plaintiff never saw her husband sober during the remainder of his life. He died July 1, 1907, at a medical institution, where he was being treated for alcoholism. He left no will. The defendant Mary Marron was unable, when her deposition was taken, and at the trial, several months later, to produce the deed, claiming on both occasions that it had been mislaid in her home, and that she was unable to find it.

The evidence shows that the deceased for a number of years was continually becoming intoxicated. He was drunk and appeared stupid and irrational on April 22d; and yet on that day and in that condition his mother accepted the instruments in question, transferring substantially all of his property to her, and, according to a fair inference from the testimony, without any, or, if any, a totally inadequate, consideration. This left him and his wife and baby, to whom he was fondly attached, with so small a portion of his property that his act may be regarded as an unusual one, and one inconsistent with his duties and obligations to his wife and child, as well as to himself.

Other facts tending to show imposition and undue influence are that Mary Marron failed to produce the documents, so that the signature thereon could be compared with the deceased's usual handwriting, which might afford some inference as to his physical and mental condition at the very time the instruments were executed; and this circumstance we regard as distinctly suspicious. For months the deceased was never permitted to see and confer with his wife alone. Was this because the deceased "did not know his own mind," and that it was feared that his wife would exercise some influence over him inimical to the interest of his mother? It is also worthy of note that the notary public felt called upon to explain to the deceased that if the deed were executed the grantee thereunder could dispose of the property to whomever she pleased, and that the deceased failed to correct the notary's impression that the deed was being made to his wife. All the circumstances taken together are certainly sufficient to cast the burden upon the defendant Mary Marron to show that no imposition was practiced on the deceased.

Woolen & Thornton, in their work on Intoxicating Liquors, say: "The inadequacy of the consideration, or its manifest unfairness, is a weighty factor in securing the annulment of a drunkard's contract."

In Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066, an intoxicated person sold property of the value of about $12,000 for $200. The court held that, while equity would not assist a man to avoid a contract which he had entered into when drunk, merely because he might wish, when in his sober senses, he had not entered into it, still equity will not countenance fraudulent imposition; and gross inadequacy of consideration is always received as evidence of imposition, justifying the interference of equity to set aside the contract.

In Crane v. Conklin, 1 N. J. Eq. 346, 22 Am. Dec. 519, it was declared to be the settled rule that, while equity would not interfere to assist a person to annul his contract on the ground of intoxication merely, nevertheless, if any unfair advantage has been taken of his situation, it will render him proper aid; and it was there further held that where the grantor is intoxicated the inadequacy of the price is direct evidence of fraud.

In Moore v. Moore, 56 Cal. 89, it is said: "The fact of there being no consideration, or a grossly inadequate one, is a circumstance which may be considered in determining the condition of the plaintiff's mind at the time of her signing the deeds. She signed instruments which transferred her entire estate, and thereby reduced herself to a state of destitution. The fact of her having done so without consideration, or any apparent motive, would indicate great weakness or unsoundness of mind. One of the indicia of a weak or disordered mind is that its possessor is quite liable to act against his own plain interest in cases where the act could not be imputed to mistake. * * * Taking an unfair advantage of another's weakness of mind is undue influence, and the law will not permit the retention of an advantage thus obtained."

In Allore v. Jewell, 94 U. S. 506, 24 L. Ed. 260, Field, J., delivering the opinion of the court, says: "It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that, from her sickness and infirmities. she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred."

Generally, when there is weakness of mind in a person executing a conveyance of land, arising from age, sickness, intoxication, or any other cause, although not amounting to absolute disqualification, an inadequate consideration, imposition, or undue influence will be presumed. Richmond's Appeal, 59 Conn. 226, 22 Atl. 82, 21 Am. St. Rep. 85; Fishburne v. Ferguson, 84 Va. 87, 4 S. E. 575; Boyd v. Boyd, 66 Pa. 283; Samuel v. Marshall, 3 Leigh (Va.) 567; Fitch v. Reiser, 79 Iowa, 34, 44 N. W. 214; Woodroof v. Howes, 88 Cal. 184, 26 Pac. 111; Dingman v. Romine, 141 Mo. 466, 42 S. W. 1087; Hays v. Feather, 244 Ill. 172, 91 N. E. 97, 18 Ann. Cas. 538.

The circumstances under which a conveyance was made, the conditions of the grantor at the time, and the injustice to him and his heirs if it is upheld, may cast on the grantee the burden of showing the absence of undue influence or imposition. Bennett v. Bennett, 65 Neb. 432, 91 N. W. 409, 96 N. W. 994.

The other matters discussed in the briefs do not require detailed notice.

For the reasons above indicated, we think the trial court erred in granting the motion for nonsuit. The judgment is therefore reversed.

We concur: LENNON, P. J.; HALL, J.

(19 Cal. App. 320)

BOYER v. GELHAUS et al. (Civ. 999.)

(District Court of Appeal, First District, California. June 21, 1912. Rehearing Denied by Supreme Court Aug. 20, 1912.)

1. Taxation (§ 734*) — Tax Sale — Delinquency.

Unless there is in fact a delinquency, a sale by a tax collector is unauthorized and void; and a tax deed given in pursuance thereof conveys no title.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470–1473; Dec. Dig. § 734.*]

2. Taxation (§ 788*) — Tax Sale — Deed — "Primary Evidence."

Pol. Code, § 3785, provides that a tax collector's deed shall be primary evidence that the taxes were not paid. *Held*, that the word "primary" was used in the sense of prima facie; and hence the presumption of nonpayment arising from such deed may be rebutted by proof that the taxes were in fact paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*

For other definitions, see Words and Phrases, vol. 6, p. 5552.]

3. Taxation (§ 709*)—Tax Sales—Redemption—"Subsequent Assessments."

Pol. Code, § 3815, provides that no redemption of property sold to the state for delinquent taxes shall be permitted without payment of all subsequent assessments, costs, fees, penalties, and interest. *Held*, that by "subsequent assessments" is meant all taxes levied against the property subsequent to the tax for which the sale was made.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1430–1435; Dec. Dig. § 709.*

For other definitions, see Words and Phrases, vol. 7, p. 6734.]

4. Taxation (§ 788*)—Tax Sales—Redemption.

Certain property in question was sold to the state in 1898 for the second installment of unpaid delinquent taxes levied against it in 1897. On December 31, 1898, the property was redeemed by a mortgagee by paying to the county treasurer the amount required for redemption, as certified by the county auditor, and the redemption was entered on the assessment roll of 1898. After July 1, 1899, the tax collector sold the property to the state as for the nonpayment of the second installment of taxes for the year 1898, and on July 5, 1904, issued a deed to the state therefor. The taxes, for the alleged nonpayment of which the sale was made in 1899, under which plaintiff claimed title, became a lien on the property on March 1, 1898, and the amount thereof had been fixed and the assessment and levy completed, before the redemption occurred from the first sale. *Held* that, since by the terms of Pol. Code, § 3817, any tax for the year 1898 should have been included and paid to effect a redemption on December 31, 1898, if it had not been previously paid, the certificate of the auditor to the redemptioner, specifying the amount due to redeem, constituted prima facie evidence that all other taxes then due had been paid, which was sufficient to overcome the presumption raised by the tax deed that the taxes for which the land was sold were unpaid, so as to sustain a finding that there were no taxes due on the land for which the second sale was made.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555, 1557, 1559–1569; Dec. Dig. § 788.*]

5. QUIETING TITLE (§ 44*) — POSSESSION — PROOF OF TITLE.

Actual possession of real property is sufficient proof of title as against one out of possession, and who establishes no title in himself.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Action by L. I. Boyer against Frank A. Gelhaus and others. Judgment for defendants, and plaintiff appeals. Affirmed.

James H. Boyer and H. M. Anthony, for appellant. F. S. Brittain, for respondent Frank A. Gelhaus. Tobin & Tobin and Stoney, Rouleau & Stoney, for respondent Hibernia Savings & Loan Society. Alexander McCulloch, for respondent Joseph F. Boeddeker.

HALL, J. This is an action to quiet title to certain real property, situate in the city and county of San Francisco, brought by appellant, who bases her title upon a certificate of sale to the state for delinquent taxes and a tax deed executed on behalf of the state to appellant's predecessor in interest, F. J. Ghiselli.

The respondents Gelhaus filed an answer denying the allegations of ownership by plaintiff and a cross-complaint, in which, among other things, they set up that they were in possession of the real property claimed by plaintiff, and were the owners thereof, and prayed for a decree affirmatively quieting their title as against appellant. The court found that appellant was not the owner of the property in suit, and that respondents Gelhaus were, and entered a judgment accordingly quieting the title of respondents Gelhaus as against the claim of plaintiff. The appeal by plaintiff is from this judgment.

The property in question was sold to the state in 1898 for the second installment of unpaid and delinquent taxes levied against the property in 1897. Subsequently, on December 31, 1898, the property was redeemed from such sale by the Hibernia Savings & Loan Society, a mortgagee thereof, by the payment to the county treasurer of the amount required for redemption, as certified by the county auditor, and the words "Redeemed December 31st, 1898," were stamped on the assessment roll for the year 1898. Subsequently, on the 1st day of July, 1899, the tax collector sold the property to the state as for the nonpayment of the second installment of taxes for the year 1898, and subsequently, on the 5th day of July, 1904, issued to the state a deed therefor. This deed was introduced in evidence by plaintiff, and is in the usual form. Appellant deraigns her title through this deed.

The defendants Gelhaus, at the beginning of the action and for some time prior thereto, were in possession of the property, claiming under a deed from the administrator of the estate of John McDonald, dated April 3, 1904.

The defendants introduced in evidence a duly certified copy of the recorded certificate of redemption given by the county auditor in pursuance of section 3817 of the Political Code. This certificate contained a statement of the amount of delinquent taxes for the year 1897 for which the property was first sold to the state and the interest and the penalty thereon, and gave the total amount necessary to redeem as $9.86. The statement of the auditor contained no statement of any other taxes that were a lien upon the property at the time said taxes became delinquent, nor of any subsequent tax.

As before stated, the court found that plaintiff was not the owner of the property, and also specially found, among other things, that at the time of the redemption of the property on December 31, 1898, all taxes levied or assessed upon said land for each year since the sale to the state, made in 1898, including the taxes for the fiscal year 1898–99, were paid, and that there was no delinquency of taxes on said property for the second installment of taxes thereon for the fiscal year 1898–99. If these facts find support in the evidence, the judgment should be affirmed, for appellant's title is based upon the sale made as for the delinquency of the second installment of taxes for the year 1898; that is to say, for the fiscal year 1898–99.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Unless there was in fact a delinquency, a sale by the tax collector is unauthorized and void, and the tax deed given in pursuance of such sale conveys no title. Randal v. Dailey, 66 Wis. 285, 28 N. W. 352.

[2] The only evidence introduced by appellant to prove that any taxes for the year 1898 were unpaid was the deed of the tax collector to the state, which recited such fact. Section 3785 of the Political Code, in terms, makes such deed "primary" evidence that "the taxes were not paid." The word "primary," as used in the statute, manifestly means prima facie (see De Frieze v. Quint, 94 Cal. 653–659, 30 Pac. 1, 28 Am. St. Rep. 151), and, of course, such evidence is subject to be controverted. If there is in the record any evidence in contradiction of the presumption of nonpayment of the tax for the year 1898 arising from the tax collector's deed, the finding of the court that such taxes were paid, and that there was no delinquency of taxes on said property for the year 1898, is supported, and the judgment of the court cannot be reversed for want of evidence to support the findings.

We think this evidence is found in the certificate of redemption given by the auditor, upon which the redemption was made on December 31, 1898, from the first sale for unpaid taxes. This statement calls for an examination of the law as to what is necessary to effect a redemption from a sale to the state and the duty of the auditor in relation thereto. After property is purchased by the state for unpaid taxes, it must "be assessed for each subsequent year for taxes until a deed is made to the state therefor, in the same manner as if it had not been so purchased." Section 3813, Pol. Code.

[3] Section 3815 of the Political Code provides that no redemption shall be permitted of property sold to the state for delinquent taxes without payment of all subsequent assessments, costs, fees, penalties, and interest. By "subsequent assessments," as used in this section, we think is meant all taxes levied against the property subsequent to the tax for which the sale was made. That such is its meaning is made quite clear by the language of section 3816 of the Political Code, which provides for the distribution between the state and county of "the original and subsequent taxes and percentages, penalty and the interest paid on redemption."

[4] Section 3817 of the Political Code, as it stood prior to 1905, gave the right to redeem at any time prior to a sale by the state "by paying to the county treasurer of the county wherein the real estate may be situated, the amount of taxes due thereon at the time of said sale, with interest thereon at the rate of seven per cent. per annum; and also all taxes that were a lien upon said real estate at the time said taxes became delinquent; and also for each year since the sale for which taxes on said land have not been paid, an amount equal to the percentage of taxes for the year upon the value of the real estate as assessed for that year."

From these various sections, it is perfectly clear that under the law no redemption from a sale to the state for unpaid taxes could be effective without payment, not only of the taxes for which the sale was made, but also all subsequent taxes levied against the property up to the time of redemption. In other words, any taxes that were a lien upon the property at the time the taxes became delinquent, for which the sale was made, as well as all subsequent taxes, must be paid to effect a redemption from the sale to the state.

In the case at bar, the taxes, for the alleged nonpayment of which the sale was made in 1899, under which alone appellant claims title, became a lien upon the property upon the 1st day of March, 1898, and the amount thereof had been fixed and the assessment and levy completed before the redemption occurred from the first sale. By the clear terms of the statute, any tax for the year 1898 should have been paid to effect a redemption on the 31st day of December, 1898, if it had not previously been paid.

In order to enable a redemptioner to comply with the requirements of the redemption law, section 3817 of the Political Code, as it stood when the redemption in this case was made, and as it now stands, further provides that "the county auditor shall, on the application of the person desiring to redeem, make an estimate of the amount to be paid, and shall give him triplicate certificates of the amount, specifying the several amounts thereof, which certificates shall be delivered to the county treasurer, together with the money," etc.

The giving of this certificate is an official duty of the auditor. It authorizes the county treasurer to accept redemption according to the face thereof (section 3817, Pol. Code), and is prima facie evidence of the facts stated therein. Sections 1926, 1963, subd. 15, Code Civ. Proc.

As before stated, the certificate given in this case contained a statement of the amount of the original tax for which the property was sold to the state, and gave the total amount necessary to be paid to effect a redemption as the sum of $9.86, which was made up of the original tax, penalties, and interest. The certificate further stated that the statement contained a full and correct statement of all unpaid taxes and penalties thereon up to the day of redemption. If the statement of the certificate be taken as true, it necessarily followed that all the taxes subsequent to the tax for which the first sale to the state was made had been paid before such redemption. In other words, this certificate was prima facie evidence that the tax of 1898, for the supposed nonpayment of which the sale under which appellant's claim was made, was not unpaid and never became delinquent.

The assessment rolls for the year 1898, it was conceded, had been destroyed in the conflagration of April, 1906. The deed to the state, under which appellant claims, and which shows a sale to the state for a sum less than $10, is prima facie evidence that the tax of 1898 was unpaid.

The certificate of the auditor is prima facie evidence that it had been paid. The court found in accordance with the evidence furnished by this certificate; and, in accordance with the well-established rule that, where there is a conflict in the evidence, this court will not interfere with the findings of the trial court, the findings in this case must stand.

There being no unpaid taxes for the year 1898, the sale to the state, under which appellant claims, was void and gave no title.

[5] The appellant, having no title, cannot prevail against one in actual possession. Such possession is sufficient proof of title as against one out of possession, and who establishes no title in himself. Civil Code, § 1006; McGovern v. Mowery, 91 Cal. 383, 27 Pac. 746; Stephenson v. Deuel, 125 Cal. 656-663, 58 Pac. 258; White v. McGilliard, 140 Cal. 654, 74 Pac. 298. Respondents Gelhaus proved their possession without dispute.

Appellant also complains of some rulings of the court in admitting evidence. We have examined these rulings. Such of them as are erroneous could not have affected the result, and will not justify a reversal.

The judgment appealed from is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

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19 Cal. App. 295

PEOPLE v. MARTIN. (Cr. 323.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. Criminal Law (§ 1160*) — Appeal — Review—Credibility of Witnesses.

The credibility of witnesses is, in the first instance, for the jury, and then, on motion for new trial, for the trial judge, whose determination is conclusive on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

2. Criminal Law (§ 510½*) — Accomplice Testimony—Corroboration.

The finding near a house, shortly after dynamite was exploded on its porch, of a newspaper, with words thereon in defendant's handwriting, coupled with her denial, when shown it, of all previous knowledge of it or the writing, tending to show a consciousness of guilt, tended to connect her with the commission of the crime, and therefore to corroborate the testimony of the accomplice that, just prior to commission of the crime, he had, at defendant's direction, wrapped the dynamite in a copy of such paper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1136; Dec. Dig. § 510½.*]

3. Criminal Law (§ 511*)—Accomplice Testimony—Corroboration.

The evidence corroborative of the testimony of an accomplice need not tend to establish the precise facts testified to by him, but, though slight, is sufficient if, in and of itself, it tends to connect accused with the commission of the crime.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

4. Criminal Law (§ 511*)—Accomplice Testimony—Corroboration.

Evidence, on a prosecution for exploding dynamite in a house with intent to injure the inmates, *held* sufficient to corroborate the testimony of the accomplice, not only that the crime was instigated by defendant, but that she actively aided and abetted its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.*]

5. Criminal Law (§ 338*)—Evidence—Statement of Defendant.

Anything that defendant may have said having a tendency to show that she induced the commission of the crime being relevant and material to the issue of her guilty participation, testimony of J. that shortly before commission of the crime by his exploding dynamite in the house of O. defendant told him she would hit him on the head with a sledge hammer, and then blow him up, if he failed to explode the dynamite in O.'s house, is admissible, though also tending to prejudice her in the eyes of the jurors by showing her little, if any, regard for human life.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752-757, 787, 788, 801, 855; Dec. Dig. § 338.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Isabella J. Martin was convicted and denied a new trial, and appeals. Affirmed.

See, also, 13 Cal. App. 96, 108 Pac. 1034.

Isabella J. Martin, in pro. per. Attorney General Webb and W. H. L. Hynes, Asst. Dist. Atty., for the People.

LENNON, P. J. The defendant in this case, Isabella J. Martin, was charged, in an information filed in the superior court of the county of Alameda, with the crime of felony, as defined in section 601 of the Penal Code. The information in substance charges that on the 19th day of March, 1907, the defendant willfully and maliciously deposited and exploded dynamite in a house which was then occupied as a dwelling house by Frank B. Ogden and his family in the city of Oakland, all with the intent to injure, intimidate, and terrify the occupants of said house.

The defendant was convicted and sentenced to life imprisonment, and this appeal is from the judgment, and from an order denying defendant's motion for a new trial.

Once before the defendant was convicted of the same offense upon the same information; but upon appeal to this court the judgment was reversed and a new trial ordered. 13 Cal. App. 96, 108 Pac. 1034.

While the same questions of law upon which the first judgment was reversed are not involved in the present appeal, the controlling facts upon which the charge against the defendant was founded and a conviction had are, as shown by the records before us, practically the same in both cases; and, as the opinion of this court, written by Mr. Justice Hall, upon the former appeal contains a clear and concise statement of the immediate circumstances of the crime and the manner of its perpetration, we herewith quote and adopt the statement of facts as therein contained:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"The crime with which defendant was charged was not committed by her in person, but was in fact committed by John B. Martin at her instigation. * * * John B. Martin was, at the time of the commission of the crime, 16 years of age, and, though he had been reared by defendant from babyhood, he was not her child. He was the principal witness for the prosecution, and testified in detail to all the circumstances of the commission of the crime, from which it appears that the defendant had for a considerable time before the commission of the crime contemplated the deed, and with the aid of the witness had made careful preparation therefor. Her motive grew out of the result of some litigation which she had had in a department of the superior court of Alameda county, presided over by Hon. Frank B. Ogden, although the action was not finally tried before Judge Ogden. The witness and defendant discussed the contemplated crime, months before its commission, at Weaverville, in Trinity county, where defendant had a home and certain mining properties. Early in January, 1907, they came to Oakland, Alameda county, where defendant owned a home and other property. Under the house belonging to defendant, and in which she and the witness took up their residence, was stored a quantity of dynamite. This was by the witness taken from under the house by the direction of defendant, and placed upon a shelf to dry. Subsequently a portion of it, about 12 sticks, was made into a bomb by the witness and defendant, for the purpose of dynamiting the residence of Judge Ogden. A long fuse was furnished by defendant and carefully prepared for subsequent use. A bicycle was rented by defendant to enable the witness to escape from the scene of the intended crime. Careful preparations were made to enable an alibi to be proved for the witness in case they were suspected or charged with the crime, and on the night of the 19th of March, 1907, the witness, at the direction of defendant, took the bomb and fuse to the residence of Judge Ogden, about a mile distant from the residence of defendant, in which she remained, and, after observing that the residence of Judge Ogden was then occupied by members of his family (wife, four children, and a maid), placed the bomb upon the front porch of the house, carefully adjusted the fuse, lighted the same, mounted his wheel, and rode away to his home, where the defendant awaited his coming. The explosion occurred before the witness reached his home, and, though badly injuring the dwelling of Judge Ogden, did no harm to the unsuspecting members of the household sheltered therein, other than such as may have arisen from fright and nervous shock at the dastardly crime attempted against their home and, possibly, lives."

[1] In support of her present appeal, the defendant urges the insufficiency of the evidence to support the verdict, and insists also that the trial court erred to her prejudice in its rulings upon the admission and rejection of evidence. Defendant's opening and closing briefs contain in the aggregate some 500 pages of typewritten matter, which is devoted chiefly to a discussion of the weight of the evidence and an attack upon the credibility of the several witnesses who testified upon behalf of the people. It would serve no useful purpose to set out in detail the many minute particulars in which the defendant claims the evidence to be insufficient to support the verdict. It will suffice to say that defendant's contention in this behalf is made up largely of references to slight and immaterial discrepancies and contradictions appearing in the testimony of some of the witnesses, all of which should have been and doubtless were, upon the argument of the case, called to the attention of the jury, and presumably duly weighed and considered by them when deliberating upon the question of the guilt or innocence of the defendant. In any event, the credibility of the witnesses was, in the first instance, a matter solely for the jury to determine; and finally, upon the hearing of the defendant's motion for a new trial, it was the right and duty of the trial judge, in weighing the sufficiency of the evidence upon which the verdict was had, to consider the credibility of the witnesses. The trial judge's determination of the question of such credibility is conclusive upon us.

Of the many objections made by the defendant to the sufficiency of the evidence to support the verdict, but one is worthy of more than passing notice; and that involves the point that the evidence shows the chief witness for the people, John B. Martin, to be an accomplice of the defendant, and that his testimony was not sufficiently corroborated to warrant a conviction.

[2-4] It must be conceded that the evidence shows clearly and conclusively that this witness was an accomplice of the defendant; but we are satisfied, after a careful reading of the record, that the evidence offered and received upon the whole case reveals ample corroboration of his testimony and fully justifies the verdict of the jury.

Among the many matters and things testified to by other witnesses, which as a whole tended strongly to support the testimony of John B. Martin, which was to the effect that the defendant instigated the crime and actively participated in its preparation, may be instanced the fact that shortly after the explosion there was found on the Ogden premises a copy of the Bulletin, a San Francisco evening newspaper, upon which was written the words "goode man." After her arrest the defendant was shown the newspaper by Detective Hodgkins, and asked if that inscription thereon was in her handwriting. The defendant denied all knowledge of the newspaper, and disputed that the handwriting thereon was hers. It was subsequently established on the trial by competent and sufficient evidence that the handwriting on the newspaper was that of the defendant. The circumstance that a newspaper containing the handwriting of the defendant was found at the scene of the crime shortly after the explosion may not, in and of itself, have been entitled to any weight as a piece of evidence; but, when considered in conjunction with the defendant's denial of all previous knowledge of the paper or the handwriting thereon, it had a strong tendency, we think, to show a consciousness of guilt on the part of the defendant, and to that extent, at least, tended to connect the defendant with the commission of the crime, and thereby corroborate the testimony of John B. Martin that, just previous to the commission of the crime, he had wrapped the dynamite which caused the explosion in a copy of the Bulletin, at the direction of the defendant.

Other evidence appearing in the record, which also tends to connect the defendant with the commission of the offense charged against her, is to be found in the testimony of several witnesses, which may be summarized as follows: The defendant, on more than one occasion previous to the explosion, openly manifested her malice and ill will toward Judge Ogden, which finally culminated in the threat that when she got through with the civil case then pending in the department of the superior court of Alameda county over which Judge Ogden presided she would "get" him. The defendant was familiar with the use of dynamite; and some time previous to the Ogden explosion had purchased in Weaverville, Trinity county, 25 pounds of dynamite, a portion of which, it was claimed by the prosecution, she wrapped in a mattress and shipped to her home in Oakland. Shortly after the explosion, the defendant's home in Oakland was searched by detectives, and they discovered, secreted in various parts of the house previously pointed out and designated by John B. Martin, not only dynamite and dynamite caps, but a piece of fuse similar to the fuse found upon the Ogden premises after the explosion. The defendant at first denied any knowledge of the fuse found in her home, but subsequently admitted to the detectives that it belonged to her.

Added to these and to the many other circumstances revealed by the record which point to the guilt of the defendant is the fact that some months after the explosion an anonymous letter was received by Judge Ogden, wherein the writer, referring to the dynamiting of his home, stated, among other things, that Judge Ogden was "nowhere near the true solution of the perpetrator of the dastardly deed. It was not done to revenge the cause you suspect; for I myself heard just such an attack planned and discussed, and this was carried out just as it was planned. It was not their intention to kill you then, only to cause you intense suffering by seeing your family and home destroyed, and your turn will come later on. * * * When you pass into that other life, you will see that is why the avenger is following hard on your path, only waiting for time and strength to carry out their hellful designs. * * * I have no means of knowing when the former attempt is to recur for I could not swear they did it, but it was all carried out just as I heard it planned and decided on."

When confronted with this letter by the detectives, the defendant denied all knowledge of it, and expressly declared that it was not in her handwriting. Upon the trial, however, it was fully established by expert evidence that the letter was written by the defendant.

The statute does not require that the evidence necessary to corroborate the testimony of an accomplice shall tend to establish the precise facts testified to by the accomplice; and strong corroborative evidence is not necessary to support a judgment of conviction founded upon the testimony of an accomplice. Even though the circumstances constituting the evidence offered and received in corroboration of the testimony of an accomplice be slight, such evidence is nevertheless sufficient to meet the requirements of the law if, in and of itself, it tends to connect the accused with the commission of the offense. People v. Barker, 114 Cal. 620, 46 Pac. 601; People v. Cleveland, 49 Cal. 577; People v. Clough, 73 Cal. 348, 15 Pac. 5.

Surely the several circumstances hereinbefore enumerated, in and of themselves, tended, in some slight degree at least, to connect the defendant with the crime charged against her, and, when taken altogether, abundantly corroborate the testimony of John B. Martin, not only that the crime was instigated by her, but that she actively aided and abetted its commission.

[5] The defendant complains of the ruling of the trial court, whereby the witness John B. Martin was permitted, over the objection of the defendant, to narrate a conversation which the witness had with the defendant on the evening of the crime and shortly before its commission, wherein the defendant in effect stated to the witness that she would hit him on the head with a sledge hammer,

and then put a stick of powder under him and blow him up, if he failed to explode the dynamite on Judge Ogden's porch as she had directed. There was no error in permitting the witness to so testify. Clearly anything that the defendant may have said which had a tendency to show that she induced the commission of the crime charged against her was relevant and material to the issue of her guilty participation therein; and, being relevant and material for that purpose, such testimony was rightfully admitted in evidence, notwithstanding that it may also have tended to prejudice the defendant in the eyes of the jury by showing that she had little, if any, regard for human life, and that she possessed an abandoned and malignant heart.

There is no merit in the defendant's contention that the former judgment of conviction against her was reversed by this court because of the admission upon the first trial of testimony similar to that now complained of. This contention of the defendant is based upon an erroneous conception of the scope and effect of the decision of this court rendered upon the former appeal. The theory of the prosecution upon the first trial was that John B. Martin was not an accomplice of the defendant in the ordinary legal acceptation of the term, because, as it was claimed, he was inspired and compelled to commit the crime charged through fear of immediate death resulting from the duress and menace of the defendant. From this it was argued and successfully maintained upon the first trial that, although John B. Martin had in fact committed the crime, nevertheless, having committed it under the compulsion of the defendant, the law excused him from the criminality of the act, and he could not, as a matter of law, have been prosecuted and convicted as a principal, from which it followed that he was not an accomplice, whose testimony came within the rule requiring corroboration.

In support of this theory, the prosecution was permitted to show, over the objection of the defendant, that, by previous persistent intimidation and threats, the defendant had so completely dominated the will of the witness John B. Martin that he had at various times, prior to the dynamiting of the Ogden residence, committed numerous misdemeanors and felonies at the instigation of and under the coercion of the defendant. This court, in reviewing the evidence presented by the record on the former appeal, in effect found that there was no foundation for the claim that the witness John B. Martin was compelled to commit the crime charged while acting under the duress and menace of the defendant; but that, on the contrary, it was clearly shown that when he committed the crime he was not in any immediate danger to his life at the hands of the defendant; and that the defendant's threat of a future, remote, and contingent infliction upon him of death or great bodily harm did not, in law, constitute such duress and menace as would excuse the crime and dispense with the necessity for corroboration of his testimony.

No question of duress and menace was involved in the evidence offered and received in support of the prosecution's case upon the second trial. On the contrary, the prosecution proceeded solely upon the theory that John B. Martin was an accomplice of the defendant, and that his testimony was fully corroborated. True there was quoted in the former opinion of this court an excerpt from the testimony of John B. Martin given upon the first trial, which shows substantially the same testimony now complained of; but it is clear upon a first reading of our former opinion that the quotation of the testimony referred to was made, not because it was claimed or held that the admission of that precise piece of testimony was error, but solely for the purpose of making clear and emphasizing the point that in dynamiting the house of Judge Ogden the witness John B. Martin could not have been actuated by any fear of immediate danger to his life at the hands of the defendant; and that the only fear, if any, which impelled him to commit the crime was the fear that the defendant might at some future time, and in some remote place, kill him if he failed to do her bidding. Such fear, it was held, did not constitute duress to such an extent, and within the meaning of section 26 of the Penal Code, that it could be invoked as a valid legal defense for the doing of an act which was otherwise criminal. Accordingly it was further held that all of the evidence upon the former trial, relating to the defendant's brutal treatment of the witness John B. Martin, and her instigation of and active participation in numerous other crimes, had not the slightest relevancy to the question of her guilt or innocence of the crime for which she was being tried; and that therefore the defendant's objection to such testimony should have been sustained and her motion to strike out granted.

Numerous other points, many of them relating to the rulings of the trial court upon the admission and rejection of evidence, are presented and discussed in a haphazard way throughout the voluminous briefs of the defendant. Upon a patient and painstaking investigation of the record, we find that some of the objections relied upon were not made at the trial in the lower court, and that all of them are without merit and unworthy of detailed mention or discussion. We are satisfied upon a careful reading of the whole record that the second trial of the defendant was free from error, and that the evidence upon the whole case is amply sufficient to support the verdict and the judgment.

It is therefore ordered that the judgment and the order appealed from be, and they are hereby, affirmed.

We concur: HALL, J.; KERRIGAN, J.

19 Cal. App. 316

REPUBLIC IRON & STEEL CO. v. PATILLO et al. (Civ. 1,016.)

(District Court of Appeal. Second District, California. June 20, 1912.)

1. APPEAL AND ERROR (§ 931*)—PRESUMPTION.

Though the complaint, in an action on a bond given for protection of materialmen and laborers under a contract with a city for street improvement, does not allege, and it is not made the subject of any finding, that the bond was given under authority of the statute, yet, the city being only authorized to act under permission of statutory authority in making the improvement, and the bond being phrased according to the statutory authority, it must be assumed the contract was so made, and the bond given in connection therewith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3728, 3762–3771; Dec. Dig. § 931.*]

2. MUNICIPAL CORPORATIONS (§ 347*)—STREET IMPROVEMENTS—CONTRACTOR'S BOND—ACTION BY LABORER OR MATERIALMAN—FILING OF CLAIM.

Under section 6½, added to the Vrooman street act (St. 1885, p. 147) by St. 1899, p. 23, requiring, in case of a contract for street improvement, the filing of a bond for the benefit of materialmen and laborers, and authorizing any of them, whose claim has not been paid by the contractor, to file with the superintendent of streets, within 30 days from completion of the work, a statement of his claim, and to commence action on the bond within 90 days after filing his claim, such filing is essential to a cause of action, and must be alleged in the complaint and found by the court.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. § 347.*]

3. BONDS (§ 35*)—STATUTORY BOND—COMMON-LAW OBLIGATION.

A bond given as a statutory bond cannot be considered as a common-law obligation.

[Ed. Note.—For other cases, see Bonds, Cent. Dig. §§ 40, 40½; Dec. Dig. § 35.*]

4. MUNICIPAL CORPORATIONS (§ 348*)—STREET IMPROVEMENTS—CONTRACTOR'S BOND—ACTION BY LABORER OR MATERIALMAN.

Under section 6½, added to the Vrooman street act (St. 1885, p. 147) by St. 1899, p. 23, authorizing a materialman or laborer, whose claim has not been paid, to file, within 30 days from completion of the work of a street improvement, his unpaid claim, and to commence his action on the contractor's bond within 90 days after such filing, the claim cannot be properly filed till completion of the work; and such action, if before such completion, or before such events as would make a showing of formal completion unnecessary, would be premature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 878; Dec. Dig. § 348.*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by the Republic Iron & Steel Company against J. N. Patillo and another. Judgment for plaintiff, and defendant A. J. Sherer appeals. Reversed.

Arthur G. Baker and Edward Winterer, for appellant. W. W. Butler, for respondent.

JAMES, J. This action was brought against defendants as sureties on a bond given for the protection of materialmen and laborers, under a contract made by the Patillo Contracting Company with the city of Hollywood for the doing of certain street work. Defendant Patillo made default, and defendant Sherer has appealed from a judgment entered against him, and also from an order made denying his motion for a new trial.

Plaintiff in its complaint set out that the Patillo Contracting Company, on or about the 13th of August, 1909, entered into a contract with the street superintendent of the city of Hollywood, a municipal corporation, for the improvement of Highland avenue, a public street within said city; that contemporaneously with the execution of said contract the contracting company, as principal, and defendants, as sureties, executed and delivered to the city of Hollywood their undertaking in writing in the sum of $10,000, a copy of which was attached to and made a part of the complaint. It was then alleged that plaintiff furnished to the contracting company materials of the value of $1,085, for which said contracting company had refused to pay. A demand was alleged to have been made upon the contracting company and upon the defendants, as sureties, prior to the commencement of the action. The complaint contained no allegation as to any claim having been filed with the superintendent of streets of the city of Hollywood on behalf of the plaintiff within 30 days after the work of improvement was completed; neither did it appear from the complaint as to when such work was completed, if at all. Upon trial being had, the court made its findings in favor of the plaintiff, following the allegations of the complaint, and made no finding as to the time of completion of the work, or as to whether plaintiff had filed any claim with the superintendent of streets. In our opinion, these findings do not sustain the judgment.

[1] It must be assumed from the facts found that the city of Hollywood entered into the contract with the Patillo Contracting Company under authority of the statute permitting it so to do, and that the bond upon which appellant was a surety was given pursuant to such statute. Section 6½ of the Vrooman street act (St. 1885, p. 147), as amended in 1899 (Stats. 1899, p. 23), provides that where contracts for street improvement are made by a municipality a bond shall be required to be filed with the superintendent of streets, which bond shall be made to inure to the benefit of any and

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all persons, companies, or corporations who perform labor or furnish materials to be used in the work of improvement. It is provided further in this section as follows: "Any materialman, person, company, or corporation furnishing materials to be used in the performance of said work specified in said contract, or who performed work or labor upon the said improvement, whose claim has not been paid by the said contractor, company, or corporation, to whom the said contract was awarded, may, within thirty days from the time said improvement is completed, file with the superintendent of streets a verified statement of his or its claim, together with a statement that the same, or some part thereof, has not been paid. At any time within ninety days after the filing of such claim the person, company, or corporation filing the same, or their assigns, may commence an action on said bond for the recovery of the amount due on said claim, together with the costs incurred in said action." While it was not alleged in the complaint, nor made the subject of any finding by the court, that the bond was given under authority of the statute, considering that the municipality was only authorized to act under permission of statutory authority in making the street improvement, and, further, that the bond in its terms was phrased according to the statutory requirement, it must be assumed that the contract was so made and the bond given in connection therewith accordingly. San Francisco Lumber Co. v. Bibb, 139 Cal. 192, 72 Pac. 964.

[2, 3] With these considerations in mind, we then find a failure on the part of plaintiff to allege, and the court to find, that plaintiff had filed any verified statement with the street superintendent, setting forth the amount of its claim, within 30 days from the time the improvement was completed. It was necessary, in order that a cause of action might be stated, for the plaintiff to allege this fact and the court to make a finding thereon. It cannot be said that a compliance with the statutory requirement in this regard would prove of no benefit to the sureties, and that therefore it may be disregarded. The first answer that might be made to such a contention would be that, where street improvement proceedings depend upon statutory provisions as giving authority to make such contracts, persons claiming the benefit of such provisions must make substantial compliance with the requirements thereof. The second answer that may be made is that as to the sureties the filing of the verified claim with the public officer, showing that the bounden principal has failed to pay for materials, furnishes a means of notice to such sureties, and by timely action they may be able to protect themselves, where, without such notice, their remedy might be lost. That the bond, having been given as a statutory bond, cannot be considered as a common-law obligation is held in the case of San Francisco Lumber Co. v. Bibb, supra, and also in the cases of Shaughnessy v. American Surety Co., 138 Cal. 543, 69 Pac. 250, 71 Pac. 701, and Montague & Co. v. Furness, 145 Cal. 205, 78 Pac. 640.

[4] It may be added that, until the street improvement work had been completed, under the terms of the statute, the notice of plaintiff's claim could not have been properly filed; and any action brought on the bond prior to such completion, or before the occurrence of such events as might make a showing of formal completion unnecessary, would be premature.

For the reasons stated, we are of the opinion that the findings do not sustain the judgment, and that it must be reversed. In view of this conclusion, other points made by appellant need not be discussed, further than to say that we have considered the argument advanced to sustain them, and are of the opinion that none of those contentions possess substantial merit.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 290

PEOPLE v. MARUYAMA. (Cr. 372.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. Criminal Law (§ 1160*) — Appeal — Review—Findings—Conclusiveness.

A jury finding in a criminal case, approved by the trial court's refusal to grant a new trial, will not be disturbed on appeal, though the evidence sustaining it is weak and unsatisfactory.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.*]

2. Indictment and Information (§ 125*)—Joinder of Offenses—Rape.

A single count in an indictment for rape properly charged that the crime was committed with a female under the age of consent, and with force and against her will.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334–400; Dec. Dig. § 125.*]

3. Rape (§ 52*)—Evidence—Sufficiency.

On appeal from a conviction under a count charging rape upon a female under the age of consent, by force and against her will, evidence tending to show that the crime was committed by force may be considered in support of the verdict, on objection that a finding that prosecutrix was under the age of consent was against the evidence.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71–74, 76; Dec. Dig. § 52.*]

4. Criminal Law (§ 1168*) — Harmless Error—Admission of Evidence.

On a trial for rape, it was not prejudicial error to permit the prosecution to identify a letter received by a witness from prosecutrix's father, where the letter was merely marked for identification and was not introduced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3124, 3125, 3129–3136, 3144; Dec. Dig. § 1168.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

5. CRIMINAL LAW (§ 1171*)—HARMLESS ERROR—EXHIBITING ARTICLES TO JURY.

In a prosecution for rape, it was not error, prejudicial to accused, for the district attorney to exhibit to the jury undergarments worn by prosecutrix when she was assaulted, though they were not in evidence, where she identified them in her testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

6. CRIMINAL LAW (§ 940*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

Newly discovered evidence in a prosecution for rape, that prosecutrix was over the age of consent at the time of the offense, was immaterial, where the verdict appears to have been founded, in part at least, upon proof that the assault was committed with force.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324–2327; Dec. Dig. § 940.*]

7. CRIMINAL LAW (§ 941*)—NEWLY DISCOVERED EVIDENCE—CUMULATIVE EVIDENCE.

Newly discovered evidence does not entitle accused to a new trial, where it is merely cumulative and would not in itself, even if uncontradicted, justify an acquittal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2328; Dec. Dig. § 941.*]

8. CRIMINAL LAW (§ 939*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

A new trial, asked on the ground of newly discovered evidence, is properly refused accused, where he does not show diligence to produce the evidence at the trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318–2323; Dec. Dig. § 939.*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

H. Maruyama was convicted of rape. From the judgment, and from an order denying a new trial, he appeals. Affirmed.

David C. Clark, for appellant. Attorney General Webb, for the People.

LENNON, P. J. The defendant was convicted of the crime of rape. He has appealed from the judgment of final conviction, and from the order denying him a new trial.

The information charges the crime in two counts. While the first count proceeds in part upon the theory that the defendant committed an act of sexual intercourse with a female child under the age of 16 years, and not the wife of the defendant, it also charges that the defendant willfully, feloniously, and unlawfully made an assault upon the said female, and by means of force and violence accomplished with her an act of sexual intercourse, against her will and consent. The second count makes no mention of the age of the female; but it specifically states that the crime charged therein arises out of the same transaction upon which the first count is founded, and then proceeds to charge the crime solely upon the theory that it was committed by the defendant by means of force and violence, and against the will and consent of the prosecutrix. The jury found the defendant guilty as charged in the first count of the information.

[1] It seems to be the contention of the defendant that, because the first count of the information, under which the defendant was found guilty, specifically sets forth the age of the female, only the evidence offered and received in proof of her age can be considered in support of the verdict; and that, inasmuch as the testimony adduced at the trial upon the subject of the age of the prosecutrix was, as the defendant claims, doubtful and contradictory, the verdict must be set aside.

The contention of counsel for defendant that the evidence offered to prove the age of the prosecutrix was so weak and unsatisfactory as to be insufficient to support a verdict grounded solely upon the theory that the crime was committed upon a female under the age of consent is but an argument directed against the weight of the evidence and the credibility of the witnesses. There was some evidence, however weak and unsatisfactory it may have been, which tended to show that the female assaulted was under the age of 16 years at the time of the assault; and the weight of the evidence and the credibility of the witnesses ordinarily are questions, once the verdict of the jury has been rendered, solely for determination by the trial judge in passing upon a motion for a new trial.

[2, 3] If the first count of the information had merely charged the crime to have been committed upon a female under the age of 16 years, there would have been much force in the claim of counsel that, by the verdict of the jury, the defendant was acquitted of the charge contained in the second count. The first count of the information, however, did not confine itself to charging an act committed with a female under the age of consent, but set forth the accompaniment of force and violence and lack of actual consent. It includes and charges much more than the mere fact that the defendant accomplished an act of sexual intercourse with a female child under the age of consent. It charges, also, that he, by means of force and violence, did carnally know and ravish one Masaye Ita, and accomplish with her an act of sexual intercourse against her will and by force. The allegation that the crime was committed with a female under the age of consent was not inconsistent with the allegation that it was committed by force and violence, and against the will and consent of the prosecutrix. Both allegations were properly united in the first count of the information; and therefore the second count was a needless repetition, which might well have been omitted altogether. Under the facts alleged in the first count of the information, the prosecution was not limited merely to proof of the age of the prosecutrix. The

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury having found the defendant guilty under a count in the information which in itself completely charged the crime under subdivisions 1 and 3 of section 261 of the Penal Code, the evidence offered upon the whole case which tended to show that the crime was committed by force and violence may be considered in support of the verdict. People v. Snyder, 75 Cal. 323, 17 Pac. 208; People v. Vann, 129 Cal. 118, 61 Pac. 776; People v. Jalles, 146 Cal. 381, 79 Pac. 965. Inasmuch as the evidence offered and received upon the whole case is amply sufficient, irrespective of the age of the prosecutrix, to show that the crime was committed by force and violence, and without the consent of the prosecutrix, it cannot be said that the verdict of the jury was founded solely upon the evidence adduced as to her age, or that it is not supported by the evidence adduced upon the whole case.

[4] There is no merit in the point that the trial court erred in permitting a witness for the prosecution, over the objection of the defendant, to identify a letter which he had received from the father of the complaining witness a few days prior to the commencement of the trial. In response to the objection of the defendant, the district attorney stated that it was not his purpose to introduce the letter in evidence at that time, and that his only purpose was to identify it and have it marked for identification for future use as evidence, if necessary. The district attorney was clearly within his rights in seeking to have the letter identified; and he was not compelled to offer it in evidence immediately upon its identification, or at any other stage of the case. Inasmuch as the letter was never thereafter introduced in evidence, we cannot conceive how the mere fact of its identification could have possibly prejudiced the defendant.

[5] It is contended that the district attorney was permitted, over the objection of the defendant, to exhibit to the jury the undergarments worn by the complaining witness at the time of the assault, without first offering the same in evidence. In that behalf the record, at the pages cited to us, shows merely that during the direct examination of the complaining witness she was permitted, without objection, to identify the undergarments worn by her at the time of the assault, and then to testify, also without objection, as to the manner in which they were torn from her body by the defendant. True the district attorney did not formally offer the garments in evidence; but, inasmuch as it was shown that they were worn by the prosecutrix at the time of the assault, that they were torn by the defendant in making the assault, that they were afterwards produced in court in the same condition as they were immediately after the crime was committed, which would have been a sufficient foundation for allowing them in evidence, the fact that they were not formally offered or received in evidence worked no injury to the defendant. People v. Amaya, 134 Cal. 531, 66 Pac. 794.

[6] Newly discovered evidence was one of the grounds of the defendant's motion for a new trial. The only showing made in that behalf was the filing of the affidavits of two Japanese, to the effect that each of the affiants knew the prosecutrix before she came to the United States, and knew her age, and that she was then, on November 24, 1911, of the age of 17 years and 6 months.

[7] This showing was wholly insufficient to warrant or justify the trial court in granting a new trial. Presumably the verdict of the jury was founded, in part at least, upon evidence that the assault was committed with force and violence, and against the will of the prosecutrix. In this view of the verdict, it is readily apparent that the age of the prosecutrix was of no consequence upon the hearing of the motion for a new trial. Testimony as to her age was not material in the face of the verdict, which was sufficiently supported by the proof of violence. Moreover, the alleged newly discovered evidence was at best accumulative, and would not in any event have been sufficient in and of itself, even if uncontradicted, to justify an acquittal of the defendant in the face of the evidence bearing upon other ingredients of the crime.

[8] In addition to all of this, there was absolutely no showing made that with reasonable or any diligence the testimony contained in the affidavits could not have been produced at the trial.

The judgment and order appealed from are affirmed.

We concur: HALL, J.; KERRIGAN, J.

19 Cal. App. 304

CUTHILL v. PEABODY et al. (Civ. 991.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. Corporations (§ 121*)—Sale of Stock—Action for Price—Pleading.

In an action for the price of certain corporate stock, it was not necessary that the complaint should allege that the contract sued on was founded on a consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

2. Pleading (§ 7*) — Matters of Presumption.

Where a contract for the sale of corporate stock, in order to be valid, must have been in writing, the law presumes that it was in writing, which presumption is necessarily pleaded by an allegation of the making of the contract.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 7.*]

3. Contracts (§ 88*)—Consideration—Presumption.

Every contract expressed in writing carries with it the presumption of a consideration

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for its execution; and the burden of showing want of consideration is on the party seeking to avoid it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 403–405, 407; Dec. Dig. § 88.*]

4. SALES (§ 340*)—BREACH OF CONTRACT—SELLER'S REMEDY.

A seller of personal property, on the buyer's refusal to take the same and pay the price, may retain the property for the buyer and sue for the purchase price; acting as the buyer's agent, he may resell the property, and then recover the difference between the contract price and the price obtained at the resale; or he may treat and keep the property as his own, and recover the difference between the contract price and the market price at the time and place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927–942; Dec. Dig. § 340.*]

5. SALES (§ 369*)—CONTRACT—BREACH—SELLER'S REMEDY.

Where the title of property contracted for has not passed to the buyer, the seller, on the buyer's breach of the contract, has no action for the purchase price, but is limited to an action for damages, founded on a breach of the buyer's contract to accept and pay for the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1083, 1084; Dec. Dig. § 369.*]

6. CORPORATIONS (§ 121*)—SALE OF STOCK—BREACH OF CONTRACT—ACTION—NATURE.

Plaintiff sued for breach of a contract to purchase certain stock, alleging that defendants promised to purchase the stock for $1,000 after one year from February 11, 1905, in the event plaintiff desired to sell, and that on February 11, 1906, plaintiff notified defendants that he desired to sell at that price, and tendered the stock, duly indorsed for transfer, but that defendants refused to pay for the same, notwithstanding plaintiff had kept and performed all of the conditions required of him by the contract. *Held* that, while such agreement at its inception was but a mere unilateral offer to purchase, lacking in mutuality, yet plaintiff's allegation that on the expiration of the time specified he promptly exercised his option to sell by acceptance of the offer to purchase, and then made an immediate tender of the stock, duly indorsed for transfer, showed a transformation of the offer into an unconditional contract of purchase and sale, so that, if after that time title vested at any time in the defendants, plaintiff could treat the transaction as closed and sue for the price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

7. CORPORATIONS (§ 121*)—SALE OF STOCK—CONTRACT—BREACH—ACTION.

Civ. Code, § 1411, provides that an offer to perform an executory contract for the purchase and sale of personal property is tantamount to a performance, and vests title to the thing sold in the buyer; that title is transferred by an executory contract of sale when the seller prepares the thing sold for delivery, and offers it to the buyer with the intent to transfer the title. *Held* that, where plaintiff averred that defendants agreed to purchase certain stock from him after a year from February 11, 1905, in the event plaintiff desired to sell, and that on that date plaintiff notified defendants that he desired to sell at the price stated, and tendered the stock, duly indorsed for transfer, to defendants, such offer to perform was sufficient to vest the title in defendants, so as to authorize plaintiff to sue for the price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.*]

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by A. Cuthill, Jr., against G. L. Peabody and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Welles Whitmore, for appellant. Ira S. Lillick, for respondents.

LENNON, P. J. This is an appeal from a judgment rendered and entered in favor of the defendants upon an order sustaining defendants' demurrer to plaintiff's third amended complaint, without leave to amend.

The plaintiff sought to recover from the defendants the sum of $1,000 as the purchase price of 100 shares of the corporate capital stock of the Sunset Dredging & Development Company, which stock, it is alleged, the defendants contracted to buy from plaintiff.

The contract sued on is not alleged in the complaint to have been expressed in writing; nor is it pleaded in hæc verba. The gist of the action, however, is to be found in those allegations of the complaint wherein, in substance, it is averred that the defendants promised and agreed to purchase said stock from plaintiff for the sum of $1,000 "after one year from February 11, 1905" in the event that plaintiff desired to sell the same; that on February 11, 1906, plaintiff notified defendants that he desired to sell the specified stock at the price stated, and thereupon tendered the stock, duly indorsed for transfer, to the defendants, but that they refused to purchase or pay for the same, as agreed, notwithstanding that the plaintiff had kept and performed all of the conditions required of him by the contract.

It is apparent that the defendants' demurrer was sustained upon the ground that the facts pleaded did not constitute a cause of action.

In support of the demurrer, it is urged that the complaint is defective in not alleging that the contract in suit was founded upon an adequate or any consideration.

[1, 2] As a matter of pleading, the plaintiff was not required to allege that the contract sued on was founded upon a consideration. To be valid under the statute of frauds, the contract must have been in writing, and the law presumes that such a contract was in writing. Presumptions of law need not be pleaded; and in the present case the presumption that the contract was in writing necessarily followed the allegation of its making. Brennan v. Ford, 46 Cal. 7; Emerson v. Bergin, 76 Cal. 202, 18 Pac. 264; Broder v. Conklin, 77 Cal. 336, 19 Pac. 513; Regan v. Justice's Court, 75 Cal. 255, 17 Pac. 195; Barnard v. Lloyd, 85 Cal. 131, 24 Pac. 658; Bradford v. Joost, 117 Cal. 204, 48 Pac. 1083.

[3] Every contract expressed in writing

carries with it the presumption of a consideration for its execution; and the burden of showing a want of consideration is upon the party who seeks to avoid the contract Civ. Code, §§ 1614, 1615; Williams v. Hall, 79 Cal. 606, 21 Pac. 965; Henke v. Eureka Endowment Association, etc., 100 Cal. 429, 34 Pac. 1089; Rogers v. Schulenberg, 111 Cal. 281, 43 Pac. 899. Presumptively the contract sued on in the case at bar was expressed in writing; and, that being so, the further presumption that it was founded upon a consideration necessarily follows as a matter of law; and therefore it was not necessary to a good complaint that the consideration for the contract should be specifically pleaded.

The defendants' contention in this regard is based in part upon the assumption that the plaintiff is seeking relief by the remedy of specific performance, and that therefore plaintiff's complaint should allege and show, not only an adequate consideration for the contract, but that, as between the parties thereto, it was fair and just.

The complaint, however, contains none of the essentials of a cause of action for the specific performance of a contract for the purchase of personal property; and as it is readily apparent from the allegations of the complaint that the plaintiff is not seeking specific performance of the contract, it will be neither necessary nor profitable to follow counsel for defendants in his discussion of what is required to constitute a good complaint in an action for specific performance.

Plaintiff's complaint evidently proceeds upon the theory that the contract for the sale of the stock was fully executed upon the exercise of the option to sell, and that when delivery of the stock, duly indorsed for transfer, was tendered to the defendants, title to the same at once became vested in them, and that upon their refusal to pay the plaintiff, electing to consider the stock as sold, was entitled to recover the purchase price thereof.

[4] Ordinarily the vendor of personal property, upon the refusal of the vendee to take the property and pay the agreed price therefor, may resort to one of three remedies, viz.: (1) Standing on the sale, the vendor may retain the property for the vendee and sue for the purchase price; (2) acting as the agent of the vendee, the vendor may resell the property, and then sue to recover the difference between the contract price and the price obtained on the resale; or (3) the vendor may treat and keep the property as his own, and recover from the vendee the difference between the contract price and the market price at the time and place of delivery. 2 Sedg. on Dam. (8th Ed.) § 753; Lewis v. Greider, 49 Barb. (N. Y.) 606; Pollen v. LeRoy, 30 N. Y. 549; Dustan v. McAndrew, 44 N. Y. 77.

[5] Of course, in a case where the title to the property contracted for has not passed to the vendee, the vendor, upon a breach of the contract, would have no cause of action for the purchase price. In such a case the vendor would be compelled to recoup his loss, if any, solely by an action for damages founded upon a breach of the vendee's contract to accept and pay for the property. Civ. Code, § 3311.

If, in the present case, the sale was completed, and the title to the property sold had actually, or in contemplation of law, passed to the defendants, plaintiff was within his rights in electing to sue for the purchase price of the stock; and the sufficiency of the facts stated in the complaint to constitute a cause of action for the recovery of the purchase price, rather than for damages for breach of contract, depends upon whether or not the pleaded facts show a completed sale, with title to the property sold in the defendants at the time the action was instituted. Civ. Code, § 3310; Lassing v. James, 107 Cal. 348, 40 Pac. 534; Bement v. Smith, 15 Wend. (N. Y.) 493.

[6] While it may be conceded, as contended by counsel for defendants, that the contract in controversy was at its inception but a mere offer to purchase, and therefore unilateral and lacking in mutuality, nevertheless if it be a fact, as alleged in the complaint, that plaintiff promptly, upon the expiration of the time specified in the contract, exercised his option to sell by an acceptance of the offer to purchase, and then made an immediate tender of the stock, duly indorsed for transfer, the original contract was thereby and thereupon transformed from a mere offer to purchase into an absolute, unconditional binding contract of purchase and sale; and from that time on, if title to the stock had vested in the defendants, the plaintiff was justified in treating and suing upon the completed transaction as if it were an ordinary contract of purchase and sale. Civ. Code, § 3310; Keller v. Ybarry, 3 Cal. 147; Lassing v. James, supra; Los Angeles, etc., Co. v. Wiltshire, 135 Cal. 658, 67 Pac. 1086; Cook on Stockholders, § 334; Bement v. Smith, 15 Wend. (N. Y.) 493; Sedg. on Dam. 282; Struthers v. Drexel, 122 U. S. 487–493, 7 Sup. Ct. 1293, 30 L. Ed. 1216.

[7] It seems clear to us that the allegations of the plaintiff's complaint are sufficient to show that title to the stock was transferred to and vested in the defendants. By the provisions of section 1411 of the Civil Code, an offer to perform an executory contract for the purchase and sale of personal property is tantamount to performance, and vests the title to the thing sold in the vendee. That section in substance provides that the title to personal property is transferred by an executory contract for the sale thereof when the seller prepares the thing sold for delivery, and offers it to the buyer with the intent to transfer the title thereto

to the buyer. That, in substance, is what the plaintiff alleges he did in the case at bar; and if it be true, as we think, that the defendants' original offer to purchase was merged into a completed contract of sale by the plaintiff's acceptance of the defendants' proposal, and that a tender of delivery vested title in the defendants, then it must follow that the plaintiff's complaint states a cause of action for the purchase price of the stock. Orr v. Bigelow, 20 Barb. (N. Y.) 21; Bement v. Smith, supra; Lassing v. James, supra.

The judgment appealed from is reversed, with instructions to the trial court to overrule the defendants' demurrer and require them to answer.

We concur: KERRIGAN, J.; HALL, J.

(19 Cal. App. 310)

KEEFE v. KEEFE et al. (Civ. 1,095.)

(District Court of Appeal, First District, California. June 20, 1912.)

1. Specific Performance (§ 86*)—Adequacy of Other Remedies.

The contract on which one conveyed to his mother his interest in real estate, that she would return it to him at her death, entitles him to specific performance, she not having done so, and not having sold the land; the remedy at law being inadequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224; Dec. Dig. § 86.*]

2. Limitation of Actions (§ 36*)—Statute Applicable.

Though the agreement on which one conveyed land to his mother, that at her death she should return it to him, was oral, yet under it, the land being impressed with the qualities of a resulting trust in the hands of those to whom she devised it, the four years' limitation, and not the two years' limitation, for action on an oral contract applies.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 168–181; Dec. Dig. § 36.*]

3. Frauds, Statute of (§ 122*)—Retroactive Operation.

The amendments of Civ. Code, § 1624, and Code Civ. Proc. § 1973, to require contracts of a certain nature to be in writing, are not retroactive, with the effect of making void a prior oral contract, valid when made.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 271; Dec. Dig. § 122.*]

4. Wills (§ 58*)—Contract to Devise.

The rights of one with whom his mother agreed that at her decease she would leave certain property to him are the same as though she expressly agreed to make a will in his favor.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. § 58.*]

5. Pleading (§ 72*)—Complaint—Prayer.

A complaint showing plaintiff may be entitled to judgment in damages states a cause of action, though its allegations do not show he is entitled to the relief demanded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 143, 144; Dec. Dig. § 72.*]

6. Dismissal and Nonsuit (§ 58*)—Grounds.

Objection that a complaint does not state a cause of action is not available on motion for nonsuit.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 134–139; Dec. Dig. § 58.*]

7. Appeal and Error (§ 241*)—Objections Below—Nonsuit.

Variance, not having been specified as one of the grounds of motion for nonsuit, is not available in support of a judgment of nonsuit on appeal therefrom. It should have been called to plaintiff's attention that he might remedy it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 642; Dec. Dig. § 241.*]

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Charles Ignatius Keefe against Elizabeth A. Keefe and others. Judgment for defendants; plaintiff appeals. Reversed.

Arthur W. Perry and Henry Conlin, for appellant. Bartlett & Langdon and Cullinan & Hickey, for respondents.

KERRIGAN, J. This is an appeal from a judgment entered upon an order of nonsuit in an action to enforce specific performance of an agreement alleged to have been made between plaintiff and his mother, Susan Keefe, deceased, where she promised to make a certain provision for him in her will.

Michael Keefe, the plaintiff's father, died intestate leaving at the time of his death two parcels of valuable real estate in the city and county of San Francisco, which estate was community property. One-half of his property was given his widow, Susan Keefe, and the other one-half descended to the five children of Michael and Susan Keefe. As one of such children, plaintiff's interest in the estate was therefore one-tenth.

At the time of the death of Michael Keefe, the plaintiff was in military service to the United States, and stationed in the Philippine Islands. With a view to looking after his interest in the estate, he secured his discharge from the army, went to San Francisco, called upon his mother, the administratrix of the estate, and demanded his share of the property left by his father. The property was still in probate, undistributed, and this request, of course, could not be complied with. The next day, at the request of Susan Keefe, she and the plaintiff met at the office of her attorney. There were also present her attorney, and her daughters, with whom she was at the time living, and who are the principal beneficiaries under her will. After considerable conversation, the plaintiff was ultimately persuaded to make a transfer of his interest in his father's estate to his mother for her better maintenance and protection during her life, with the understanding that upon his mother's death his share in his father's estate would be returned to him.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Susan Keefe died in San Francisco March 12, 1909, leaving a last will and testament, according to the terms of which she in effect failed to carry out her contract with the plaintiff. Her will was subsequently, to wit, April 6, 1909, admitted to probate, and on April 14, 1911, this action was commenced.

Upon the trial thereof, as before stated, a judgment of nonsuit was entered against the plaintiff. The motion for nonsuit was made upon the following grounds: (1) That the cause of action asserted by the complaint on the contract alleged and sought to be established and specifically enforced is barred by section 339 of the Code of Civil Procedure. (2) That the contract sought to be established and specifically enforced is within subdivision 7 of section 1973 of the Code of Civil Procedure. (3) That the contract alleged is not specifically enforceable.

Taking up the last ground of the motion first, defendants contend in effect that equity ought not to interpose and grant relief in this case, because the contract is vague and indefinite, and because the plaintiff may be fully and adequately compensated in money for the breach of the alleged contract.

The testimony shows that immediately upon the plaintiff's arrival in San Francisco he, at the suggestion of his mother, met her at the office of her attorney; that the attorney asked him if he had received a letter requesting him to deed his share of his father's estate to his mother, and, upon receiving a reply in the affirmative, asked him what he was going to do about it. Plaintiff replied that he was going to take his share of the estate; whereupon his mother commenced to cry, and said, "Charlie, are you going to take my property? * * * Charlie, you will be getting old one of these days, and if you take your share you will only squander it. Let me have it, and I will give it back to you on my death." He told his mother that upon those conditions she could take it. At this point the attorney came forward with the deed, and said: "Charlie, remember, now, this share that you are giving to your mother will be given back to you on her death." "These are the conditions," said the plaintiff, "upon which I am going to give it to my mother."

The attorney, who was a witness for the plaintiff, testified that at this meeting he explained to plaintiff that the latter's two sisters had conveyed, or were going to convey, their interests to their mother, and it was desired that he should do likewise, in order that his mother might have an income for the rest of her life sufficient to keep her comfortable; that to this plaintiff was agreeable, but that he did not want the property sold. In reply the witness informed him that his mother considered the land in question a fine piece of property, producing a good income, and had no idea of selling it; that nevertheless, if plaintiff conveyed his share to her, it would be hers absolutely, and if so advised she might sell it. In effect the plaintiff still objected; but when he was informed that, if he persisted in receiving his share, his mother would not hold the land with him, and that it could be sold in partition proceedings, he finally acquiesced in making a deed to her, with the understanding that the share so conveyed should be returned to him on his mother's death.

Prior to receiving a conveyance of their interest in the land from all of her children, the mother made a will in which she stated that it was proposed that her sons and daughters should deed to her their five-tenths interest in their father's estate, and in the said will she devised and bequeathed to each of her children, who should thus convey to her their said interest, a one-tenth interest in her estate. This will was subsequently revoked, and another one executed in which the mother left all her property to her daughters.

[1] We think the contract disclosed by the evidence is neither uncertain nor unenforceable in equity. Even if Susan Keefe had sold the land perhaps, under a fair interpretation of the contract, the plaintiff would have been entitled to a one-tenth interest in the proceeds; and possibly in that event the proceeds would have been in such shape that an action at law would have been entirely adequate. But under the circumstances presented by the evidence it is quite clear, we think, that Susan Keefe agreed to return to the plaintiff, at the time of her death, his one-tenth interest in this land, provided she had not in the meantime sold the same. She did not sell the property; she failed to keep her contract, which is definite, certain, and valid. He was therefore entitled to some remedy; and, as land was the subject-matter of the agreement, as well as of this suit, the inadequacy of the legal remedy is well settled, and the jurisdiction of equity firmly established. Cordano v. Feretti, 15 Cal. App. 670, 115 Pac. 657; 2 Pom. Eq. Rem. § 745.

[2] As before indicated, this action is based upon an oral contract; and, if it is governed by the provisions of section 339, limiting the time to commence actions on such contracts to two years, it is, of course, barred. But under the terms of the contract the property involved is impressed with the qualities of a resulting trust in the hands of the defendants. Duvall v. Duvall, 54 N. J. Eq. 581, 35 Atl. 750; Best v. Gralapp, 69 Neb. 811, 96 N. W. 641, 99 N. W. 837, 5 Ann. Cas. 491; 2 Pom. Eq. Rem. § 746; 1 Underhill on Wills, § 286. See cases cited in note to Johnson v. Hubbell, 66 Am. Dec. 787. In such a case an action may be brought at any time within four years. Hecht v. Slaney, 72 Cal. 363, 14 Pac. 88; Piller v. S. P. Ry. Co., 52 Cal. 42; Chapman v. Bank of

Cal., 97 Cal. 155, 31 Pac. 896; Nouguls v. Newlands, 118 Cal. 102, 106, 50 Pac. 386.

[3] Since this contract was made, sections 1624 of the Civil Code and 1973 of the Code of Civil Procedure have been amended so as to require contracts like this one to be in writing; and at the trial defendants insisted that this contract came within those sections as amended. They have not pressed the point in this court, and may be deemed to have abandoned it, as well they might; for it is wholly without merit. The case was not within the sections as they read at the time this contract was made. Stewart v. Smith, 6 Cal. App. 152, 91 Pac. 667. And certain it is that the amendments should not have a retroactive effect, and operate to make void a contract valid at the time of its execution. 29 Am. & Ency. of Law, 814; 20 Cyc. 281.

[4] There is no merit in the suggestion that there was no agreement to make a will. It is sufficient that Susan Keefe promised to leave the property to the plaintiff at her decease. Best v. Gralapp, supra.

[5, 6] One other matter is suggested in the brief of respondent, which we will notice. While it may be that the allegations of the complaint do not show that the plaintiff is entitled to the relief demanded, still, if it shows, as is admitted by the defendants, that he may be entitled to a judgment in damages, it follows, of course, that the complaint states a cause of action. Swan v. Talbot, 152 Cal. 142, 94 Pac. 238, 17 L. R. A. (N. S.) 1066. But, even if the complaint did not state a cause of action, this objection could not be availed of on a motion for nonsuit. Pacific Pav. Co. v. Vizelick, 141 Cal. 410, 74 Pac. 352.

[7] If the allegations of the complaint and the proof do not correspond, there is a variance; but, the defendants not having specified this as one of the grounds of their motion for nonsuit, we cannot here consider it for the first time. The attention of the plaintiff should have been called to the supposed defect, so that he might have an opportunity to remedy it, if he desired. 1 Hayne on New Trial and Appeal [Revised Ed.] §§ 115, 116, pp. 561 and 577.

The judgment appealed from is reversed.

We concur: LENNON, P. J.; HALL, J.

(19 Cal. App. 255)

BAGLEY v. CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 1,041.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

1. LIMITATION OF ACTIONS (§ 95*)—EXECUTORS' SALE—EXCUSE FOR DELAY.

Where plaintiff's action to set aside an executors' sale, made in good faith for value to an innocent purchaser, was not brought until nearly 20 years after she reached her majority and 33 years after the sale, her mere want of knowledge of the sale, when all the proceedings were of record and could have been discovered by inquiry, did not excuse her long delay, nor prevent the action from being barred by Code Civ. Proc. §§ 1573, 1574, providing that no action shall be brought to set aside an executor's sale, unless commenced within three years after final settlement, or discovery of the grounds for setting it aside, or within three years after the removal of any legal disability; and it was immaterial whether the purchaser was in possession of the land.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 473, 474; Dec. Dig. § 95.*]

2. JUDGMENT (§ 517*)—COLLATERAL ATTACK—CONFIRMATION OF EXECUTORS' SALE.

The confirmation of an executors' sale by a court of competent jurisdiction in a decree finding that the sale was without notice, but interpreting the will to authorize sale without notice, was not subject to collateral attack in a suit instituted long afterwards to set aside the sale, nor could the correctness of such interpretation of the will be inquired into; it being essential to any such attack and inquiry to consider the terms of the will—a course not permitted in a collateral proceeding.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 959, 960; Dec. Dig. § 517.*]

3. JUDGMENT (§ 495*)—JURISDICTION—PRESUMPTION.

All intendments are in favor of the validity of the judgments of courts of general jurisdiction and of the jurisdiction of such courts to render a particular judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 933, 934; Dec. Dig. § 495.*]

4. EXECUTORS AND ADMINISTRATORS (§ 138*)—SALE—NOTICE.

An executors' sale of land pursuant to Probate Act (St. 1851, p. 470) § 177, in effect in 1872, which provides that notice shall be given by an executor of the sale of a testator's estate, unless there are special directions given in the will, in which case he shall be governed by such directions, and also pursuant to a will which makes no specific directions as to whether the sale shall be with or without notice, but provides that the executors, within a reasonable time and when they think it advisable to do so, shall sell the property, is not invalid, though no notice of the sale is given.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560–566, 568–575; Dec. Dig. § 138.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Mary C. Bagley against the City and County of San Francisco and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John Hubert Mee, for appellant. Olney, Pringle & Mannon and Page, McCutchen, Knight & Olney, for respondent Walker. Edwin T. Cooper, for respondent Bennett. A. H. Redington, for respondents Redington. Solomon Bloom, for respondent David C. Bloom. Stoney, Rouleau & Stoney, for respondents Solomon Bloom and others.

BURNETT, J. The action was brought to quiet title to certain real property in San Francisco, and the judgment in favor of defendants was rendered upon an agreed statement of facts. It appears that, on November 9, 1869, one Charles F. Hamilton and Monroe Greenwood became the owners of the premises by virtue of a deed from the city and county of San Francisco. Hamilton died on November 14, 1872, leaving a will, by which he disposed of all of his personal property and directed, in a codicil thereto, that his executors sell all of his real property in the city and county of San Francisco and invest the proceeds thereof in United States government bonds for the benefit of his widow, Mary C. Hamilton, and his only child, Mary C. Hamilton, now Mary C. Bagley, plaintiff herein. The will was admitted to probate on December 3, 1872, and the executors, acting under the authority contained in said codicil proceeded, on March 3, 1875, to sell the real property at private sale and without any notice to the public. The executors rendered to the court a proper return and account of the sale, showing that they had sold to Monroe Greenwood, for the sum of $3,991, the various tracts of land described in the return, and they prayed for an order of confirmation. At the hearing of the return, on March 19, 1875, after proper notice given, the court appointed Timothy D. Reardon attorney to represent the minor heir in the proceeding and made its decree, adjudging that "said sales were duly made under the powers conferred on said executors under the will of deceased, and that the same are hereby confirmed, approved, and declared valid, and said executors are hereby authorized and empowered to execute conveyances of said land to said purchaser upon receiving the purchase price aforesaid." The court found that "said sale was at private sale, and no notice of the time or place of said sale was given previous to the sale," and "that the executors were fully authorized and empowered by said will to sell the estate of the deceased without any order of court, and that said sales were legally made and fairly conducted, and that the sums bid for said lots were not disproportionate to the value thereof, and that a sum exceeding such bids by at least 10 per cent. cannot be obtained." A deed of the interest of said estate to Monroe Greenwood was executed by the executors on the 25th day of March, 1875, and recorded in the office of the county recorder on April 2, 1875. The defendants thereafter, by payment of what was considered the full value of said property and without knowledge of any claim of plaintiff, succeeded to all the right, title, and interest of Greenwood in and to the premises in controversy. On April 29, 1875, a decree of final distribution was made in the estate of Hamilton, which, after distributing certain personal property not involved herein, distributed all of the rest, residue, and remainder of the property of the decedent, whether then known or discovered, to the widow of deceased and plaintiff herein, share and share alike; no specific mention being made in said decree of any real property. A certified copy of said decree was recorded the same day in the county recorder's office. Monroe Greenwood and his successors in interest have paid all taxes levied or imposed upon the property and also all street assessments.

With the exception of the pieces claimed by W. P. Redington, George M. Rolph, and Margaret Jane Walker, the property involved has at all times been vacant, open, unfenced, uncultivated, and unused. On December 1, 1907, W. P. Redington and George M. Rolph inclosed by a substantial fence the land claimed by them, and, between the 1st day of July and the 1st day of November, 1907, Margaret Jane Walker built substantial improvements upon the lot claimed by her, of the value of $11,000; but these improvements were made without the knowledge or consent of plaintiff. Plaintiff made no claim to any of the property until February 1, 1905, and since that date she has asserted her right to an undivided one-fourth interest therein. As to her claim, the various defendants had no knowledge, other than such knowledge as was imparted by the public records of the various documents set forth in the agreed statement of facts. At the time of the said probate sale, plaintiff was of the age of four years. She reached her majority in 1889, and she brought this action 19 years thereafter, to wit, on the 11th day of January, 1908.

The answers denied plaintiff's title, averred ownership in defendants, pleaded the statute of limitations as embodied in sections 318, 343, and 1573 of the Code of Civil Procedure, set up the facts in reference to said probate sale, and presented, also, the defense of laches and estoppel.

All the various contentions made and argued by counsel in their exhaustive briefs revolve about the vital consideration as to the legal effect of the said probate sale made by the executors to Greenwood. In fact, appellant's cause is grounded upon the proposition that "the attempted sale in probate to Monroe Greenwood was a nullity, for the reason that it was made at private sale and without notice as required by law." The basis for the contention is that the law in force at the time of the death of Hamilton controlled the proceeding, and that its mandate required the executors to give notice of the sale. Section 177 of the Probate Act (St. 1851, p. 470), in effect at that time, November 14, 1872, directed that, "if the testator shall make provision by his will, or designate the estate to be appropriated for the payment of his debts, the expenses of administration or family expenses, they shall be paid according to the provisions of the will and out of the estate thus appropriated, so far as the same may be sufficient," and the following section, 178, as amended by St. 1861, p. 645, provided that "when such provision has been made, *or any property directed by the will to be sold,* whether for payment of debts, or expenses, or for any other purpose, the executor or administrator with the will annexed may proceed to sell without the order of the probate court but *he shall be bound,* as an administrator, *to give notice of the sale,* and to return accounts thereof to the court, and to proceed in making the sale in all respects as if it were made under the order of the court, *unless there are special directions given in the will, in which case he shall be governed by such directions;* but in all cases, no sale shall be valid unless confirmed by the court under the rules prescribed in cases of sales of real estate by an administrator." The clause of the will involved herein is: "And I declare it to be my desire that my executors within a reasonable time, and when they think it advisable to do so, to sell all my real estate in the city of San Francisco, and invest the proceeds from such sale in United States government bonds." It is contended that this does not amount to a *direction* for the sale of any real property, and, since there is no provision in the will for the payment of debts, expenses of administration, or family allowance, the case is not brought within the exception that obviates the order of sale by the court and the notice required by the statute; or, at any rate, if said language of the will is construed as equivalent to a direction to sell, it was still necessary to give the proper notice to make the sale valid.

Against this view thus generally stated are opposed various contentions of respondents, among them, that the action is barred by section 1573 of the Code of Civil Procedure; that, having received the purchase money for the said probate sale, appellant is deemed to have ratified the proceeding, and it is now too late for her to question it; that the failure to give notice of said sale is not a defect that can be taken advantage of in a collateral attack; that the law in effect at the time of sale, and not that at the time of the death of the testator, applies, and under said law no notice was required; and that, under a fair construction and reasonable application of said section 178 of the Probate Act, as it stood in 1872, the sale must be held to be regular and valid.

Said section 1573 of the Code of Civil Procedure reads as follows: "No action for the recovery of any estate sold by an executor or administrator, under the provisions of this chapter, can be maintained by any heir or other person claiming under the decedent, unless it be commenced within three years next after the settlement of the final account of the executor or administrator. An action to set aside the sale may be instituted and maintained at any time within three years from the discovery of the fraud, or other grounds upon which the action is based." Section 1574, following, provides that "the preceding section shall not apply to minors or others under any legal disability, to sue at the time when the right of action first accrues; but all such persons may commence an action at any time within three years after the removal of the disability."

[1] As we have seen, 19 years elapsed after plaintiff ceased to be a minor before she brought the action, and this was 33 years after said probate sale. It thus appears that plaintiff is unmistakably brought within the clearly expressed inhibition of said statute of limitations, unless it can be said that, by reason of the want of actual knowledge of the claim of respondents, the bar of the statute does not operate against her. The portion of the stipulated facts in point is as follows: "The said Monroe Greenwood and his grantees and his successors in interest after him claimed ownership of said real property under said will and probate proceedings and other documents hereinbefore set out, but as to said claims plaintiff had no knowledge, other than such knowledge as can be imputed to her from the existence of the records hereinafter set out and referred to, * * * until the commencement of this action." It might be claimed, therefore, that, since plaintiff acquired knowledge of the probate sale within 3 years of the beginning of the action, this circumstance constitutes one of the "other grounds upon which the action is based," and that she is thus brought within the exception provided for in said section 1573. But the want of actual knowledge of the sale does not justify her long delay in bringing the action. The burden was obviously cast upon her to excuse her ignorance of the proceedings in her father's estate. They were matters of public record, and it was her legal duty, at least after reaching her majority, to make inquiry concerning them. If she had so inquired, the result would have been the discovery of the fact that this identical property was sold in 1875, for its full value, by the executors of her father's estate, and she would have known that, in order to maintain an action to recover said property, or any portion of it, she must proceed not later than 1892. The situation, in brief, is simply this: With the means of knowledge available, and without offering any excuse for her failure to make inquiry, plaintiff waits for nearly 20 years after reaching her majority and then institutes proceedings to set aside a sale made to an innocent purchaser for value by the executors of her father's estate in the utmost good faith and by virtue of a purported power in the will, and afterwards confirmed by a solemn decree of the court. No judicial tribunal, with proper regard for vested interests and that wise public policy which fosters the stability of titles, should allow her want of actual knowledge of the adverse claims to operate, under such circumstances, to protect her from the bar of the statute. In Dennis v. Bint, 122

Cal. 39, 54 Pac. 378, 68 Am. St. Rep. 17, the action was to recover possession of a tract of land and to set aside a sale thereof made in probate, and it was stated in the opinion by Commissioner Britt, referring to the same statute of limitations, that "it is further claimed that the case is taken from the operation of the statute by the averment that the grounds of the action were discovered within a year next before the commencement of the suit. Aside from other considerations which may bear on this point, the statement of the complaint is insufficient for the purpose claimed, because unaccompanied by any explanation of the failure to acquire knowledge earlier—so as regards the adult plaintiffs, at least." If a mere allegation in the complaint of the want of knowledge is insufficient, clearly a stipulation of like import falls short of meeting the requirement of the rule. The Chief Justice, in his concurring opinion, discusses the matter at length, and declares that "under this section [1574, supra] I think it appears from the complaint that the action of the two plaintiffs herein, who were more than three years past their majority when the original complaint was filed, was barred, and that the ruling of the court sustaining the demurrers as to them was correct, and that the judgment as against them should be affirmed upon this ground alone. They are not saved by their allegation that the facts upon which their action is founded came to their knowledge within three years of the commencement of the action, because they offer no explanation or excuse for their ignorance."

In Moore v. Boyd, 74 Cal. 171, 15 Pac. 671, it is said: "For the purposes of the statute of limitations, if the means of knowledge exist, and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been readily ascertained by such inquiry. This rule is applied both in equity (New Albany v. Burke, 11 Wall. 107 [20 L. Ed. 155]; National Bank v. Carpenter, 101 U. S. 576 [25 L. Ed. 815]) and at law (Bailey v. Glover, 2 Wall. 349 [22 L. Ed. 636]; Wood v. Carpenter, 101 U. S. 141 [25 L. Ed. 807])."

The effect of the corresponding section 190 of the Probate Act received consideration in the early case of Harlan v. Peck, 33 Cal. 515, 91 Am. Dec. 653. The only substantial difference between the language of that section and the provision before us is that the former required the action to be brought within three years next after the *sale*, instead of the *settlement of the final account* as now. In the Harlan Case the court, through Mr. Justice Sanderson, said: "Whether this language embraces sales which are made under order of the probate courts which are void for the want of jurisdiction, or only such sales as are merely voidable, is the question. There is nothing in the policy or language of the statute which excludes void sales from its operation. The policy of the statute is to quiet titles to real estate sold by order of the probate courts. In view of that policy merely, there can be no distinction between sales which may be termed void for the want of jurisdiction and those which are voidable only. Nor is there anything in the language of the statute which creates such a distinction. * * * To the phrase in question there is added no qualification; and hence, if it restricts the limitation at all, it excludes all sales which are not 'according to the provisions of the chapter,' which includes voidable as well as void sales." The authority of this case is recognized in subsequent decisions of the Supreme Court, and it would probably be admitted as decisive of the controversy, were it not for some expressions used in the opinion found in Gage v. Downey, 94 Cal. 241, 29 Pac. 635, and in Campbell v. Drais, 125 Cal. 253, 57 Pac. 994. But those cases in their facts are so dissimilar to the case at bar that they can be of little, if any, assistance here. The distinction is clearly pointed out by respondents, and it is manifest that these cases are not inharmonious with the other decisions of the Supreme Court.

In the Gage Case the defendants did not claim under the probate sale at all. They set up a sale to a man by the name of Carlisle, with whom they were not in privity. The sale to Carlisle was unquestionably void, and the contention of defendants was that plaintiff could not recover of them because there had been a void probate sale to a stranger, which sale had remained unattacked for more than three years. The decision is grounded upon the well-known doctrine that the statute of limitations creates a personal privilege that may be waived, and that, in order to be available, it must be claimed by one upon whom the privilege is conferred.

While not actually determined by the court, it seems to have been conceded that if the action had been against Carlisle he might have urged successfully the statute of limitations; the court stating: "Here it is conceded that no title vested in Carlisle under the probate sale, and that the facts exist which, under this section of the Code, deprive plaintiffs of the right to bring an action for the recovery of the land"—that is, as against Carlisle. Appellant calls attention to the fact that in the Gage Case, supra, the purchaser under the probate sale had not taken possession of the property, and that this circumstance was considered of some importance by the court. But it is obvious that the court was considering this particular statute of limitations in connection with the question of title. The purpose was to make the position plain that a void sale of itself could not create and it would not ripen into title, no matter how much time had elapsed, but that, under the provisions of the statute, it could be set up simply as a bar to prevent the assertion of title in another. It occurred, however, to the author of the opinion that, if possession were taken under a void sale, then the purchaser might assert title in himself. This is true, because occupancy confers a species of title which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better title (section 1006, Civ. Code; King v. Gotz, 70 Cal. 240, 11 Pac. 656); and possession, when adverse, as is well known, may ripen into a perfect title. This accounts for the expression in the opinion: "It appears that Carlisle never entered into possession of this land under his purchase, and to hold that, under the circumstances as here depicted, the interest of the heirs was transferred to Carlisle would be novel in the extreme; but we do not deem it necessary to discuss that question." The case does not decide that, in order to take advantage of this statute of limitations, the purchaser must enter into actual possession of the property. This would be adding something that the Legislature has not provided. Of course, there may be circumstances where the question of possession would affect the application of the statute, but to agree with appellant's contention here would be to exclude unoccupied land altogether from the operation of said section 1573 of the Code of Civil Procedure. We can find no warrant for this position.

In the Campbell Case, supra, it was held that the probate sale to one Hewitt was void. He held and occupied the premises for a few days and, on March 11, 1874, he conveyed the land to one Cross, who occupied it till February, 1876, when he conveyed the whole in severalty to one Church, who had entered into possession of the property and was occupying it at the time of the trial. While Cross was in possession, he allowed the widow of John A. Campbell, deceased, to build a house upon a portion of the land and to occupy it with her minor children, and in 1876 Church married the widow, and the children continued to live there with Church and their mother. They were raised and treated by Church substantially as if they had been his own children, and he recognized their interest in the property, and, before the execution of the mortgage under which appellants claimed, he said to all the plaintiffs that they owned one-half of the property, and he told the mortgagee that the children owned one-half and called his attention to an abstract of title showing that fact, and the mortgagee thereupon agreed to take the mortgage with the knowledge that, although it covered the whole title to the land, yet it probably would be good for only an undivided one-half. All the plaintiffs had attained their majority a little more than three years, and the final account of the administration of the estate of Campbell had been settled more than three years, before the commencement of the action. It was therefore argued that the action was barred by section 1573 of the Code of Civil Procedure; but the Supreme Court held that it had no application, since "plaintiffs had no cause of action against Church, for he acknowledged their title and was holding for them as a tenant in common, and they could not have litigated their title in the foreclosure suit because they held by a paramount title, and not under the mortgagor."

Neither of these cases can be said to favor the addition of a new element to the said statute, or to manifest a purpose on the part of the Supreme Court to depart from the plain and unequivocal language of the legislative intent.

[2] But the contention of appellant in effect is that the executors, by reason of their failure to give notice of the sale, did not properly exercise the power committed to them by the will. This question, however, as already indicated, was determined by the court in a solemn judgment confirming the sale, and it cannot be again litigated in this collateral proceeding. There is no dispute that the statute required the court to determine whether the sale was valid. By virtue of the decree, whose terms have already appeared, the court did determine that the sale was legally made, and that the executors, in making the sale, properly exercised the power conferred upon them by the will of the deceased. It cannot be doubted that the court had jurisdiction to render this decree. The will had been admitted to probate; it contained a direction to the executors as to the sale of the real property; they had proceeded to make a sale, and had filed in the court a proper return, which, after due notice, came on for hearing. The court found, it is true, that no notice of the sale was given by the executors; but the court so interpreted the will that no notice was required, and appellant now seeks, more than 30 years thereafter, to reverse that ruling. The only possible question of controversy before the court was the proper construction of the will, as to whether it authorized the executors to sell without notice. The court determined that it clothed the executors with that power, and if we are to attribute to judgments their necessary incidents it must be held that the construction of the will can no longer be open to dispute. If the decree showed upon its face that it was necessarily invalid, a different question might be presented; but it cannot be declared, from an inspection of the decree, that the judgment was even erroneous—much less that there was any want of jurisdiction on the part of the court. To reach even the conclusion that the court committed an error in confirming the sale, we must travel beyond the decree and consider the terms of the will; in other

words, a part of the evidence upon which the court based its judgment. This is not permitted in a collateral proceeding. Emery v. Kipp, 154 Cal. 83, 97 Pac. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792. But if we were to do so the result would be, under well-established principles, to leave the judgment undisturbed and unaffected by this action.

[3] Of course, "all intendments are in favor of the validity of judgments of courts of general jurisdiction, and the jurisdiction of such courts in rendering a particular judgment is conclusively presumed to have been acquired, unless the record itself shows to the contrary." Morrissey v. Gray (Sup.) 124 Pac. 246.

There would be more plausibility in appellant's contention if there were no pretense of power to sell conferred by the will, and her claim would undoubtedly possess merit if such power were prohibited by law; but no situation of that kind is presented.

The two cases cited by respondents, Richardson v. Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101, and Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408, affirm the principle that is applicable here to the said judgment of confirmation. In the former, the action being to quiet title, one of the contentions was that notice of the probate sale was not posted as required by law; but the Supreme Court, through Mr. Justice McFarland, said: "The probate court, in its order confirming the sale, declared that the notice was posted in three public places. Respondent introduced evidence against the objection of appellants, with intent to show that *one* of the places was *not* a public place, within the meaning of the Code. But surely the court, having jurisdiction of the proceeding, could, within that jurisdiction, find the fact that the place was a public place; and such finding cannot be attacked collaterally." Furthermore, we may adopt as peculiarly appropriate in this case the following language of the court: "It may be remarked that there is no pretense that the sale under which appellants claim was in fact fraudulent, or without adequate consideration, or in any way unfair. To the objections made to it may well be applied that often abused word 'technical'; and we do not think they are sufficient to overturn, for want of jurisdiction, the solemn judgment of a court, or to destroy a title to realty honestly acquired."

In the Zilmer Case, supra, it is said that, "conceding, however, that the proceeding for confirmation of the sale was irregular as claimed, and that notice of the sale was not published for the time required by the order of the court, yet these irregularities or errors in the exercise of unquestionable jurisdiction would not invalidate the sale nor the administrator's deed to the extent of making them vulnerable to the collateral attack made upon them in the court below. Jurisdiction existing, any order or judgment is conclusive in respect to its own validity in a dispute concerning any right or title derived through it, or anything done by virtue of its authority."

The vice of appellant's argument, let it be repeated, is in the assumption that the court confirmed the sale in the face of an affirmative showing that the notice required by the statute was not given; whereas the truth is the court determined that, under the provisions of the will, no notice was required, and thus was effect given to the intent of the testator as found by the court. This judicial construction of the will is as effective now as it would be if it had been made in a decree of distribution, instead of an order confirming the probate sale.

In the cases cited by appellant, there was either a direct attack upon the judgment, or else it appeared that the court had no jurisdiction, either of the person or of the subject-matter; and hence the judgment was void.

In Townsend v. Tallant, 33 Cal. 45, 91 Am. Dec. 617, the order to show cause why the sale should not be made was not published *four* weeks as required by the statute. The statute indubitably required such publication, and the probate court, in its order confirming the sale, expressly found that the order to show cause had been duly advertised for *three* weeks. It was held that the order confirming the sale was without jurisdiction, and could be collaterally attacked. The court said, through Mr. Justice Shafter: "The sale being void, there was no subject-matter upon which the order of confirmation could act. If the court had no jurisdiction to order the sale, it had none to confirm it. Where there is no power to render a judgment or to make an order, there can be none to confirm or execute it, or none, at least, without the help of legislation." The order to show cause is the process in this probate proceeding, and it is manifest that a compliance with the mandate of the statute as to its service is as indispensable to the jurisdiction of the court as an obedience to the requirement of the law as to jurisdiction of the person, where reliance is had upon the publication of summons in an ordinary action.

So in Smith v. Olmstead, 88 Cal. 582, 26 Pac. 521, 12 L. R. A. 46, 22 Am. St. Rep. 336, there was a sale under a power conferred by the will of one Z. B. Smith, deceased; but it was properly held that the sale did not transfer an interest upon which the will did not operate; that the pretermitted child succeeded "immediately by operation of law to the same portion of the testator's real property as if no will had been made; that as to such portion the testator is to be regarded as dying intestate, and its succession is directed by law, and not by the will. And as a necessary legal consequence of this contention, it would follow that every provision in the will directly or indirectly attempting to dispose of such portion of the estate, except for the discharge of the decedent's debts, or other charges accruing in due course of administration, is inoperative as against such child." The court concluded that "the order of confirmation imparted no validity to the sale in this case; it only adjudicated that the power contained in the will had been followed, and that the sale was for a fair price." If we accept this as a correct statement of the effect of the order of confirmation, it is manifest that it sets at rest the disputed point here, as the vital question is whether the "power contained in the will has been followed."

Again, it would seem that the manner in which the power of sale shall be exercised—in other words, the mode of procedure for the execution of the authority conferred on the executors—should be determined by the provisions of the statute in force at the time of the sale, rather than by the law as it existed at the time of the death of the testator. The position of appellant is that at the time of the death of Hamilton the title to the real property vested in his devisees, subject only to such conditions of administration as the statute imposed at that time, and that the Legislature could not enlarge those conditions or divest or impair the title of said devisees by subsequent legislation. The theory is sound; but it is believed that it has no application to the situation here. In brief, whether, technically speaking, there was or not an equitable conversion of the real into personal property at the time of the death of the testator, it is at least true that the devisees took the real estate subject to the power of sale vested in the executors, and the amendment of the statute left this interest unaffected, but dispensed with the necessity for giving notice of the sale, thereby simply changing the form of procedure for the enforcement of a right or the exercise of a power that was created by the will. The law, as it existed at the time of the sale, provided that "when property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine; but the executor must make return of such sales, as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case no title passes unless the sale be confirmed by the court."

The case in principle is not unlike Murphy v. Farmers', etc., Bank, 131 Cal. 115, 63 Pac. 368, 731, where it was held that "a subsequent statute, permitting a mortgage of the unadministered estate to pay the debts, passed after the death, does not create a new burden, nor interfere with the vested rights of the heirs, but provides merely for a change in the form of the burden, which is within the power of the Legislature."

The cases cited by appellant, as pointed out by respondents, relate to statutes which increased the instances in which the power of sale might be exercised, or enlarged the powers of the executor conferred by the will. An example is afforded in the leading case of Brenham v. Story, 39 Cal. 179. At the time of the death of the intestate in that case, the law allowed the sale of the real property of an estate only for the purpose of paying the debts of the deceased, for the support of the family, or for the expenses of administration. While the estate was being administered, the Legislature passed a special act authorizing the administrator, at his discretion, to sell any portion of the real estate of the deceased held or owned by him at the time of his death as in the judgment of the administrator would best promote the interest of those entitled to the estate. A sale under this act was held to be invalid, for the obvious reason that it impaired the vested rights of the heirs. The court said: "Upon the death of the ancestor, the heir becomes vested at once with the full property, subject to the liens we have mentioned; and, subject to these liens and the temporary right of possession of the administrator, he may at once sell and dispose of the property, and has the same right to judge for himself of the relative advantages of selling or holding that any other owner has. His estate is indefeasible, except in satisfaction of these prior liens; and the Legislature has no more right to order a sale of his vested interest in his inheritance, because it will be, in the estimation of the administrator and the probate judge, for his advantage, than it has to direct the sale of the property of any other person acquired in any other way."

[4] But, conceding that the sale must be tested by the law of procedure as it existed at the time of the death of Hamilton, still, under a reasonable construction of the power of sale conferred by the will, it cannot be held that the sale was invalid. The act, as it was in 1872, provided, as we have already seen, that the executor was bound to give notice of the sale, "unless there are special directions given in the will, in which case he shall be governed by such directions." While there are no specific directions as to whether the sale shall be with or without notice, it is fairly inferable that the testator intended to leave this for the executors to determine. He expressed his desire that his executors, "within a reasonable time and when they think it advisable to do so," sell the property. The discretion

to sell when they should consider it advisable plainly implies an option to sell without the delay that would be caused by giving notice. As to this, the case of Larco v. Casaneuava, 30 Cal. 560, is somewhat instructive. The land in controversy there was sold under a power conferred by the will, as follows: "I hereby appoint my brother, Francisco Casaneuava, my executor of this my last will, with power to sell, dispose of and convey all my said property, both real and personal, for the benefit of my said sister, without obtaining any order of any court therefor." The law then, as far as notice of the sale is concerned, was the same as in 1872, and there was no more explicit direction in said will as to the manner of sale than in the case at bar. It was held, however, that the sale was valid without regard to a compliance with the provisions of the statute; the court saying: "The language is broad and general, and clearly shows that the intent of the testator was to withdraw his estate from the operation of the probate act and vest in his executor full power to convert in his own way the estate into cash for the benefit of his sister." The specific point that the sale was made without notice does not appear to have been urged, but the record shows that an objection was made to the sale, on the ground that there was not shown "a compliance with the law in any respect as to sales by executors," and therefore the deed was void. The logic of the decision, though, necessarily involves the proposition that, under such donation of power to the executor, he is not required to give any notice of the sale. The language of the power here is somewhat different, but it seems equally potent to clothe the executors with authority to sell the real estate at their discretion.

It may be said, finally, that there is respectable authority for holding that the want of notice of the sale is not jurisdictional, and does not invalidate the order of confirmation. In Blackman v. Mulhall, 19 S. D. 534, 104 N. W. 250, the Supreme Court of South Dakota held that "the failure to publish notice for the required time did not render the proceedings void, but only irregular, and this irregularity does not affect the validity of the sale in this collateral proceeding."

In McNair v. Hunt, 5 Mo. 309, the Supreme Court of Missouri declared that, although the law required notice of the sale to be given, yet, in the absence of notice, the sale was merely voidable, and could not be questioned in a collateral suit.

In Matheson's Heirs v. Hearin, 29 Ala. 210, the court declared that a certain sale made by the administrator under a "purported order of the orphan court was a judicial sale; and that, although there may be irregularities in it, such as the omission of the administrator to give the notice of it directed by law, it is not void, and cannot be collaterally impeached for such irregularities."

In Burris v. Kennedy, 108 Cal. 331, 41 Pac. 458, it is held that, under the statute, the filing of a petition for an order of sale and the giving of notice of the hearing of the petition are jurisdictional and essential to the power of the court to order the sale; but if the court has thus acquired jurisdiction errors afterward in the exercise of it, however gross, will not render the decree invalid, and that if the court erred in ordering a private sale, instead of a public sale, as it ought to have done, this was mere error, and did not affect the validity of the sale. Here, as we have seen, no order for the sale was required, and the foregoing case would seem to be authority for the position that the fact of the sale being private—that is, without notice—is not jurisdictional. There is, of course, a distinction between this circumstance and the service of the order to show cause why an order of sale should not be made. The latter is without doubt a jurisdictional matter.

For further discussion of the question of jurisdictional defects, reference may be had to the following cases: Dennis v. Winter, 63 Cal. 16; Richardson v. Butler, 82 Cal. 174, 23 Pac. 9, 16 Am. St. Rep. 101; Smith v. Biscailuz, 83 Cal. 359, 21 Pac. 15, 23 Pac. 314; Zilmer v. Gerichten, 111 Cal. 73, 43 Pac. 408; Ions v. Harbison, 112 Cal. 260, 44 Pac. 572; Matter of Devincenzi, 119 Cal. 498, 51 Pac. 845.

It is believed that no substantial reason has been or can be advanced why a court of equity should disturb these titles that have been unquestioned for so many years, and the judgment is therefore affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

(19 Cal. App. 273)

BAGLEY v. LILIENTHAL et al.

(Civ. 1,042.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Mary C. Bagley against Jesse W. Lilienthal and others. From judgment for defendants, plaintiff appeals. Affirmed.

John Hubert Mee, for appellant. Olney, Pringle & Mannon, for respondents.

BURNETT, J. This case involves the same questions as Bagley v. City and County of San Francisco et al. (No. 1,041) 125 Pac. 931, and, for the reasons stated in the opinion this day filed therein, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 274

BAGLEY v. DEVLIN. (Civ. 1,043.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Mary C. Bagley against Frank J. Devlin. From judgment for defendant, plaintiff appeals. Affirmed.

John Hubert Mee, for appellant. Robert T. Devlin and George Clark, for respondent.

BURNETT, J. Respondent relies upon adverse possession, in addition to the defenses presented in the case of Bagley v. City and County of San Francisco et al. (No. 1,041) 125 Pac. 931, but it is unnecessary to give the questions specific attention.

For the reasons stated in the opinion filed this day in Bagley v. Bloom et al., supra, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 275

RULAND v. ALL PERSONS. (Civ. 1,023.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Charles Ruland against All Persons. From the judgment, Mary C. Bagley, defendant, appeals. Affirmed.

John Hubert Mee, for appellant. McNair & Stoker, for respondent.

BURNETT, J. This case also involves the same questions as those decided in Bagley v. City and County of San Francisco et al., 125 Pac. 931, and, for the reasons stated in the opinion therein filed, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 274

BAILLEY v. ALL PERSONS. (Civ. 1,025.)

(District Court of Appeal, First District, California. June 15, 1912. Rehearing Denied by Supreme Court Aug. 14, 1912.)

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Thomas E. Bailley against All Persons. From the judgment, Mary C. Bagley, defendant, appeals. Affirmed.

John Hubert Mee, for appellant. F. O'Callaghan and George A. Connolly, for respondent.

BURNETT, J. The questions involved herein are the same as those in the case of Bagley v. City and County of San Francisco et al. (No. 1,041) 125 Pac. 931, decided this day, and, for the reasons stated in the opinion filed therein, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

163 Cal. 398

SCHWARTZ v. CALIFORNIA GAS & ELECTRIC CORPORATION et al.

(Sac. 1,827.)

(Supreme Court of California. Aug. 3, 1912. Rehearing Denied Aug. 31, 1912.)

1. Negligence (§ 140*)—Injury to Horse—Instructions—Proximate Cause.

In an action for injuries to a horse, caused by its stepping on a broken insulator which, it was claimed, defendant's employés dropped while working on one of its poles, where the undisputed evidence showed that the insulator, at the time of the accident, was 60 feet in one direction and 72 feet in the other direction from any pole of defendant's, an instruction that defendant was not liable, unless its employés negligently placed the insulator on the premises and at the point where the horse was injured, was improperly denied, and a modification thereof, only requiring a finding that it was negligently placed at some point where injury might result, was improper, since the evidence justified an inference that the insulator had been moved between the time it was dropped and the time of the accident.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371, 377; Dec. Dig. § 140.*]

2. Negligence (§ 62*)—Injury to Horse—Proximate Cause—Intervening Cause.

If an employé of defendant negligently dropped on plaintiff's premises a glass insulator, but it was afterwards picked up by some one else and moved to the place where plaintiff's horse was injured by stepping on it, the negligence of the employé was not a proximate or concurring cause of the injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76–79; Dec. Dig. § 62.*]

3. Negligence (§ 62*)—Proximate Cause—Intervening Cause.

A negligent act, which would not have resulted in injury except for the intervention of an independent cause, does not give rise to a cause of action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 76–79; Dec. Dig. § 62.*]

4. TRIAL (§ 191*) — INSTRUCTIONS—CHARGES ON FACTS.

In an action for injuries to a horse, caused by its stepping on a broken insulator, a requested instruction that defendant was not liable, unless its employés negligently placed the insulator at the place "where the evidence shows said horse was in fact injured," was not improper as a charge on the facts, since it did not assume any fact as proven, but stated what must be shown to justify a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420–431, 435; Dec. Dig. § 191.*]

In Bank. Appeal from Superior Court, Yolo County; N. A. Hawkins, Judge.

Action by Eliza J. Schwartz against the California Gas & Electric Corporation and others. From a judgment for plaintiff and an order denying a new trial, defendants appeal. Reversed.

Wm. B. Bosley and John P. Coghlan (Chas. W. Thomas, of counsel), for appellants. Arthur C. Huston and Harry L. Huston, for respondent.

PER CURIAM. This action was brought to recover damages for injuries to a horse, known as "Joe Terry," belonging to plaintiff, caused, it is alleged, by the horse stepping upon or against an insulator dropped by an employé of defendants upon a tract of land in Yolo county, known as the "Van Zee Place," occupied by plaintiff at the time of such injuries. The jury gave a verdict in favor of plaintiff for the sum of $6,475.00, for which amount judgment was entered. An appeal was taken by defendants from the judgment, and from an order denying their motion for a new trial. Two decisions have been rendered on these appeals by the District Court of Appeal for the Third district, the judgment and order being reversed by the first decision on account of error of the trial court in refusing an instruction as requested by defendants, and giving the same in a modified form; and, a rehearing having been granted by said court, the judgment and order were affirmed by the second decision. An application for a hearing in this court was then granted.

We are of the opinion that the first decision of the District Court of Appeal was correct. It is essential to a proper understanding of the question presented in the matter of said instruction that a statement be made as to some of the facts.

The defendants maintained and operated an electric transmission line, consisting of poles, crossarms, wires, and insulators along certain highways in Yolo county, and the line passed the Van Zee place just outside the city of Woodland. In the summer and early autumn of the year 1906, the line was reconstructed by defendants, new insulators put in on many poles, and every alternate pole removed, making the distance between poles 264 feet, instead of 132 feet, which was the distance prior to the reconstruction. At the time of this work, the Van Zee place was occupied by one L. E. Hutchings. A portion of this place consisted of an inclosed parcel of land fronting on the road, on which was a house, and another adjoining inclosed parcel, on which was a barn. The land inclosed with the barn was known as the barnyard or corral. The land inclosed with the house was known as the houseyard and old vineyard. The vineyard portion fronted on the road, and contained some 10 or 12 rows of vines, varying, according to the testimony of Mr. Schwartz, the husband of plaintiff, from two inches to three feet in height. The inclosed portion containing the vineyard was not used by Mr. Hutchings for stock. Some time in November, 1906, plaintiff leased from Mr. Hutchings the two parcels of land we have referred to, and went into occupancy thereof. On April 10, 1907, plaintiff's husband turned the horse into this old vineyard portion while his stall was being cleaned. A few minutes later, the stall having been cleaned, he went after the horse to take him back. He testified: "As I started to halter him, he bit at me, and I stepped back. I stepped back and corrected him for attempting to bite me. I held the halter for him to put his nose in, and the horse, in stepping back to put his nose in the halter, moved back and came in contact with something, which I found afterwards was a broken insulator." The insulator was similar to those in use on defendants' line at the time the reconstruction work was done, some of which were then removed. They had an 11-inch porcelain top, shaped something like a saucer, and a glass center, about 9 inches long, and weighed about 12 pounds. Mr. Schwartz said that the saucer part of this insulator was whole, and laid next to the ground. The result of the contact of the horse with this insulator, the glass part of which was broken, was, according to Mr. Schwartz, that the horse was severely cut on the right hind foot between the hoof and the fetlock. The horse was a stallion and valuable only for breeding purposes, and there was testimony sufficient to sustain a conclusion that he was thereby rendered useless for such purposes. There was testimony, given by one William Weight, who was over 80 years of age, and who was employed by Hutchings on the Van Zee place at the time of such reconstruction work in the summer and autumn of 1906, to the effect that he saw one of the men engaged in such work drop an insulator from the crossarm of one of the poles into this vineyard, and that the insulator fell into the vineyard at the northwest corner, some seven or eight feet from the fence. This testimony was given some two years after the accident to the horse. He said that he saw the insulator in the vineyard many times thereafter, "passed it nearly every day," but did not pick it up, because it did no harm there, and that they were not using the vineyard for stock. It was clearly established that the horse was injured in the northwest corner of the vineyard, and Mr. Schwartz said that the insulator was at a point two or three feet from the north fence and between six and ten feet from the west fence, which was the road fence. Evidence introduced by the defendants was very clear to the effect that at the time this work was done by the defendants the nearest pole to the northwest corner of the vineyard on one side was 60 feet and on the other side 72 feet. Mr. Hutchings, then and for many years prior occupant of the place, testified in effect that there had been no change in the poles, except that every other pole was taken out; and his testimony and that of Mr. Ashley, taken together, is clearly to the effect already stated. This evidence was in no way contradicted, except in so far as it was inferentially contradicted by the evidence of Mr. Weight, to which we have already referred.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In the light of these facts, which we have stated as strongly in favor of plaintiff as the record warrants, the District Court of Appeal in its first opinion declared in part as follows:

"Many points are made for a reversal of the judgment. Most of them are without merit, some of them probably involve error without prejudice; but one necessitates, as we view it, a new trial of the action.

[1] "Defendants requested the court to instruct the jury as follows: 'You cannot find for the plaintiff in this case, unless you believe from the evidence: (1) That plaintiff's horse was injured by an insulator, the property of defendants. (2) That the employés of defendants negligently placed said insulator on the premises where, it is claimed, said horse was injured, and *at the point where the evidence shows said horse was in fact injured.*' As given by the court, the second subdivision was modified to read as follows: 'That the employés of defendants negligently placed or permitted said insulator to remain on the premises where, it is claimed, said horse was injured, *and at a point where the evidence shows some injury might result.*'

"In the language of appellants: 'As proposed, this instruction limited responsibility to the placing of the insulator at the point where the horse was injured. The modification made the defendants liable if they placed it anywhere on the premises.'

[2] "The proposed instruction was based upon the theory that an intervening, independent agency may have been the proximate cause of the injury. It seems plain that if appellants carelessly dropped the insulator upon the premises and did not remove it they would be guilty of negligence; but after it was dropped, if somebody else picked it up and moved it to this spot where the damage was done, it was the negligence of the latter that proximately caused the injury.

[3] "It would not be a case of correlative and concurring causes, but of proximate and remote agencies independent of each other. The rule is well settled that 'an injury is not actionable which would not have resulted from the act of negligence, except for the interposition of an independent cause.' Chicago, etc., Ry. Co. v. Elliott, 55 Fed. 949 [5 C. C. A. 347, 20 L. R. A. 582]; Cole v. German Savings & Loan Society, 124 Fed. 115 [59 C. C. A. 593, 63 L. R. A. 416]; Western Union Telegraph Co. v. Schriver, 141 Fed. 550 [72 C. C. A. 596, 4 L. R. A. (N. S.) 678].

"In the Cole Case, supra, it appears that the plaintiff entered and passed along a hall in the building of the defendant to take the elevator, the well or shaft of which opened into the hall. A boy, who was a stranger to her and to the defendant, hurried past her in the hall, pushed the sliding door of the well of the elevator, which was open from one to ten inches, back as far as it would go and stepped back. The plaintiff supposed the boy was the operator of the elevator, and stepped in. The elevator was at an upper floor in charge of its regular operator, and plaintiff fell to the bottom of the well and was injured. The hall was so dark that it was difficult, but not impossible, to see the elevator when it was at the lower floor; and when it was not there nothing but darkness was visible in the well. It was held that the negligent acts and omissions of the defendant were not, and those of the strange boy were, the proximate cause of the injury. 'The latter constituted an independent, intervening cause which interrupted the natural sequence of events between the negligence of the defendant and the injury of the plaintiff, insulated the defendant's negligence from the plaintiff's hurt, broke the causal connection between them, and produced the injury.' The negligence of the defendant in that case, as stated by the court, consisted of permitting such a degree of darkness in the hall, of allowing boys to ride upon and sometimes operate the elevator, of neglecting to provide a lock for the door, which would prevent any one from unlocking it from the outside, and of permitting the door to stand open from one to ten inches. Defendant there was indeed guilty of gross negligence; but it was held not to be the proximate cause of the injury.

"In Berry v. S. F. & N. P. R. R. Co., 50 Cal. 435, it was held that the injury done to plaintiff's wheat by the hogs of third persons was not the direct damage resulting from the trespass of defendant in destroying a portion of plaintiff's fences, by reason of which the hogs obtained access to said premises.

"In Loftus v. De Hail, 133 Cal. 214 [65 Pac. 379], the action was brought to recover damages for injuries sustained by the plaintiff, an infant seven years of age, from falling into a cellar of defendants, situated on a vacant lot in the city of Los Angeles. The defendants were the owners of the lot, which was located in a populous and thickly settled quarter of the city. Upon the lot had stood a house, which had been removed leaving upon the premises a cellar partially filled with débris. The premises were left in an open and unguarded condition. The plaintiff lived in the neighborhood of the lot, and, upon the day of the accident, was engaged with other children in playing around the cellar, and while so engaged was by her younger brother pushed into the cellar, sustaining the injuries complained of. It was held by the court that his act was the proximate cause of the injury, and that 'it was not in her play and as part of her play and in ignorance of the danger of her play, but she was injured by the violence of her little brother in a matter apart.' The foregoing are a few of many cases illustrating the operation of an independent, proximate cause producing injury, and they seem to be in harmony with the principle embodied in said proposed instruction here.

"Of course, if there were no evidence in the record tending to support said theory, the court's action would be adjudged entirely without prejudice. While there was no direct evidence that any third party moved said insulator, circumstances do appear from which a rational inference might be drawn to that effect; and therefore it was a proper question to submit to the jury. The only witness who testified that he saw the insulator fall from the pole was one William Weight, an old man past 80, who admitted his eyesight was bad. He testified that he was employed on the Van Zee place during the summer and forepart of the fall of 1906, when it was occupied by Lee Hutchings. 'During that time men worked on the electric pole line. They were changing insulators and putting up wires, and one of the men dropped an insulator into the northwest corner of the vineyard. The man was on a crossbar when he dropped the insulator, which was as large as a cuspidor.' Other evidence shows clearly that the nearest pole to the northwest corner of the vineyard was 60 feet, and in another direction there had been one 72 feet from the corner. The insulator weighed 12 pounds, and the poles were 30 feet high. It was therefore quite a probable inference that within the eight or nine months intervening before the accident some other party moved the insulator, as it could not have 'dropped' to a point on the ground sixty or seventy feet from the foot of the pole.

[4] "To this complaint by appellants of the action of the court in refusing said instruction, the only answer made by respondent is as follows: 'The modification of instruction 18 was proper, because the instruction as proposed was erroneous, in that it was an instruction as to the facts. The language of subdivision 2 of the instruction was a straight statement that the evidence shows that the horse was not injured.' In this respondent is clearly in error. The instruction is altogether hypothetical; it does not assume any fact as proven, but states what must be shown to justify a verdict for plaintiff. The point seems to be a vital one in the case, and it is believed that the defendants were entitled to the instruction, and for this reason the judgment and order are reversed."

Learned counsel for plaintiff ably and earnestly assailed this opinion and the consequent judgment of reversal in their petition for a rehearing in the District Court of Appeal, and in their brief filed subsequently in this court; but we believe that it correctly disposes of this appeal. Some of the points so made by counsel are sufficiently disposed of by such opinion. We are of the opinion that the requested instruction was not an instruction as to the facts, and that it correctly stated the law applicable in view of the testimony. We are satisfied that none of the instructions given the jury substantially covered the subject-matter of the requested instruction, in so far as the same referred to the question of an intervening, independent agency. We do not consider Merrill v. Los Angeles, etc., Co., 158 Cal. 499, 111 Pac. 534, 139 Am. St. Rep. 134, in any way opposed to our conclusion herein.

The judgment and order denying a new trial are reversed.

SLOSS, J., deeming himself disqualified, does not participate herein.

163 Cal. 392

HALL v. CLARK. (L. A. 2,860.)

(Supreme Court of California. Aug. 3, 1912.)

1. Appeal and Error (§ 1002*)—Review—Findings—Conclusiveness.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. Master and Servant (§ 228*) — Negligence—Directions to Employé.

An employé is not warranted in obeying a direction involving danger to him, unless he acts under duress or coercion, if the danger is so obvious and serious that no ordinary prudent person of similar age and experience would obey the order; and this rule is unchanged by Civ. Code, § 1970, as amended in 1907 (Laws 1907, p. 119), which provides that knowledge by an employé injured by the defective or unsafe character of machinery, etc., shall not bar recovery for injury caused thereby, unless it

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

appears that he fully understood the dangers incident to the use of the same.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. § 228.*]

3. MASTER AND SERVANT (§ 289*)—CONTRIBUTORY NEGLIGENCE—NATURE OF QUESTION.

Ordinarily it is a jury question whether an injured employé was guilty of contributory negligence in obeying an order which involved danger to him; but the facts of the particular case may make it a question of law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089–1132; Dec. Dig. § 289.*]

4. MASTER AND SERVANT (§ 245*)—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO ORDER.

A teamster was guilty of contributory negligence, as a matter of law, in obeying an order to drive his team and wagon into an excavation about four feet deep, where the embankment was perpendicular at that point, and there was a runway at another point, down which he could have driven safely.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 778–788; Dec. Dig. § 245.*]

In Bank. Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by C. H. Hall against Wesley Clark. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Anderson & Anderson and Gibson, Trask, Dunn & Crutcher, for appellant. E. B. Drake, for respondent.

PER CURIAM. In an action for damages for personal injuries, plaintiff had verdict for $1,800, and judgment was given him for that amount. This is an appeal by defendant from such judgment, and from an order denying his motion for a new trial.

Substantially, the case made by the complaint was as follows: Plaintiff was in the employ of one Crandall, a contractor, as a teamster, and was in charge of a three-mule gravel wagon of Crandall. Under a contract with Crandall, defendant had charge and control of plaintiff and his mule team and wagon, using them in making an excavation in a lot of land on the corner of Pico street and Vermont avenue, in the city of Los Angeles. While plaintiff was engaged in this work on May 14, 1909, he was negligently directed and required by defendant's foreman, in charge of the work, to drive said team and wagon into said excavation, which was about four feet deep, and by reason of obeying said order the wagon became uncoupled, and its bed fell upon him, causing the injuries for which compensation is claimed. At the time the said foreman directed him to drive into said excavation, plaintiff by reason of his inexperience in such work, did not fully understand, comprehend, and appreciate the danger of so doing, while said foreman, by reason of his long experience in such business, did realize and know such danger. The answer of defendant denied the allegations of the complaint and set up the defense of contributory negligence on the part of plaintiff.

While it is suggested by appellant that the complaint does not state facts sufficient to constitute a cause of action, that point is not pressed. It is earnestly claimed, however, that the evidence is not sufficient to sustain the verdict, in that it shows, as matter of law, that plaintiff either was guilty of contributory negligence, or assumed the risk of injury in doing the act resulting in the accident.

Plaintiff was 26 years of age, and testified that he had driven a team all his life practically, hauling wood, rock, and sand, handling a horse and wagon, and that he knew pretty well about horses and wagons on good roads, but that he had only about two weeks' experience in excavating. The dimensions of the excavation where he was working at the time of the accident were 57x84 feet. His duty was to drive his team into this excavation, there help load his wagon with earth, and drive out with his load. A driveway or "runway" into the excavation existed, along which the wagons could safely be taken down. Plaintiff's wagon was what was called a "patent gravel wagon" with four wheels. There was a front running gear and a king bolt which held the front gear to the remainder of the wagon. The wagon was not over 10 feet long, exclusive of the pole. The three mules were worked abreast. Plaintiff had worked at this place for three days before the accident. According to his testimony, the accident occurred as follows: Seated on his empty wagon, he was about to drive into the excavation by a runway on the easterly side of the excavation, when defendant's foreman told him to drive around to a place on the southerly side. When he reached that place, the foreman told him that there was the place he wanted him to drive down. He said that there was no runway, no "slanting place" there, but "just a straight embankment" 3½ or 4 feet deep. "It was almost straight up and down." He stopped his team and asked the foreman: "Where? Off here?" The foreman answered, "Yes." He said, "I can't drive off there." The foreman asked him, "Why?" and he said, "It will hurt the mules." The foreman answered: "Never mind that. That is where I want the wagon over there." Thereupon he drove over the edge. Two of the mules were "almost wild" and "did not need any persuading to make them go." The mules "jumped off"; the front gear of the wagon very naturally dropped down when the wheels thereof no longer had earth upon which to rest, and in some way became uncoupled from the rest of the wagon, which followed the front gear over the edge; the plaintiff jumped from his seat, and the wagon turned over, pinning him to the ground and breaking one of his legs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

He further testified: "I didn't consider it was a dangerous place if the foreman instructed me to drive in it. I relied on him and his direction." Plaintiff's testimony was corroborated as to the direction given him by the foreman by two witnesses.

[1] On the part of the defendant there were several witnesses, including the foreman. Their evidence was to the effect that no such direction was ever given to the plaintiff as was testified to by him and his witnesses; that, in fact, plaintiff was proceeding to drive into the excavation near a driveway, when the foreman called to him, "Come around the corner and go into the driveway straight," and he answered, "This is all right," and went on down into the excavation, with the result already stated. So far as the number of witnesses, at least, was concerned, the preponderance of testimony on that point was with defendant. In view of the verdict of the jury, however, we must accept as true the testimony of plaintiff and his witnesses in regard to the matter of direction by the foreman, and have stated the substance of the evidence given in behalf of the defendant solely to show that there was nothing therein to support a conclusion in favor of plaintiff. The verdict must find its whole support in the testimony of plaintiff and his witnesses, the material parts of which we have stated.

For the purposes of this appeal, we have, then, a case in which the plaintiff, an adult and a teamster of experience, in obedience to the direction of the defendant's foreman in charge, deliberately drove his three-mule team and empty gravel wagon over the edge of an excavation at a point where the side of the excavation was practically perpendicular and from 3½ to 4 feet high, when he actually had knowledge of these conditions and was not acting under such circumstances as would warrant a conclusion that he was acting under coercion or duress.

[2] It is thoroughly settled that an employé is not warranted in following the direction of an employer, except where he acts under what, under the law, amounts to duress or coercion, where the danger to be encountered in doing so is at once so obvious and so serious that no ordinarily prudent person of similar age and experience, situated as was the employé, would have obeyed the order; and that, where the rules as to contributory negligence and assumption of risk are such as they were in this state at the time of this accident, the employé receiving personal injuries by reason of following such direction cannot recover damages therefor from his employer. See 1 Labatt on Master and Servant, § 442. It is not disputed by counsel for plaintiff that this was the law in this state prior to the amendment of section 1970, Civil Code, in 1907 (Laws 1907, p. 119), by which the Legislature added to that section, among other things, a provision that knowledge by an employé injured by the defective or unsafe character of any machinery, etc., shall not be a bar to recovery for any injury caused thereby, unless it shall also appear that such employé "fully understood, comprehended, and appreciated the dangers incident to the use of" the same. This amendment did not change the rule we have stated. If the danger is so obvious and serious that no ordinarily prudent person of similar age and experience, situated as was the employé, would have done the act, even though ordered by his employers to do it, it is manifest that the situation is such that the employé will not be heard to say that he did not fully understand, comprehend, and appreciate the danger incident to the doing of the act. As said by this court in Limberg v. Glenwood Lumber Co., 127 Cal. 598, 600, 60 Pac. 176, 177 (49 L. R. A. 33): "He cannot be allowed to close his eyes to the danger, and thereafter say, 'I did not know it was dangerous.'" We are cited to no case and know of none that is opposed to the view we have stated above.

[3, 4] While the question whether the situation is such, under the evidence, as to compel the application of this rule is ordinarily one for the jury, rather than one of pure law for the court, there are cases where the admitted facts are such that but one conclusion can reasonably be arrived at therefrom, and the question is one of law for the court. For instance, if an adult employé of ordinary intelligence was told to drive his team over a perpendicular embankment 10 or 12 feet high, and he, with full knowledge of these conditions, voluntarily obeyed and thereby received injuries, no one would be bold enough to suggest that a verdict of a jury awarding him damages therefor could be upheld by the courts, if properly brought in question. It would be held, as matter of law, that the situation was such that he was precluded from recovery, both by reason of contributory negligence and voluntary assumption of risk. The physical facts actually known to him would be such that his mere statement that he did not consider it a dangerous place, and that he relied on the person directing him, would be ineffectual for any purpose. By reason of his admitted knowledge of all the facts, no other conclusion would be possible than that he fully understood, comprehended, and appreciated the danger incident to the act. While here, according to plaintiff's testimony, there was a difference in the height of the embankment from that spoken of in the illustration just made, the difference is not so great, in our judgment, as to affect the legal situation. We think the admitted facts of this case are such as to bring it within the rule we have already stated. They are such as to require the conclusion, as matter of law, that the plaintiff was guilty of contributory negli-

gence in obeying the order that he testified was given to him by the foreman. The case is not to be distinguished in its material facts from Lindsey v. Hollerback, etc., Co. (Ky.) 92 S. W. 294, 4 L. R. A. (N. S.) 830. No case has been cited by learned counsel for plaintiff that appears to us to support a contrary conclusion. The nearest case in point among those cited by him is that of Haley v. Case et al., 142 Mass. 316, 7 N. E. 877. But it appears to us that there were facts in that case which might reasonably be held to take it out of the operation of the rule that we have enunciated. The court in that case recognized the rule to be as we have stated it, saying: "As the plaintiff was of full age, and an experienced teamster, if the danger of driving the horses with the van under the gateway was well known to him, he cannot recover, although he was acting under the immediate personal direction of Dodge. The fear of the plaintiff that he would be discharged from his employment, if he did not obey the orders of Dodge, his employer, would not justify him in running a risk which was well known to him, and then, if injured, in recovering damages from his employer."

In view of our conclusion on this point, it is unnecessary to consider any of the other points discussed in the briefs.

The judgment and order denying a motion for a new trial are reversed.

163 Cal. 385

MEGARRY v. MEGARRY et al. (Sac. 1,947.)

(Supreme Court of California. Aug. 3, 1912.)

Trusts (§ 89*)—Sale or Trust—Evidence.

In an action to have the plaintiff declared the sole owner of a business, evidence *held* not to show that there was a sale of the business to plaintiff by his father, but rather that he was made a trustee for his brothers and sisters as to their interest in the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134–137; Dec. Dig. § 89.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by James Megarry against Mary Megarry and others. From a judgment for plaintiff, and an order denying a motion for new trial, defendants appeal. Reversed.

W. U. Goodman and Leon Samuels, for appellants. L. G. Harrier and W. T. O'Donnell, for respondent.

ANGELLOTTI, J. By his complaint in this action, plaintiff sought a decree adjudging that he is the sole owner of a certain grocery business in the city of Vallejo, Solano county, "conducted at No. 310 Georgia street, under the name of James Megarry & Company [the term 'business' including the stock in trade, money on hand, accounts and good will thereof]," and perpetually restraining defendants from interfering therewith "by claiming or asserting any control or dominion over the same, from taking possession of, or attempting to take possession of, said property, or any part thereof, or from making any claim of ownership therein adverse to this plaintiff." The complaint contained the allegations usual in complaints to quiet title to real property, and alleged that the plaintiff was in the sole possession of said business. The defendants by their answer denied various allegations of the complaint, including those relating to the ownership of the property. The issues so made were tried, and the trial court found in accord with the allegations of the complaint and gave judgment as prayed therein. This is an appeal by defendants from the judgment, and from an order denying their motion for a new trial.

Passing certain claims apparently made for the first time on the oral argument in this court, we will consider the claim made in the briefs to the effect that there is not sufficient support in the evidence for the conclusion of the trial court that plaintiff is the sole owner of the property in question.

The defendants are Arthur Megarry, Mary Megarry, and Letitia Megarry, sole surviving brother and sisters of plaintiff, and Mary Megarry and Letitia Megarry, as executrices of the last will of Walter Megarry, a deceased brother of plaintiff. The persons named, including plaintiff, were children of William Megarry, who died March 15 or 17, 1891, and his wife, Elizabeth Megarry, who died in the year 1901. The father left surviving him, in addition to the children already named, two other sons, John and William. At the time of his death the children were of the following ages, viz.: Plaintiff 22 years, John 19, William 15, Walter 13, Mary 11, Arthur 9, and Letitia 7.

The father was then engaged in the grocery business, under the name of William Megarry, and also owned some land, lots 8 and 16, block 215, and lot 10 and the west half of lot 14, block 268, Vallejo. So far as appears, the sole source of income of the family was the grocery business. The only evidence as to the then value of the grocery business was that of plaintiff, to the effect that the stock was worth not over $1,500, and that the business then did not amount to $1,500. Plaintiff was then working in the store, and had been so working for some 12 years. John and William were also working in the store.

On March 12, 1891, the father, who was then confined to his bed by his last illness, with the aid of a notary public, attempted to make disposition of his property. He executed a deed of gift to his wife, conveying to her his real property, and executed what was called a "bill of sale" of the grocery business, according to the testimony of the notary and plaintiff, to plaintiff for a consideration of $10. This instrument was never recorded and has been lost; but the evidence is sufficient to support a conclusion that it was in part in the form of a bill of sale, and that $10 was in fact paid by plaintiff to the father at the time. It may also be assumed that the evidence was sufficient to show that the instrument was at once delivered to plaintiff by the notary, together with the deed to the mother, although plaintiff in one place testified that it was delivered after the death of his father. According to plaintiff's testimony, there was a "memorandum" on the "bill of sale," written by the notary, being "a request that I take care of my mother and raise my brothers and sisters, and educate them to the best of my knowledge, and so far as the business would go." He further testified that "my father gave me that bill of sale with the understanding that I was to keep the family together and support them with that business;" that he told me to "support my mother, educate the children, take care of them to the best of my ability with the business, what I got out of it;" and that he thought it was placed in his name "for the benefit of the entire family."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Upon the death of the father a few days later, plaintiff changed the name under which the business was conducted to "James Megarry & Co." It has ever since been conducted under this name, and undoubtedly plaintiff has always been at the head of the business. William and John continued to work in the store with plaintiff until they died; William dying in the year 1899, and John dying in the year 1901. In the meantime, the other brothers, Walter and Arthur, had come into the store, and continued there until Walter died in 1910.

Plaintiff married in the year 1900. Up to that time the following conditions existed, viz.: All of the family lived together in the family home. None of the brothers received any salary from the business. Each of them took what money he needed for clothes, etc., from the drawer. There was never any account kept of these withdrawals. When the mother wanted any money, it was given to her. There was also taken from the store such supplies as were needed for the family home. The business was apparently well and profitably managed. In 1897 the property occupied for store purposes was purchased from funds accumulated by James Megarry & Co.; some $6,000 to $8,500 being paid therefor, and the title being placed in the name of the mother. Valuable improvements, costing some $5,000, were added thereto, likewise from the funds of James Megarry & Co. A dwelling home for the family was also constructed at a cost of about $5,000 by James Megarry & Co.

When plaintiff married, he commenced, and has ever since continued, to take from the business $15 a week and his groceries. The remainder of the family continued to live together. Walter and Arthur took $35 a week "home to the family," and the family was provided from the store "with everything—vegetables, meat, and everything they wanted." No account was ever kept of these things. These conditions continued to the time of Walter's death.

Neither John nor William was ever married. No probate was had on the estate of either.

In 1901 the mother died. On May 29, 1901, she executed a deed of trust covering the land conveyed to her by her husband and the property subsequently purchased and improved by James Megarry & Co. for the benefit of her five surviving children, each to share equally in the rents, issues, and profits for the term of 10 years, and each to have an undivided one-fifth at the expiration of said 10 years. Plaintiff was one of the trustees, as well as beneficiaries, under the deed, and subscribed and acknowledged execution of the same. This, it will be observed, included the real property purchased and improved for the store purposes from the funds of James Megarry & Co. By a written statement addressed to the appraisers of the estate of Walter Megarry, deceased, plaintiff acknowledged Walter to have been the owner of an undivided one-fifth of this property, as well as of the other real property covered by the trust deed.

After the real property occupied for store purposes was acquired by purchase in 1897, no rent was paid therefor by plaintiff or any one else on account of the grocery business until the death of Walter in 1910. But the taxes on said property and other property of the Megarry estate, as well as all bills for improvements, etc., were paid out of the funds of James Megarry & Co.

While plaintiff was undoubtedly the active factor in the management of the business, we can see nothing in his testimony to indicate that he ever assumed, at any time prior to Walter's death, to be the sole owner thereof. The bill heads described the firm as "Jas. Megarry & Co.," and the letter heads, in addition, declared them to be "Grocers, Wine and Tea Merchants." The checks were signed, "James Megarry & Company by James Megarry." The application for United States internal revenue licenses contained the names, as members of the firm, of the brothers and sisters at first, and afterwards the names of the brothers alone; the sisters having requested that their names be not attached "to a liquor license." In some instances, plaintiff individually entered into contracts; the special instances shown being a purchase of certain store fixtures for $250, and the contract for carpenter work on the extension added to the building on the property purchased in the name of the mother. Everything done by plaintiff was entirely consistent with the idea that the grocery business was purely "a family affair," and many things done were absolutely inconsistent with any other theory. Up to a very short time before the death of Walter, certainly there was nothing to indicate to any of the others that plaintiff claimed to be the sole owner of the business.

A few months before the death of Walter, trouble arose among the members of the family, and there was some talk of arranging a settlement as to the property. At that time, according to Mary, each of the brothers and sisters claimed one-fifth of the business, while plaintiff claimed one-half. It does not appear that at that time plaintiff did anything indicating that he claimed to own the whole of the business.

Walter died in July, 1910. A few days before his death, he executed a will, subsequently admitted to probate, giving all of his property to his two sisters. Plaintiff was dissatisfied with the provisions of this will, and told his sisters that he owned absolutely the business of Jas. Megarry & Co. On August 20, 1910, he submitted to the appraisers of the estate of Walter a written statement, prepared and signed by himself, as to the firm of Jas. Megarry & Co., showing the property thereof, including $14,000 cash, to be worth $24,000, and the owners to be as follows: James Megarry one-half, Mary Megarry one-eighth, Arthur Megarry one-eighth, Lettie Megarry one-eighth, and Walter Megarry, deceased, one-eighth. This statement plaintiff claims to have made in view of certain pending arrangements for a compromise between himself and his sisters and Arthur, which he then thought would result in the compromise being made. Various writings, several of which were in the handwriting of plaintiff, were in evidence, showing his acquiescence in any arrangement by which he should be given one half of the business, while the other half was divided among the others. Owing to the advice of the attorneys for the sisters, the sisters refused to sign any agreement for a compromise. This action was commenced December 9, 1910.

We believe that we have stated the case as favorably as it can be stated for plaintiff on his own testimony, and are of the opinion that no warrant is to be found in such evidence for a conclusion that plaintiff is the sole owner of the property in question. Clearly there was never any *sale* of the business by the father to plaintiff. The transaction, as shown by plaintiff's own testimony, was a transfer in trust for the benefit of the family, which trust plaintiff accepted and has honestly and efficiently performed, without attempted repudiation of any kind, up to the moment of Walter's death. As we have substantially said, his conduct during all these years has been entirely inconsistent with any other idea than that the business was the property of the family, and that he was managing it for the benefit of the family, including, of course, himself. Even after the death of Walter, he apparently never seriously made claim to be the absolute owner of the whole business until about the time of the commencement of this action; and this claim was apparently brought about by reason of the refusal of the others to consent to what he considered a reasonable adjustment of the respective claims in regard to this business, in view of the part he had played in making a success thereof and bringing it to its present prosperous condition. There was natural justice in plaintiff's claim that he should be given, in view of what he had done in building up the business, and the small amount he had taken therefrom by way of compensation for his work, a larger share than any of the others; and if courts were invested with the power to apportion this property in accord with their views as to what would be fair, under the circumstances, regardless of rules of law, we would unhesitatingly declare the proposed adjustment offered by plaintiff to be one that should be approved. But we cannot escape the conclusion upon the evidence before us that the surviving brother and sisters and the estate of Walter are each equally interested with plaintiff, as beneficial owners at least, in this property. It may be true that plaintiff is entitled to be awarded some compensation for his services as trustee, payable out of this property; but this is a question not presented in this proceeding, and one that we do not attempt to determine. The conclusion that the plaintiff is the sole owner, free of all lawful claim by the defendants, is not supported by the evidence.

In view of our conclusion on the point discussed, we deem it unnecessary to discuss other matters suggested in the briefs.

The judgment and order denying a new trial are reversed.

We concur: SLOSS, J.; SHAW, J.

163 Cal. 445

NEALE v. MORROW. (S. F. 5,892.)

(Supreme Court of California. Aug. 6, 1912.)

APPEAL AND ERROR (§ 1194*) — REVERSAL—JUDGMENT ON DEMURRER—EFFECT.

Defendant having demurred to the complaint for want of facts, and also because the action was barred by limitations, and that the complaint was uncertain in a specified respect, the demurrer was sustained and plaintiff appealed; whereupon the order was reversed, with directions to overrule the demurrer and allow defendant to answer. *Held*, that the order of reversal constituted an adjudication that the complaint stated facts sufficient to constitute a cause of action against defendant, and that the demurrer was not well taken, though the only question discussed on appeal was whether the suit was barred by limitations, so that on remand the court had no authority to hear and sustain the demurrer for want of facts.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4648-4660; Dec. Dig. § 1194.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Vincent Neale, special administrator, etc., against Robert H. Morrow. Judgment for defendant, and plaintiff appeals. Reversed.

Vincent Neale, in pro per. R. H. Morrow and Garber, Creswell & Garber, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment given in favor of defendant in an action upon a promissory note. The judgment was based upon an order of the superior court, made September 6, 1910, sustaining an objection interposed by defendant at the time the action came on for trial that the supplemental and amended complaint of the plaintiff on file in said action does not state facts sufficient to constitute a cause of action.

The supplemental and amended complaint was filed September 18, 1903. A demurrer was interposed thereto on November 9, 1903, the grounds thereof being (a) that the same "does not state facts sufficient to constitute a cause of action against this defendant"; (b, c) that the cause of action set forth is barred by the provisions of sections 337 and 342 of the Code of Civil Procedure; (d) that said complaint is uncertain in a certain respect, specifying it. On February 23, 1904, the superior court made an order "that said demurrer be, and the same is hereby, sustained, with leave to the plaintiff to amend his said amended and supplemental complaint within ten (10) days." Plaintiff failed to amend, and judgment was thereupon given in favor of defendant. From this judgment an appeal was taken to this court. The appeal was decided by this court on February 2, 1907. The judgment given herein was as follows: "The judgment is reversed, with directions to the lower court to overrule the demurrer and allow the defendant to answer." The only question discussed by the court in its opinion was that presented by the objection that the alleged cause of action was barred by the statute of limitations. See Neale v. Morrow, 150 Cal. 414, 88 Pac. 815. On the going down of the remittitur from this court, the trial court overruled the demurrer in accord with the mandate of this court, and the defendant subsequently served and filed his answer. The case was set for trial, and when it was regularly called for trial the defendant made his objection that such complaint, which had not been changed in any respect since its filing on September 18, 1903, did not state facts sufficient to constitute a cause of action. As already stated, this objection was sustained by the trial court, and thereupon judgment was given for the defendant.

Upon this appeal defendant, conceding that all the questions as to the statute of limitations are settled by the decision of the court on the former appeal, endeavors to support the action of the trial court by pointing out certain particulars in which it is claimed that such complaint fails to state a cause of action. We see no escape from the conclusion that the sufficiency of this complaint against any objection that it fails to state facts sufficient to constitute a cause of action, in whatever form such objections may be made, is res adjudicata by the judgment given on the former appeal. In the language used in Phelan v. San Francisco, 20 Cal. 39, 45, "it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." Under the circumstances here existing, it can make no difference that this court in its opinion on such appeal confined its discussion to the question of the effect of the statute of limitations. The question of the sufficiency of the complaint against the objection of want of facts to state a cause of action was presented by the demurrer, and was necessarily presented by the appeal to this court. If the complaint did not state facts sufficient to constitute a cause of action, the ruling of the trial court in sustaining the demurrer was correct, and the judgment should have been affirmed, even though the objections based on the statute of limitations were not well taken. See People v. Central Pacific R. R. Co., 76 Cal. 29, 43, 18 Pac. 90. The judgment of this court reversing the judgment of the lower court, with directions to the lower court to overrule the demurrer, was necessarily an adjudication that the demurrer was not well taken; in other words, that the complaint did state facts sufficient to constitute a cause of action against defendant; that the cause of action therein set forth was not barred by either sections 337 or 342 of the Code of Civil Procedure; and that the complaint was not uncertain. As we have said, it can make no difference that the contentions now made were not discussed in the opinion. They were adjudicated against defendant by the *judgment* given by this court; for such adjudication was "actually and necessarily included therein or necessary thereto." Section 1911, Code Civ. Proc. Section 434 of the Code of Civil Procedure has no application whatever to the matter under consideration. So far as pertinent, it simply provides that an objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a failure to demur on that ground. The trial court was without power to consider such objections as are here urged, for the simple reason that this court had rendered an adjudication thereon that forever concludes the matter.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The judgment is reversed.

We concur: SHAW, J.; SLOSS, J.

163 Cal. 436

FOERST v. KELSO. (S. F. 5,827.)

(Supreme Court of California. Aug. 6, 1912.)

1. JUDGMENT (§ 283*)—RESTORATION—APPLICATION—SCOPE.

The judgment roll in an action having been destroyed in a conflagration pending a motion for a new trial, an application by plaintiff for leave to supply, as authorized by Act June 16, 1906 (St. Ex. Sess. 1906, p. 73), involved no question as to the effect of the judgment roll when restored, nor as to the right of defendant to relief by or on account of the fact that the court reporter's notes and transcript had been destroyed in the same fire, and that it was impossible for him to prepare a bill of exceptions.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 557, 558; Dec. Dig. § 283.*]

2. JUDGMENT (§ 283*)—DESTROYED JUDGMENT ROLL—RESTORATION.

Where the judgment roll and the records in an action were destroyed by a conflagration pending a motion for a new trial, plaintiff had a sufficient interest to entitle her to an order for the restoration thereof under Act June 16, 1906 (St. Ex. Sess. 1906, p. 73), providing for the restoration of court records lost, injured, or destroyed by conflagration or other public calamity.

[Ed. Note.—For other cases, see Judgment, Cent. Div. §§ 557, 558; Dec. Dig. § 283.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Minna Foerst against John Kelso. From an order granting plaintiff's application to supply a destroyed judgment roll in the action, defendant appeals. Affirmed.

J. C. Bates, for appellant. Sullivan & Sullivan and Theo. J. Roche, for respondent.

ANGELLOTTI, J. In February, 1901, plaintiff filed in the superior court of the city and county of San Francisco an amended complaint stating a cause of action for damages. In March, 1901, defendant filed his answer. The cause was tried with a jury, which, on December 12, 1905, rendered its verdict in favor of plaintiff for the sum of $7,000. Judgment was entered in accord with said verdict on December 14, 1905, and the judgment roll in said action was made up and certified by the clerk on the same day. Within 10 days after the rendition of such verdict, defendant served and filed his notice of intention to move for a new trial on some or all of the grounds specified in section 657, Code of Civil Procedure, stating in such notice that the motion would be made upon a bill of exceptions. Within the requisite time, his attorney served on plaintiff's attorneys his proposed bill of exceptions, and subsequently and in due time plaintiff's attorneys served on defendant's attorney amendments to said proposed bill of exceptions. At this stage, neither said proposed bill of exceptions, nor said proposed amendments, having as yet been filed among the papers of the case, and the same apparently being in the possession of the attorney of defendant, and no bill of exceptions having been settled, and said motion for a new trial being still pending, came the great conflagration of April 18 and 19, 1906, by which all of the records and files in said cause, and also all papers relating thereto in the office of said attorney for defendant, including said proposed bill and proposed amendments, and the shorthand reporter's transcript of the proceedings which such attorney had, were destroyed. Attorney for defendant, in his affidavit made November 9, 1910, which is not contradicted, states that the shorthand reporter who took down in shorthand the proceedings in said cause is dead, and that he believes it impossible to obtain another transcript of such proceedings, and that the evidence taken at the trial has passed from his memory, and that he cannot now state even the substance thereof. On November 3, 1910, plaintiff made her application to said superior court, in accord with the provisions of the act of June 16, 1906 (Stats. 1906, Extra Session, p. 73), for the restoration of court records "lost, injured or destroyed by conflagration or other public calamity," for an order reciting the substance and effect of the judgment roll in said action. After proper proceedings had, this application came on for hearing November 18, 1910. It was admitted that the judgment roll, as set forth in the application to restore such records, was correctly set forth, with the exception of a minor detail, which was corrected. The affidavit of defendant's attorney, the material facts stated in which have already been set forth, was read in evidence. Defendant's attorney claimed, both in his affidavit and at such hearing, that either the motion for a new trial should be granted, or that plaintiff's motion for restoration should be denied, on the ground that the granting of the same would give plaintiff an unfair advantage over defendant and leave defendant without any adequate remedy, as it was impossible for defendant to supply a new proposed bill of exceptions to be used on his motion for a new trial, and that the granting of such motion would be a violation of his rights under the fourteenth amendment to the Constitution of the United States. The trial court overruled the objections of defendant and made the order petitioned for by plaintiff, viz., "an order reciting what was the substance and effect" of such destroyed judgment roll. This is an appeal from such order, and from the judgment in said action as recorded on the restoration proceedings December 1, 1910.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Nothing is said in defendant's brief about an appeal from the judgment. We do not understand that it was intended to appeal from the judgment entered December 14, 1905, which is the only judgment in the case, and the time for appeal from which had expired several years prior to the taking of this appeal. The judgment referred to in the notice of appeal is one recorded and entered on December 1, 1910, on which date the order of the court, reciting the contents of the lost judgment roll, including the judgment, was recorded by the clerk of the court, the order of restoration. No judgment was entered on that day, but only an order reciting the contents of a lost judgment roll, including a judgment that had been entered on December 14, 1905. Practically the appeal is only from the order of the court restoring the records sought by plaintiff to be restored. There is no appeal from any order refusing to grant the defendant a new trial; nor does it appear that the trial court has acted upon any such motion. It simply regarded the facts stated in support of the demand of defendant for a new trial as an insufficient objection to the restoration of the record, and overruled the same.

So far as appellant bases any claim for a new trial upon the provisions of an act entitled "An act providing for the disposition of actions and proceedings in which bills of exceptions and statements on motion for a new trial have been lost or destroyed by conflagration or other public calamity," approved March 23, 1907 (Stats. 1907, p. 998), his claim would appear to be without force, in view of the express provision contained therein that "the motion provided for by this act must be made within thirty days after the loss or destruction of such records; provided, that in any case now pending such motion may be made at any time within sixty days after the passage of this act." No demand or motion based on facts warranting such action under this act was made until November 11, 1910, and no request was made to the court until November 18, 1910.

[1] But we are satisfied that no question as to the effect of the judgment roll when restored, or as to the right of defendant to relief by or on account of the facts set up by him in the affidavit of his attorney, was involved on the application for restoration of the record, or is involved on this appeal.

[2] A somewhat similar question was presented in Estate of Jones, 17 Cal. App. 327, 119 Pac. 670, in which a petition for hearing in this court was denied. The opinion of the District Court of Appeal in that case succinctly and clearly states the law applicable on such applications, so far as this matter is concerned. Substantially it is held that the sole object of such a proceeding as this is to restore a record; that the obvious purpose of such a proceeding is to permit a person apparently having some interest in a lost record, even though his interest is, perhaps, doubtful, to have the same restored, so that it may afford conclusive evidence of its contents and obviate the necessity of resorting to secondary evidence in any litigation that may arise to enforce rights or obligations established by such record; that the ends of justice would not be promoted by complicating the question of restoration of the records with other issues, and that as a rule the regularity or legal effect of the record will not be considered; that questions affecting the judgment, other than those which appear on the face of the record sought to be substituted, should not be investigated in such a proceeding; and that in such a case the record should be restored substantially as it was, even if voidable, and the other party left to make whatever defense, not appearing from the face of the record, that might exist precisely as he could, had the record not been destroyed. Whatever rights or remedies defendant had at the time of this application for restoration, by reason of the matters set up in the affidavit, plaintiff was nevertheless entitled to such restoration, and the trial court did not err in making the order therefor.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

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163 Cal. 440

In re MARTIN'S ESTATE. (S. F. 6,227.)

(Supreme Court of California. Aug. 6, 1912.)

EXECUTORS AND ADMINISTRATORS (§ 32*)—LETTERS OF ADMINISTRATION—PETITION FOR REVOCATION—RIGHT TO PETITION FOR.

Under Code Civ. Proc. § 1383, which provides that when letters of administration have been granted to one other than the surviving husband or wife, child, parent, brother, or sister any one of them, or their nominee, may obtain revocation of the letters, and be entitled to administration, an incompetent relative cannot nominate a competent one; and hence, where decedent's living brother was incompetent to serve as administrator under section 1369, because he was a nonresident, he could not authorize his son, who was competent to serve, to petition for revocation of letters of administration issued to the son of a deceased brother of decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 191–212; Dec. Dig. § 32.*]

Department 1. Appeal from Superior Court, Napa County; Henry C. Gesford, Judge.

In the matter of the estate of Lawrence Martin, deceased. From an order denying a petition to revoke letters of administration issued to Clarence Martin, John Martin appeals. Affirmed.

Percy S. King and J. R. Pringle, for appellant. C. N. Riggins, for respondent.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ANGELLOTTI, J. The deceased died intestate, and Clarence Martin, a nephew and heir (being a son of a deceased brother of deceased), was appointed administrator of his estate on October 19, 1911. Letters of administration were issued to said Clarence Martin on October 24, 1911. On November 29, 1911, John Martin, a son of Andrew Martin, who is a brother of deceased and one of his heirs, at the written request of his father, filed his petition, under section 1383, Code of Civil Procedure, for the revocation of such letters of administration issued to Clarence Martin, and asking that he (John Martin) be appointed administrator of said estate. Said Andrew Martin, father of said petitioner, is in all respects competent to serve as administrator, except that he is a nonresident of the state, being a resident of Ireland. For this reason he is neither competent nor entitled to serve as administrator. Code Civ. Proc. § 1369. The petitioner himself is a resident of this state and in all respects competent. The lower court, finding that Andrew Martin was incompetent to be appointed by reason of nonresidence, concluded that petitioner had no right, under section 1383, Code of Civil Procedure, to a revocation of the letters theretofore granted to Clarence Martin; the theory being that such section authorized the revocation of letters only upon the petition of a relative who is himself competent to serve as administrator, or upon the petition of a competent nominee of such a relative who is himself competent. It therefore denied the petition. This is an appeal by said petitioner from the order denying his petition.

Section 1383, Code of Civil Procedure, provides: "When letters of administration have been granted to any other person than the surviving husband or wife, child, father, mother, brother, or sister of the intestate, any one of them who is competent, or any competent person at the written request of any one of them, may obtain the revocation of the letters, and be entitled to the administration, by presenting to the court a petition praying the revocation, and that letters of administration may be issued to him." The words "who is competent, or any competent person at the written request of any one of them," were inserted in this section by amendment April 16, 1880. Amendments to Codes 1880, p. 80. Sections 1384 and 1385, Code of Civil Procedure, provide for the notice and hearing on such petition; and the latter section provides that, "if the right of the applicant is established, and he is competent, letters of administration *must* be granted to him, and the letters of the former administrator revoked." By section 1369, Code of Civil Procedure, it is provided that "no person is competent or entitled to serve as administrator or administratrix" who is (1) under the age of majority, (2) not a bona fide resident of the state, (3) convicted of an infamous crime, (4) adjudged by the court incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding and integrity.

It is not disputed that Andrew Martin, by reason of his nonresidence, was not "competent or entitled to serve as administrator" (section 1369, Code Civ. Proc.), and that he was therefore not entitled to personally petition, under section 1383, Code of Civil Procedure, for the revocation of the letters theretofore granted to Clarence Martin. Does section 1383, Code of Civil Procedure, give his nominee any greater right in the matter than he himself has? Was it the intent of the framers of the amendment of 1880 to that section to give to a relative named therein the right, under the circumstances set forth therein, to clothe any competent person, not otherwise entitled to administer, with the authority to obtain a revocation of the letters previously issued to another and a grant of letters to himself, although he (such relative) could not ask for such revocation or be appointed administrator by reason of his own incompetency? This is the question presented by this appeal.

The meaning of section 1383, Code of Civil Procedure, in this regard is not entirely free from doubt; but we are of the opinion that the lower court was correct in its conclusion that the section authorizes the revocation of letters already granted only upon the petition of one of the designated relatives who is competent to serve as administrator, or the petition of a nominee of such a one, i. e., the nominee of one who is himself competent to serve as administrator. Taking the section as it stands, without regard to other sections of our probate act, and looking solely to its general purpose, such would appear to be a fair construction of its provisions. The general purpose of the section has been declared to be to allow a prior right to letters to be asserted against one who has obtained a grant of letters by virtue of a secondary right; to permit the former administrator to be superseded by a person of another and superior claim. See Estate of Wooten, 56 Cal. 322, 326; Estate of Aldrich, 147 Cal. 343, 345, 81 Pac. 1011. It is solely in the interest of the person having such prior right or belonging to such superior class. But if the relative is incompetent under the laws of this state to obtain letters or serve as administrator, he has no prior right to letters over the person theretofore appointed, and does not belong to a superior class in the matter of the right to letters. This being the situation, the Legislature provides for the initiation of proceedings for revocation when letters have been granted to any other person than to a husband or wife, child, father, mother, brother, or sister of the deceased "by any one of them who is competent, or any competent person at the written request of any one of them."

The right to obtain such revocation is solely for the benefit of the relative. It is limited by express terms, in the first instance, to such of the designated relatives as are themselves competent; and the words "at the written request of any one of them" may well be construed as referring solely to those described in the last preceding clause, viz., "any one of them who is competent," thus giving the *competent* relative the right to act either directly or through a nominee.

When we consider the section in the light of the well-settled law as to the rights of such relatives, other than a surviving husband or wife, on an original application for letters of administration, this would appear to be almost the necessary construction. Section 1365, Code of Civil Procedure, specifies the persons "entitled to administer," and the order in which they are severally entitled, being: "1. The surviving husband or wife, or some competent person whom he or she may request to have appointed. 2. The children. 3. The father and mother. 4. The brothers. 5. The sisters," etc. It is thoroughly settled that, except in the case of a surviving husband or wife, the competent nominee of a relative who is incompetent by reason of nonresidence is not "entitled" to letters, on an original application for letters, by virtue of his nomination by such relative. See Estate of Beech, 63 Cal. 458; Estate of Muersing, 103 Cal. 585, 37 Pac. 520; Estate of Kelly, 57 Cal. 81; Estate of Morgan, 53 Cal. 243. It is thus clear that the competent nominee of a nonresident child, father, mother, brother, or sister of the deceased would not have been entitled by reason of such nomination to letters of administration as against Clarence Martin at the time the latter was appointed, if he had then filed his petition asking for such letters; and this because of the incompetency of the person nominating him. The cases cited make this clear, and the fact is not disputed by learned counsel for appellant. It is unreasonable to assume, in the absence of language clearly compelling such a conclusion, that the Legislature intended that such a nominee should have the absolute right to insist on the revocation of letters, the issuance of which neither he nor the person nominating him could have successfully opposed in the first instance. Especially is this true when we bear in mind that the purpose of section 1383, Code of Civil Procedure, is, as we have said, to allow a prior right to letters to be asserted against one who has obtained a grant of letters by virtue of a secondary right.

Much reliance is placed by appellant on the fact that the amendment to section 1383 was made within a few weeks after this court decided the case of Estate of Cotter, 54 Cal. 215, wherein it was held that the surviving husband or wife of a deceased person, though incompetent to serve on account of nonresidence, nevertheless is entitled to nominate a suitable person for administrator, who would thereupon become entitled to letters on an original application in preference to any of the other persons named in section 1365, Code of Civil Procedure. This section has already been referred to. The decision referred to was based upon the express language of subdivision 1 of that section, which gives the first right to letters to "the surviving husband or wife, or some competent person whom he or she may request to have appointed." It was said that this statute "does not make the right of the surviving husband or wife to nominate depend upon the matter of residence." But the Legislature was dealing with an entirely different question in amending section 1383, Code of Civil Procedure, viz., the right to a revocation of letters already granted at the instance of one having a prior right; and we do not think that the language used by it in such amendment was such as to warrant a conclusion that it was endeavoring to apply the rule declared in the Cotter Case to applications for revocation. Especially is this true when we consider that no amendment was made, conferring upon the nominee of any heir, other than the surviving husband or wife, the right to letters of administration in place of said heir upon the original granting of letters.

It may be that there is no good reason why any heir should not be placed in the same position in the matter of obtaining letters in the first instance as is the surviving husband or wife; that is, with the absolute right to nominate in his place, even if incompetent by reason of nonresidence, some competent person to act in his place, who shall have the same right to letters that he would have if a resident of the state. That, however, is a matter within the legislative domain. As has been said by this court, "there have been, at various times, so many amendments to the Code concerning the right of administration that it is quite difficult to extract a harmonious system." Estate of Kelly, 57 Cal. 81. We cannot claim that our construction of section 1383, Code of Civil Procedure, makes our system in this regard absolutely harmonious; but as many, if not more, discordant notes would be found if the construction contended for by appellant should be adopted.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

(163 Cal. 449)

In re EVERTS' ESTATE.

(S. F. 6,072, 6,073.)

(Supreme Court of California. Aug. 6, 1912. Rehearing Denied Sept. 5, 1912.)

1. Appeal and Error (§ 979*)—New Trial (§ 68*)—Wills (§ 155*)—Want of Evidence—Review.

The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court, which will not be reversed in the absence of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3871–3873, 3877; Dec. Dig. § 979;* New Trial, Cent. Dig. §§ 135–140; Dec. Dig. § 68;* Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

2. New Trial (§ 9*)—Separate Issues.

It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 12; Dec. Dig. § 9.*]

3. New Trial (§ 170*)—Separate Issues—Severance.

Where a new trial is granted as to one of two separate issues, it authorizes a re-examination only of the issue on which the new trial has been ordered; the moving party's remedy as to the others being limited to an appeal from the part of the order denying the motion as to them.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 337; Dec. Dig. § 170.*]

4. Wills (§ 166*)—Evidence—Fraud—Undue Influence.

Evidence *held* to sustain a verdict finding that a will offered for probate had not been procured by fraud or undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

5. Wills (§ 153*)—Fraud—Undue Influence—Promise to Distribute.

A will executed on the faith of a promise that the sole beneficiary would distribute certain of testatrix's estate among certain charities is not procured by fraud or undue influence; but if, after testatrix's death, the donee fails or refuses to perform the promise the donee and the property may be charged with a trust in favor of the intended beneficiaries.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 371; Dec. Dig. § 153.*]

6. Trial (§ 253*)—Instructions—Excluding Evidence.

The court, having given instructions in a will contest concerning unsoundness of mind in introducing the subject of undue influence, charged that unsoundness of mind and undue influence were entirely distinct grounds for denying the probate of a will; that a person might be the victim of undue influence, whether at the time sound or unsound in mind; and that, if the jury found the testatrix was of unsound mind at the time of the execution of the will, then it was entirely immaterial whether the principal beneficiary exercised any undue influence over her in the matter of the execution of the will, because unsoundness of mind would incapacitate her to execute the will, "influence or no influence." *Held*, that such instruction was not objectionable as authorizing the jury, after finding unsoundness of mind, to conclude that they need not consider the evidence relating to undue influence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613–623; Dec. Dig. § 253.*]

7. Trial (§ 194*)—Instructions—Effect of Evidence.

A request to charge in a will contest that two former wills were admitted as tending to raise a probability of undue influence, and that they were limited to that purpose, was improper, being a charge as to the effect of evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439–441, 446–454, 456–466; Dec. Dig. § 194.*]

8. Wills (§ 331*)—Contest—Instructions.

An instruction that two former wills were admitted in evidence to show the state of mind of testatrix toward the beneficiaries therein named, and not specifically to show that she made the will in controversy while of unsound mind, or through undue influence or fraud, was not erroneous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 782–784, 786, 787; Dec. Dig. § 331.*]

9. Trial (§ 260*)—Instructions—Request to Charge—Instructions Given.

Where, in a will contest, the court charged that in considering the issue of undue influence the jury should take into consideration the age and mental and physical condition of testatrix as shown by the evidence, that an influence which she was too weak to resist, and which destroyed her free agency and prevented the free and voluntary action of her judgment, amounted to undue influence, and that undue influence was the control of another will over that of testatrix, whose faculties had been so impaired as to submit to that control, such instruction covered a request to charge that the amount of undue influence which would invalidate a will varies with the strength or weakness of testatrix's mind and will, and the influence which would subdue or control a mind naturally weak, or which had become impaired by age, weakness, disease, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired by any of the causes stated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. § 260.*]

10. Evidence (§ 350*)—Documents—Nurse's Chart.

A nurse's chart or memorandum of the pulse of testatrix and her symptoms during her last illness was not legal evidence of the facts stated therein.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1388–1397; Dec. Dig. § 350.*]

11. Trial (§ 252*)—Instructions—Applicability to Evidence.

Where, in a will contest, it was shown that a nurse's chart showing testatrix's symptoms and pulse during her last illness had been lost, but there was no proof that it was willfully destroyed or suppressed, or that it was kept for or delivered to proponent, such facts did not furnish a basis for a refused instruction that evidence willfully suppressed was presumed to be adverse to the party suppressing it.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596–612; Dec. Dig. § 252.*]

Department 1. Appeal from Superior Court, Santa Cruz County; George H. Buck, Judge.

In the matter of the estate of Jeanette L Everts, deceased. A writing purporting to be decedent's will having been offered for probate, certain legatees in an alleged will bearing prior date contested such probate. From an order granting proponent's motion for a new trial on the issue of insanity, and denying contestants' motion for a new trial on the issues of undue influence and fraud, contestants appeal separately. Affirmed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Chas. M. Cassin and Benj. K. Knight, for appellants. Stratton, Kaufman & Torchiana, for respondent.

SHAW, J. Jeanette L. Everts died in Santa Cruz county on January 16, 1911. On January 19, 1911, a petition for the probate of a writing, dated January 13, 1911, purporting to be her will was filed. A will previously executed had given certain legacies to the contestants above mentioned. They appeared and filed a contest of the will of January 13th. The grounds of contest were, first, that the decedent was of unsound mind when said paper was executed; second, that it was procured by undue influence; third, that it was procured by fraud. The issues were tried by a jury, which found that the decedent was of unsound mind as alleged, but that the will was not procured by fraud or undue influence. Thereupon the proponent and contestants moved separately for a new trial of the issues decided against them respectively; the proponent asking a new trial of the issue as to insanity, the contestants for a new trial of the issues as to undue influence and fraud. The court granted the motion of the proponent and ordered a new trial of the issue as to insanity, and, denying the motion of contestants, refused a new trial of the questions of undue influence and fraud. The contestants appeal separately from each order; the appeal from the order relating to the issue of insanity being case No. 6,073, and that from the order upon the issues of undue influence and fraud being case No. 6,072.

[1] The granting of a new trial for want of evidence to support the verdict is usually a matter almost entirely within the discretion of the trial court. Such order will not be reversed, unless an abuse of discretion appears. Estate of Motz, 136 Cal. 560, 69 Pac. 294; Bjorman v. Ft. B. R. Co., 92 Cal. 501, 28 Pac. 591. The record contains no substantial evidence that the testatrix was of unsound mind or otherwise incompetent to make a will at the time of the execution of the will in question. The court very properly ordered a new trial of that issue.

[2, 3] It is within the power of the trial court, where there is more than one issue of fact in a case, and such issues are distinct and separable in their nature, to order a new trial of one issue and refuse it as to the others. San Diego L. & T. Co. v. Neal, 78 Cal. 64, 20 Pac. 372, 3 L. R. A. 83; Duff v. Duff, 101 Cal. 4, 35 Pac. 437; Mountain, etc., Co. v. Bryan, 111 Cal. 38, 43 Pac. 410. These cases declare, also, that when such new trial is granted it opens for examination only the issue upon which it is ordered; that the determination of the other issues remain in the record; and that they cannot be retried. The only remedy of the moving party as to those issues is to appeal from the part of the order denying the motion for a new trial as to them. This the appellants have done in this case. If we affirm that part of the order denying the new trial as to fraud and undue influence, the findings on those issues will stand unaffected, and the new trial to follow in the lower court must be confined to the question of the unsoundness of mind of the decedent.

[4] The decedent left but one heir at law, namely, the proponent, Sarah M. Chapman, her daughter. By the instrument of January 13, 1911, here offered for probate, the decedent gave all her property to her daughter, appointed her executor without bonds, and revoked all former wills. On December 3, 1909, she made a will giving the contestants, 10 in number, legacies amounting to $17,000, and to other persons and institutions legacies amounting to $13,300, her summer home to her cousin, Etta Alfred, for her life, and the residue to her said daughter. The contestant, Harry J. Bias, who was designated as executor in said former will, was the only natural person among the contestants who were named therein as legatees. His legacy of $2,000 was said to be for past services and for his services as executor. The other contestants are benevolent and religious societies and corporations. The value of the estate is about $75,000.

The undue influence, as alleged, consisted of the importunities, advice, solicitations, and representations of Sarah M. Chapman and others acting for her, whereby the will and purpose of the decedent to leave part of her property to others was overcome, and she was caused to make the will giving it all to said daughter. The fraud, as alleged, consisted of promises and representations, said to have been made by and for Sarah M. Chapman to the decedent, that if the decedent would execute the will in question leaving all her property to said Sarah, she, the said Sarah, would distribute a part of the same among certain nieces and cousins of the decedent and certain churches and charitable institutions, according to the wish and intent of the decedent, which promises, it is alleged, were made without any intention of performing them, and by means thereof she was induced to and did make said will.

So far as the point that the verdict against the contestants on these two issues is contrary to the evidence is concerned, no extended discussion is required. A perusal of the record shows that at least the great preponderance of the evidence was against the contestants. There was no satisfactory evidence of undue influence. The circumstances proven to show it were all readily susceptible of an innocent explanation. On the subject of fraud, the evidence was wanting upon the important element of fraudulent or bad intent. There was evidence that the decedent desired to give a considerable part of her estate to certain churches and societies and to other relatives, and also that she wished to place it all in control of her daughter for distribution of that part according to her desires; that the daughter was informed of these desires, and promised the decedent that, if the will was made giving it all to her unconditionally, she would carry out those desires; and that the will was made upon the faith of this promise. But there is no substantial proof of bad faith on the part of the daughter, or of the allegation that she made such promise without any intention of performing it. She did not testify; but her counsel stated that she did not deny the promise, and that she intended to perform it. The only evidence of any consequence that might be supposed to indicate a contrary purpose is the testimony of the representatives of one of the contestant churches, who, the second day after the funeral of the testatrix, half playfully reminded the daughter of a promise she had a few hours before expressed to carry out her mother's wishes concerning the intended beneficiaries of the estate, to which the daughter answered: "You know my heart; but I am making no promises." It appeared, however, that at that time she had not seen the previous will, and was not fully advised as to the details of her mother's wishes; that she had received advice from her attorney in the meantime; and that she then again avowed her intention to carry out her mother's desires. The jury, on this evidence, was entirely justified in finding that the will was not procured by fraud.

[5] A will executed upon the faith of such a promise, honestly made, cannot be said to be procured by fraud or undue influence. If, after the death of the testatrix, the donee fails or refuses to perform the promise, a different question arises and, although the will stands unaffected, the donee and the property may be charged with a trust in favor of the intended beneficiaries. De Laurencel v. De Boom, 48 Cal. 585; Estate of Brooks, 54 Cal. 475; Curdy v. Berton, 79 Cal. 426, 21 Pac. 858, 5 L. R. A. 189, 12 Am. St. Rep. 157.

[6] The court instructed the jury that undue influence and unsoundness of mind were entirely distinct grounds for denying probate of a will; that a person might be the victim of undue influence, whether at the time sound or unsound in mind; and that, if they found that the testatrix was of unsound mind at the time of the execution of the will, then it was entirely immaterial whether or not the daughter "exercised any undue influence over her in the matter of the execution of the will," because unsoundness of mind itself would incapacitate her to execute the will, "influence or no influence." The appellants contend that the jury, after finding that such unsoundness of mind was established, would conclude from this instruction that they need not consider the evidence relating to undue influence, and that, in effect, it did prevent, or may have prevented, them from considering that evidence. The contention is not tenable. This statement was made immediately following the instructions concerning unsoundness of mind and in introducing the subject of undue influence. It was correct in point of fact. It does not purport to tell the jury that it would, in the event stated, be unnecessary or immaterial for them to consider the evidence as to undue influence, or to find upon that issue. The court proceeded to instruct the jury fully upon the question of undue influence, and in effect directed the jury to consider the evidence relating to it, to decide the issue according to the evidence, and to return a verdict thereon. The jury must be presumed to have obeyed these directions. There is nothing in the record, or even in the evidence, to indicate the contrary.

[7] There was no error in refusing the requested instruction to the effect that the two former wills were admitted for the purpose of tending to raise a probability of undue influence, and that they were limited to that purpose. Such an instruction was improper, being an instruction as to the effect of evidence.

[8] The instruction that these two former wills were allowed in evidence for the purpose of showing the state of mind and feeling of the testatrix towards the beneficiaries therein named, and not specifically to show that she made the will while of unsound mind, or through undue influence or fraud, is not erroneous. It was for the jury to determine what feeling or state of mind toward those beneficiaries was indicated by these wills, and, having done so, to decide whether it did or did not tend to prove the facts stated. An instruction, to the effect that it did prove those facts, by the court would have invaded the province of the jury.

[9] The court refused instruction 7, asked by appellants, containing this passage: "The amount of undue influence which will be sufficient to invalidate a will must, of course, vary with the strength or weakness of mind and will of the testator; and the influence which would subdue or control a mind naturally weak, or which had become impaired by age, weakness, disease, or any other cause, might have no effect to overcome or mislead a mind naturally strong and unimpaired by any of the causes above stated." That the propositions stated are correct is self-evident. But it does not follow that they should have been given to the jury as an instruction by the court. The jury must decide all questions of fact arising from the evidence, at least where there is a substantial conflict. Where there is no such conflict, the court may direct a verdict, but otherwise it may instruct only as to the law. The instruction is argumentative to a degree

to which the court need not go. Where proper instructions on the point are given, a reversal should not follow either the giving or refusal to give such a proposition as an instruction. In other charges the jury was told that in considering the issue of undue influence they should take into consideration the age and mental and physical condition of the testatrix, as shown by the evidence; that an influence which she was too weak to resist, and which destroyed her free agency and prevented the free and voluntary action of her judgment, amounted to undue influence; that undue influence was the control of another will over that of the testatrix, whose faculties have been so impaired as to submit to that control. We are of the opinion that the contestants suffered no substantial injury from the lack of fuller instructions on the precise point.

[10, 11] The nurses in attendance on the testatrix at the time of the execution of the will kept a chart or memorandum of her pulse and symptoms. This was lost; but there is no evidence that it was willfully destroyed or suppressed, or that it was kept for or delivered to the proponent. It was not legal evidence of the facts stated in it. Estate of Flint, 100 Cal. 399, 34 Pac. 863. Consequently it did not furnish a basis for the instruction that evidence willfully suppressed is presumed to be adverse to the party suppressing it, which was asked by contestants and refused.

A number of other rulings and proceedings at the trial are objected to as erroneous. None of them, in our opinion, could have affected the case to the prejudice of the contestants, or are of sufficient merit or importance to require discussion.

The orders appealed from are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J

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163 Cal. 423

MITCHELL v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 5,699.)

(Supreme Court of California. Aug. 5, 1912. Rehearing Denied Sept. 4, 1912.)

1. CONTEMPT (§ 54*) — AFFIDAVIT — SUFFICIENCY.

The affidavit or affidavits upon which a contempt proceeding is based constitute the complaint; and, unless they charge acts constituting contempt, the court is without jurisdiction to proceed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143–149; Dec. Dig. § 54.*]

2. DIVORCE (§ 269*)—ALIMONY—CONTEMPT—AFFIDAVIT—SUFFICIENCY.

An affidavit to punish for contempt of an order requiring a husband to pay his wife's counsel fees and monthly sums for her support pending a divorce suit brought by her was not insufficient for failing to state that a copy of the order for such payment was personally served on him, or that he knew of the order, where the affidavit recited that he appeared in all the proceedings, and at all the times and dates mentioned in the affidavit, and that the order was made on a specified date.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756–763; Dec. Dig. § 269.*]

3. DIVORCE (§ 269*) — ALIMONY — CONTEMPT —EVIDENCE—MATERIALITY.

In a proceeding to punish a husband for contempt of an order in a divorce suit, proof of service of a copy of the order was immaterial, where it was undisputed that he was present when the order was made.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756–763; Dec. Dig. § 269.*]

4. CERTIORARI (§ 58*) — REVIEW — MATTERS NOT SHOWN BY RECORD.

Objection on certiorari to review a conviction of contempt that petitioner's counsel was not permitted to read his affidavit at the hearing of the order to show cause cannot be considered, where the certified record fails to indicate any such state of facts.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. § 146; Dec. Dig. § 58.*]

5. WITNESSES (§ 60*) — COMPETENCY — HUSBAND AND WIFE.

Pen. Code, § 1322, and Code Civ. Proc. § 1881, subd. 1, which disqualify a wife to testify against her husband in certain cases, does not prevent her from testifying against him in a proceeding to punish him for contempt of an order requiring him to make her certain payments pending suit by her for divorce.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 167–173; Dec. Dig. § 60.*]

6. DIVORCE (§ 269*)—TEMPORARY ORDERS—CONTEMPT—PROCEEDINGS TO PUNISH.

A proceeding to punish for contempt of an order in a divorce suit requiring a husband to make certain payments to his wife, while similar in some respects to a prosecution for a criminal offense, is properly entitled in the style of the divorce proceeding itself, and not as a separate action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756–763; Dec. Dig. § 269.*]

7. DIVORCE (§ 269*) — CONTEMPT — PROCEEDINGS TO PUNISH—JUDICIAL NOTICE OF PROCEEDINGS.

In a proceeding to punish a husband for contempt of an order made in a divorce suit against him, requiring payments to his wife, the court takes cognizance of pendency of the main cause; and it is unnecessary to set forth in the affidavit to punish for the contempt the fact of such pendency, nor the provisions of the order violated.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 756–763; Dec. Dig. § 269.*]

Department 2. Petition by G. W. Mitchell, Jr., for certiorari against the Superior Court in and for the City and County of San Francisco and another to review contempt proceedings. Writ discharged.

Rehearing denied; Beatty, C. J., dissenting.

F. H. Dam, for petitioner. Arthur E. Nathanson, for respondents.

MELVIN, J. Certiorari directed to a judge of the superior court to the end that this court might examine the proceedings whereby the petitioner, G. W. Mitchell, Jr., was found guilty of contempt.

[1, 2] It appears from the record that an

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action for divorce was pending in the superior court of the city and county of San Francisco, in which Edith Mitchell was plaintiff and this petitioner was defendant. On or about September 25, 1908, after due proceedings, the court ordered the payment of certain counsel fees and also monthly sums for the support of said plaintiff, Edith Mitchell, pendente lite. Thereafter, upon the affidavit of Edith Mitchell being filed, the court issued an order requiring G. W. Mitchell, Jr., to show cause why he should not be punished for contempt of court because of his failure to comply with the direction to pay alimony and counsel fees. After a hearing he was found guilty, and it was adjudged that he be imprisoned in the county jail of the city and county of San Francisco for the term of five days. Petitioner contends that the court never obtained jurisdiction of the proceeding because of the defects in the affidavit. The rule upon this subject in California is well settled. "The affidavit or affidavits upon which the contempt proceeding is based constitute the complaint; and, unless they, upon their face, charge facts constituting a contempt, the court is without jurisdiction to proceed." Hutton v. Superior Court, 147 Cal. 159, 81 Pac. 410. The same rule was announced in Batchelder v. Moore, 42 Cal. 415; Overend v. Superior Court, 131 Cal. 284, 63 Pac. 372; Rogers v. Superior Court, 145 Cal. 91, 78 Pac. 344; Otis v. Superior Court, 148 Cal. 130, 82 Pac. 853; Frowley v. Superior Court, 158 Cal. 226, 110 Pac. 817. Petitioner's first and principal objection to the affidavit is that it fails to state that a certified or any copy of the order for the payment of alimony was personally served upon him, or that he had actual knowledge of the signing and filing of said order, or of its contents. The affidavit, however, contains a recital "that the defendant has duly appeared in the above-entitled action in all the proceedings therein, and at all the times and dates herein mentioned." This is followed by the statement that on September 25, 1908, "upon due proceedings therefor first had and obtained, the above-entitled court duly made its order, ordering and directing that the said G. W. Mitchell, Jr., pay to the said Edith Mitchell," certain sums by way of allowance for maintenance and attorney's fees pendente lite. This language amounts to an allegation that defendant was present when the order was made. It was consequently unnecessary to allege or to prove that he had been served with notice of the original order. Ex parte Cottrell 59 Cal. 418; In re McCarty, 154 Cal. 537, 98 Pac. 540.

[3] An effort was made to show by the affidavit of one Reinicke, made during the progress of the hearing, that he had served upon G. W. Mitchell, Jr., a copy of the order for the payment of allowance for maintenance and counsel fees shortly after it was made. Petitioner makes objection both to the introduction of this affidavit and the denial to him of the right to cross-examine Reinicke, and also asserts that the affidavit is insufficient to show service of the order according to law. We find it unnecessary, however, to determine these matters, because the undenied allegation of defendant's presence at the time of the making of the order rendered a showing of service of notice upon him entirely unnecessary.

[4] Complaint is made that his counsel was not permitted to read petitioner's affidavit on the day of the hearing of the order to show cause. The certified record fails to indicate any such state of facts; consequently we cannot consider the point.

[5-7] Petitioner also insists that, the proceeding to punish him for contempt being in the nature of a criminal prosecution, it cannot be inaugurated nor supported by the affidavit of his wife. In this behalf he cites section 1322, Penal Code, and section 1881, subd. 1, of the Code of Civil Procedure. His position, briefly stated, is that the proceeding to punish for contempt of court one who disobeys a lawful order is a criminal proceeding designed to "vindicate the dignity and authority of the court" (Ex parte Gould, 99 Cal. 362, 33 Pac. 1112 [21 L. R. A. 751, 37 Am. St. Rep. 57]); that therefore it is not "a criminal action or proceeding for a crime committed" by the husband against the wife; and that if we regard it as a civil proceeding the result will be the punishment of the offending party by imprisonment for debt. If this were an independent prosecution unconnected with the civil action to which the husband and wife are parties, there would be much force in petitioner's argument; but the right of the wife to testify in an ancillary proceeding of this sort has never been questioned. This proceeding, although partaking of some of the characteristics of a prosecution for a criminal offense, is properly entitled in the style of the divorce proceeding itself, and not as a separate action. The court takes cognizance of the pendency of the main cause, and there is no necessity of setting forth in the affidavit that fact or "the provisions of the order which has been violated." Ex parte Ah Men, 77 Cal. 200, 19 Pac. 380, 11 Am. St. Rep. 263. It has been held that the sections limiting the right of one spouse to give testimony against the other should receive a liberal construction. People v. Langtree, 64 Cal. 256, 30 Pac. 813; People v. Loper, 159 Cal. 13, 112 Pac. 720, Ann. Cas. 1912B, 1193. A construction refusing to a wife, suing for a divorce, a right to institute this ancillary proceeding by her affidavit and to sustain it by her testimony would be most illiberal and strained. The purpose of the affidavit is not merely to set in motion the machinery of the law for the punishment of the delinquent litigant. Its prayer is that he be required to show cause why he has not complied with the court's command. This clearly differentiates

the proceeding from the ordinary criminal prosecution and emphasizes its quality as something ancillary to the divorce action and subject to the rules with reference to the competency of witnesses in that cause.

Let the writ of review be discharged.

We concur: LORIGAN, J.; HENSHAW, J.

163 Cal. 427

DENNIS v. GORDON. (L. A. 2,937.)

(Supreme Court of California. Aug. 5, 1912.)

1. APPEAL AND ERROR (§ 671*) — RECORD — CONSIDERATION OF EVIDENCE — "BILL OF EXCEPTIONS" AND "STATEMENT OF THE CASE."

An order denying a new trial recited that the motion was presented on all the grounds stated in the notice of intention to move for new trial, and upon the statement of the case previously settled. The record contained a bill of exceptions in which the insufficiency of the evidence to sustain the findings was specified, but the order denying the new trial did not clearly state that the grounds on which the motion was based were those specified in the settled statement; the document referred to as a statement of the case being denominated on its face as a "bill of exceptions." *Held* that, since the expressions "bill of exceptions" and "statement of the case" would be considered synonymous when necessary to accomplish the ends of justice, the recital in the order that the motion was presented on the statement of the case previously settled would be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion, so as to authorize a consideration of the evidence on appeal, though the copy of the notice of intention printed in the transcript was not authenticated by a bill of exceptions, and therefore could not be considered, under Code Civ. Proc. §§ 661, 951, 952.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867–2872; Dec. Dig. § 671.*

For other definitions, see Words and Phrases, vol. 1, pp. 783–784.]

2. APPEAL AND ERROR (§ 340*)—REVIEW OF EVIDENCE—JUDGMENT—NOTICE.

A party wishing to take advantage of the fact that notice of the entry of judgment was served, in order to prevent a consideration of the evidence on appeal from the judgment taken more than 60 days after its entry, must show that such notice was served more than 60 days before the taking of the appeal; otherwise the appeal will be considered as having been taken under Code Civ. Proc. §§ 941a, 941b, 941c—the latter two sections providing that the sufficiency of the evidence is reviewable in the same manner as if the appeal had been taken within 60 days of the entry of judgment under section 939.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1888; Dec. Dig. § 340.*]

3. PARTNERSHIP (§ 94*)—DUTY OF PARTNERS.

By Civ. Code, §§ 2410, 2411, the relation between partners is declared to be confidential, and, with respect to the firm property and business, each is a trustee of the other and bound to act in the highest good faith toward the other, and may not obtain any advantage by the slightest misrepresentation or concealment.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 141; Dec. Dig. § 94.*]

4. PARTNERSHIP (§ 99*)—GENERAL PARTNER—DUTY TO FIRM—PERSONAL ATTENTION.

Under Civ. Code, §§ 2436–2438, relating to partners, a general partner, who agrees to give his personal attention to the partnership business, may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it; but with such exception he may engage in any other business without being accountable to the firm for the profits thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 141; Dec. Dig. § 99.*]

5. PARTNERSHIP (§ 328*)—GENERAL PARTNER—ENGAGING IN OTHER BUSINESS—EVIDENCE.

In an action for an accounting between partners, evidence *held* to warrant findings that, as to certain corporate stock and other property acquired by defendant during the existence of the partnership, it was obtained with his own funds and effort, without misrepresentation or concealment or injury to the firm, and that he was not therefore required to account for any part of the value thereof to complainant.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 779–781; Dec. Dig. § 328.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by G. C. Dennis against F. V. Gordon for an accounting. From so much of a judgment as denied plaintiff an undivided half interest in property which defendant claimed to own individually, and from an order denying the plaintiff's motion for a new trial, he appeals. Affirmed.

Woodruff & McClure and Gibson, Dunn & Crutcher, for appellant. Haas, Garrett & Dunnigan, Hunsaker & Britt, and W. E. Mitchell, for respondent.

SHAW, J. Dennis and Gordon were partners, doing business under the firm name of Dennis-Gordon Company. The partnership was formed in September, 1907, and was dissolved by mutual consent on January 31, 1910. Dennis thereupon demanded of Gordon an accounting of the partnership business, which was refused. This action was then begun to compel such accounting. An account was rendered, and after it was settled by the court judgment was given, declaring that certain property standing in the name of Gordon was partnership property, and that Dennis was the owner of an undivided half thereof, and that certain other property in the name of Gordon or his wife was his individual property, in which Dennis had no interest. Dennis appeals from that portion of the judgment which is in favor of Gordon. He also moved for a new trial, and he appeals from an order denying the motion.

The property adjudged to belong to Gordon was, first, 17½ shares of the Wellman Oil Company; second, 75,000 shares of the Western Crude Oil Company and 1,500 shares of the 32 Oil Company; and, third, 100,000 shares of the Hale-McLeod Company. The contention of Dennis is that, although the money paid by Gordon in the acquisition of this property was his own, and not the money of the firm, yet because he did not inform Dennis fully of the facts concerning it, so that Dennis could take an equal share, and, because a part of the consideration upon which Gordon acquired it was services performed and to be performed by Gordon in bettering the property, Gordon was not acting in good faith, and holds the property as trustee for the firm and as firm assets. The findings on this point are in general terms, as to each of said parcels, that it is not a part of the assets of the firm. There were special findings to the effect that Gordon paid $1,000 for the property which he exchanged for the shares in the Western Crude Oil Company and in the 32 Oil Company, and that before buying any of the shares he offered to take Dennis in with him on the deal, but that Dennis refused. It is claimed that these findings are not sustained by sufficient evidence.

[1, 2] There is no merit in the preliminary objection of Gordon that the evidence cannot be considered. The order denying a new trial recites that the motion for a new trial was "presented upon all the grounds stated in the notice of intention to move for a new trial herein, and upon the statement of the case heretofore settled." A copy of the notice of intention is printed in the transcript; but it is not authenticated by a bill of exceptions. Hence it cannot be considered as a part of the record on appeal. Code Civ. Proc. §§ 661, 951, 952. But the record contains a bill of exceptions in which the insufficiency of the evidence to sustain these findings is specified. The order denying the new trial does not clearly state that the grounds upon which the motion was made were those specified in the settled statement, and the draftsman apparently failed to observe that the document referred to as a statement of the case is denominated on its face as a "bill of exceptions." But such orders are to be liberally construed, and substance, rather than form, is the essential thing. A bill of exceptions setting forth the evidence and proceedings taken at the trial, such as the one in this record, is in no wise distinguishable from a statement of the case. Wherever it is necessary for the ends of justice to do so, we will consider the expressions as synonymous. A recital in the order that the motion was presented upon the statement of the case heretofore settled will be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion. The misnomer, whereby the bill was referred to as a statement, will be disregarded. Furthermore, upon this point it is to be observed that the record does not show that any notice of the entry of the judgment was ever served upon Gordon's attorneys of record. The party wishing to take advantage of the fact that it was served, for the purpose of preventing a consideration of the evidence on appeal from the judgment taken more than 60 days after its entry, must show that such notice was served more than 60 days before the taking of such appeal. Otherwise the appeal will be considered as having been taken under sections 941a, 941b, and 941c of the Code of Civil Procedure. In such a case, by sections 941b and 941c, the sufficiency of the evidence is reviewable in the same manner as if the appeal had been taken within 60 days of the entry of the judgment under section 939.

The Dennis-Gordon Company was formed without capital. Its business was to be the buying and selling of oil, bonds, stocks, oil leases, and real estate, either for others on commission, or on its own behalf, and the promoting of oil companies and the improvement of oil lands. The principal part of its business, however, was the business of selling property for others on commission. It was successful and profitable; but the profits received in money were immediately divided between them. Only a small amount of money was kept on hand, apparently for the purpose of paying current expenses. The agreement of partnership was oral. It contemplated the buying of lands by the firm as a part of the business; but, as there was no capital and no agreement that either should contribute money to the business, it would follow, necessarily, that if any property was bought by or for the firm requiring any considerable sum of money, a new agreement concerning it would have to be made before either would be obliged to contribute of his individual funds for that investment. Such new agreement might be made informally, as, for example, if either bought property for the firm and the other, after knowledge thereof, acquiesced therein, or made no objection thereto. In that case there would be an implied agreement by each to contribute such additional funds as might be required therefor.

It is conceded that Gordon did not use any partnership funds in acquiring the properties in question, and that the money he paid therefor was his individual property. The only grounds upon which it is claimed that the property belongs to the firm are, as before stated, that Gordon paid the consideration in part by the performance of services in and about the properties; that his attention thereto prevented him from giving due attention to the firm business; and that he obtained the consent of Dennis that it should not be bought on firm account by concealing from Dennis the real character of the property, or by failing to inform him thereof.

The shares in the 32 Oil Company, in the Western Crude Oil Company, and in the Hale-McLeod Company were all obtained in exchange for interests in certain oil lands held by Gordon and transferred by him to those companies. The 32 Oil Company shares were procured by the transfer of a one-fourth interest in a part of section 32, those of the Western Crude by the transfer to it of a one-fourth interest in a part of section 4, and those in the Hale-McLeod Company by the transfer to it of an interest in lands in sections 28, 34, and 24. These lands were not all in the same township and range; but their particular location is not important. The fact of the exchanges of these lands for stocks is of no consequence. The material inquiry is with regard to the acquisition by Gordon of the interests in the lands. If such interests became firm assets, then the stocks received in exchange would also be firm assets.

The lands were all government lands, subject to location and acquisition as mineral lands, on condition that oil was discovered therein. The lands in section 32 and section 4 had been located as mineral lands by one McMurtry; but no discovery had been made, and they were entirely undeveloped. One McLeod had obtained control thereof, and had induced Wheat and Wilson to take each a one-fourth interest with him, and was endeavoring to get a fourth man to take another one-fourth interest. The agreement with McMurtry was in the name of McLeod's wife. McLeod had agreed to drill certain wells thereon for the discovery of oil in consideration of this contract. These three parties then proposed to Gordon to transfer to him a one-fourth interest with them in the enterprise, he to pay one-fourth of the expenses, estimated at $1,000, and to assist in obtaining other parties to drill the wells. The plan was to erect derricks preparatory to drilling, and then make leases to others, who would complete the wells and discover the oil.

Gordon informed Dennis of this proposition, stating to him that the land had to be developed; that it was government land, not proved up; that it was a wildcat proposition and very much of a gamble; and that it would take $1,000 if they went into it together; and proposed that if he would go in for one-half of it they would take it for the firm. Dennis refused to go into it, and said, in substance, that the firm should not go into it; that he was without funds to invest in it himself; and that he would not go into anything in which McLeod was interested. Upon this refusal of Dennis, Gordon, on his own behalf, agreed with McLeod, Wheat, and Wilson to take a one-fourth interest with them on the terms proposed. Mrs. McLeod thereupon assigned to Wheat, Wilson, and Gordon each a one-fourth interest in the land. She apparently held the other one-fourth as trustee for McLeod. The four then began the erection of derricks for drilling wells, and sought to find persons who would take leases and drill the same. These were the services referred to as part of the consideration given by Gordon for the property. It does not appear that much of Gordon's time was spent therein, or that it seriously interfered with his proper attention to the affairs of the Dennis-Gordon Company. Gordon's share of the outlay was $1,000. Before expending more, they succeeded in obtaining lessees, who proceeded with the work and drilled the wells. Oil was found, and the land at once became valuable. The services of Gordon in this enterprise were all performed after he had made the proposal to Dennis, above stated, and after Dennis had refused to go into it. If this refusal was not procured by concealment or misrepresentation, the consent of Dennis that Gordon might go into it on his own account and his refusal to allow the firm to take a part in it would estop him from claiming that Gordon's subsequent reasonable attention to the new enterprise, not materially interfering with his attention to the firm business, should nevertheless inure to the benefit of the firm.

[3, 4] The law governing partnerships is settled by the Civil Code. The relation between partners is confidential. With respect to the firm property and business, each is trustee of the other. Section 2410. In the conduct of the business, each must act in the highest good faith toward the other, and may not obtain any advantage over him by the slightest misrepresentation or concealment. Section 2411. A general partner, who agrees to give his personal attention to the partnership business, may not engage in any other business which gives him an interest adverse to that of the firm, or which prevents him from giving to the firm business all the attention which would be advantageous to it. Section 2436. Except as thus bound, he may engage in any other business without being accountable to the firm for the profits thereof. Sections 2437, 2438.

[5] The evidence shows that the statements made by Gordon to Dennis respecting the property were true. The land was undeveloped; it was not known that it contained oil; and if none was discovered all the money and effort expended in it would be a total loss. It was truly a gamble and a speculation. The value afterwards shown to be in the property was practically all the result of the money expended and the exertions of the interested parties after they had made their agreement. There is nothing to indicate that Gordon had any greater knowledge of the existence of oil in the land than Dennis had. The latter had not had as much experience as Gordon in the development of oil land, it is true. But he had had some experience in such matters, and had made some deals in oil lands. He does not claim that he was so destitute of common knowledge on the subject that he did not know that a mineral location was valueless if there was no mineral in the

land, and that, in order to make an undeveloped oil location on government land of any value, both money and time had to be expended in discovering the oil believed to be contained in it. The information he received was therefore sufficient for him to understand that if he and Gordon went into the speculation together they would have to give to it time and services, as well as money, and that Gordon must do the same if he alone went into it with the other parties. The refusal of Dennis to take an interest, and his consent that Gordon alone should do so, was equivalent to an agreement that Gordon should do his part in assisting the independent concern without giving the Dennis-Gordon Company any claim or account thereof.

The evidence does not compel the conclusion that Gordon was acting in bad faith, or with the intent to deter Dennis from taking an interest in the property. The finding of the court implies that he acted in good faith, and we must take it as true. No effort at concealment is shown to have been made by Gordon; nor is there anything indicating that he did not believe that the land and its prospects were as he represented it to Dennis when he asked him to take a share therein. No money of the firm was used. The fact that the $1,000 which Gordon paid was soon returned to him out of the profit is not material. Having the right, under the circumstances, to acquire the interest for himself, he was entitled to the profit as his own. It follows from all these considerations that the court below properly found that the stock for which these lands were exchanged was not a part of the firm assets.

There is no substantial ground for the claim that the Hale-McLeod Company stock is firm assets. McLeod had obtained some interest or right in the three sections, above mentioned, by an agreement with the original locators that he would protect the locations for them by doing the necessary development work. Several months after the transaction hereinbefore set forth had occurred, McLeod offered Gordon a one-fourth interest in this contract with the locators, for the sum of $2,100. He also offered to loan Gordon the money to pay for this interest. Gordon informed Dennis of the offer of the interest and proposed to let him in on the deal on the same terms; but he did not say anything about McLeod offering to loan him the money. He informed him, however, of the condition of the land, the plan contemplated for development and discovery of oil, and that it was his opinion that it was good property, and that they would make money on it, either in cash, or by acquiring shares in some corporation to be formed with the land as capital. Dennis thereupon stated that he had no money to invest, and refused to go into it. There is no evidence that Gordon devoted any time or attention whatever to this enterprise. As a partner of Dennis, he was under no obligation to use his own credit in borrowing money to loan to Dennis to enable Dennis to go into the deal, either as a member of the firm, or on his own account. With respect to new enterprises in which the firm had no interest, he was not bound to pay money for Dennis as a contribution for Dennis to the enterprise. If he had advanced such money, the transaction would have been an individual matter between them, and not a part of the firm business. There is no evidence of any concealment by Gordon respecting this property. So far as he appears to have been concerned with it, the business was in no wise adverse to the interests of the firm. No reason appears why he could not buy an interest in it without taking it as firm property.

The shares in the Wellman Oil Company were not firm assets. They were obtained in the following manner: The Western Crude Oil Company, after Gordon became a stockholder therein, obtained a large block of stock in the Wellman Oil Company. It desired to raise funds for its own development work, and for that purpose offered to its stockholders the Wellman stock at a fixed price in proportion to their holdings of the Western Crude stock. Gordon took 17½ shares at the price named and paid his own money for them. It was a mere investment of his own funds. His relations to the firm did not make it his duty to offer the property to the firm, or to buy it for the firm. It was in no way connected with the firm business, nor adverse to its interests.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; MELVIN, J.

163 Cal. 461

PEOPLE v. DELHANTIE. (Cr. 1,740.)

(Supreme Court of California. Aug. 6, 1912.)

1. GRAND JURY (§ 38*) — STENOGRAPHERS — QUALIFICATIONS.

A stenographer, selected under Pen. Code, § 925, to report grand jury proceedings, need not be the official reporter of the superior court; and Code Civ. Proc. §§ 270, 271, relating to official reporters, are inapplicable.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. § 81; Dec. Dig. § 38.*]

2. INDICTMENT AND INFORMATION (§ 12*) — OBJECTIONS TO INDICTMENT—IRREGULARITY OF GRAND JURY PROCEEDINGS.

Under Pen. Code, § 995, specifying the grounds upon which an indictment may be set aside, it is no objection that no copy of the stenographer's report of testimony taken before the grand jury was served on defendant within five days after adjournment of the grand jury, nor that the grand jury never caused the person appointed as reporter to transcribe such testimony.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 76; Dec. Dig. § 12.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. CRIMINAL LAW (§ 970*)—MOTION IN ARREST OF JUDGMENT—GROUNDS.

Under Pen. Code, § 1185, which authorizes a motion in arrest of judgment for defects in an indictment not waived by failure to demur, etc., objections that no copy of the stenographic report of the testimony taken before the grand jury was served on defendant within five days after the adjournment of the grand jury, and that the grand jury never caused the reporter to transcribe such testimony, are not available, on such a motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2445–2462; Dec. Dig. § 970.*]

4. CRIMINAL LAW (§ 83*)—JURISDICTION—GRAND JURY PROCEEDINGS.

The jurisdiction of the superior court of a criminal case does not depend upon compliance with Pen. Code, § 925, which governs grand jury proceedings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 112–114; Dec. Dig. § 83.*]

5. CRIMINAL LAW (§ 1166*)—TESTIMONY BEFORE GRAND JURY—SERVICE OF COPY.

The requirement of Pen. Code, § 925, for service upon accused, within five days after the discharge of the grand jury which indicted him, of a copy of the stenographic report of testimony taken before the grand jury is directory; and noncompliance therewith is not reversible error, in the absence of prejudice to accused, where the copy is served within a reasonable time and early enough to enable him to properly make such defense as he has to the matters shown thereby.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100–3102, 3107–3113; Dec. Dig. § 1166.*]

6. GRAND JURY (§ 40*)—STENOGRAPHIC REPORT OF TESTIMONY—TRANSCRIPTION—TIME.

A reporter, appointed under Pen. Code, § 925, to report testimony taken before a grand jury, may make a certified transcript after the grand jury has been discharged.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 83–85; Dec. Dig. § 40.*]

7. HOMICIDE (§ 127*)—MURDER—INDICTMENT—SUFFICIENCY.

An indictment, charging that accused on a specified day, at and in a specified county, willfully, unlawfully, and feloniously, and with malice aforethought, killed and murdered a specified person, being contrary to the form, etc., of the statute, sufficiently charges murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 192–194; Dec. Dig. § 127.*]

8. CRIMINAL LAW (§ 1170½*)—REVIEW—HARMLESS ERROR—CROSS-EXAMINATION OF ACCUSED.

Where one accused of murder testified that he did not remember of having attacked decedent or another person, it was not prejudicial error to permit the district attorney to ask him, on cross-examination, if he did not remember lying in wait in an alley for such other person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

9. CRIMINAL LAW (§ 1170½*)—REVIEW—HARMLESS ERROR—CROSS-EXAMINATION OF ACCUSED.

It was not prejudicial error to permit one accused of murder to be asked, on cross-examination, if, when he stabbed decedent and "knew that he was a dead one," accused did not remember leaving, as against objection that the question improperly assumed that accused knew decedent was dead.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129–3135; Dec. Dig. § 1170½.*]

10. CRIMINAL LAW (§ 479*)—EXPERTS ON SANITY—QUALIFICATIONS—SUFFICIENCY.

Physicians showed sufficient observation of accused to qualify them to testify to his sanity, where they had acted as commissioners on examination of accused for insanity, and where one of the physicians had had accused under his observation for an hour or more six days prior to such examination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1067, 1068; Dec. Dig. § 479.*]

11. CRIMINAL LAW (§ 452*)—EXPERTS ON SANITY—QUALIFICATIONS—SUFFICIENCY.

A state prison warden was sufficiently acquainted with accused to qualify him, under Code Civ. Proc. § 1870, subd. 10, to give an opinion as to accused's sanity, where the warden had had accused in his custody for about three years next preceding the date of the particular offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1053–1055; Dec. Dig. § 452.*]

12. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a trial for murdering a fellow convict, it was not prejudicial error to permit the district attorney to ask the warden of the prison whether decedent had the reputation of being a "busybody," where defendant's witnesses testified that decedent was a "stool pigeon" and a trouble maker.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3088, 3137–3143; Dec. Dig. § 1169.*]

In Bank. Appeal from Superior Court, Marin County; E. T. Zook, Judge.

Edward Delhantie was convicted of murder, and he appeals. Affirmed.

George H. Harlan, for appellant. U. S. Webb, Atty. Gen., J. H. Riordan, Deputy Atty. Gen., and Thomas P. Boyd, Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was charged by the grand jury of Marin county, by indictment presented in the superior court on March 1, 1912, with the crime of murder, alleged to have been committed in said county on February 16, 1912. His trial in the superior court was commenced on April 8, 1912, and resulted, on April 11, 1912, in a verdict of "guilty of a felony, namely, murder in the first degree." On April 15, 1912, judgment of death was pronounced. This is an appeal by defendant from such judgment.

1. When the matter was under investigation by the grand jury, that body appointed one F. O. Sirard as a reporter to report the testimony taken. Mr. Sirard was present as such reporter during the taking of the testimony by the grand jury, and took down such testimony in shorthand. The grand jury presented the indictment in this case on March 1, 1912, and on the same day was finally discharged by the court

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from further attendance. Mr. Sirard failed to certify as correct or present any longhand transcript of such testimony until March 8, 1912, and no copy of the same was served on defendant prior to said day. It further appeared that such testimony was not transcribed before the discharge of the grand jury.

Section 925, Penal Code, provides in part, as follows: "The grand jury, on the demand of the district attorney, whenever criminal causes are being investigated before them, must appoint a competent stenographic reporter to be sworn and to report the testimony that may be given in such causes in shorthand, and to transcribe the same in all cases where an indictment is returned. If an indictment has been found against a defendant, a copy of the testimony given in his case before the grand jury shall be served upon him within five days after the discharge of the grand jury, or if the grand jury has not been discharged, at least five days before the cause is set for trial. * * * No person other than those specified in this and the succeeding section is permitted to be present during the session of the grand jury, except the members and witnesses actually under examination. * * *"

It is not claimed that a copy of the testimony was not served upon the defendant in ample time to enable him to prepare for trial, or that he suffered any prejudice whatever from the failure to serve him with such copy within five days after the discharge of the grand jury.

[1-3] Based upon the facts we have stated, a motion was made to set aside the indictment, on the ground that it was not found, indorsed, and presented as prescribed in the Penal Code, in that (1) no copy of the testimony was served on defendant within five days after the adjournment of the grand jury; (2) that the grand jury never caused the person appointed as stenographic reporter to transcribe such testimony; (3) that the testimony was not taken down by an official reporter qualified or appointed as required by sections 260, 270, and 271, Code of Civil Procedure; and (4) that a person was permitted to be present during the session of the grand jury and when the charge embraced in the indictment was under consideration, other than as provided in section 925, Penal Code, viz., said F. O. Sirard. The last specification is based entirely on the claim that Mr. Sirard was not such a person as could be appointed by the grand jury as reporter, for, of course, the "competent stenographic reporter," who may be appointed under the provisions of section 925, Penal Code, and is in fact appointed and sworn, is one of the persons specified in that section who may be present. There is nothing to indicate that Mr. Sirard was not "a competent stenographic reporter," and the section authorizes the selection by the grand jury of *any* competent stenographer. It is not essential that the one selected be the official reporter of the superior court; and sections 270 and 271 of the Code of Civil Procedure have no application. What we have said disposes of the third, as well as the last, specification. The other two specifications have nothing to do with the matter of the finding, indictment, and presentation of the indictment, and are not available on a motion to set aside an indictment. Section 995, Pen. Code. The motion to set aside the indictment was properly denied. Similar objections were made on a motion in arrest of judgment; but they were not available thereon. Section 1185, Pen. Code.

[4] It is insisted that by reason of the facts we have stated, the superior court was without jurisdiction to proceed with the trial of defendant upon this indictment. We are unable to perceive any merit in this claim. The *jurisdiction* of the superior court was not dependent upon compliance with the provisions of section 925, Penal Code. It obtained jurisdiction of the cause for all purposes by reason of the presentation by the grand jury of the indictment charging defendant with the crime of murder, alleged to have been committed in Marin county. If any substantial right given defendant by section 925, Penal Code, was denied him, it could amount at most simply to error, reviewable in such manner as the law provides.

[5] The only right given to an indicted defendant by this section, so far as the testimony taken before the grand jury is concerned, is, where the testimony has been taken down in shorthand on the demand of the district attorney, to have a longhand copy thereof furnished him "within five days after the discharge of the grand jury, or if the grand jury has not been discharged, at least five days before the cause is set for trial." The manifest object of this provision is to enable him to know the testimony upon which the charge against him is founded, and to enable him to make his defense. We have no doubt that, as has been held several times with relation to subdivision 5 of section 869, Penal Code, requiring the shorthand reporter at a preliminary examination within ten days after the close of such examination to transcribe into longhand his shorthand notes and certify and file the same with the county clerk, that the specification as to time is directory merely (see People v. Buckley, 143 Cal. 375, 381, 77 Pac. 169, and cases there cited); and that, if the defendant is served with a copy of the testimony within a reasonable time and early enough to enable him to properly make such defense as he has to the matters shown thereby, he cannot be heard to complain of the failure to comply literally with the terms of the statute. In such event such

noncompliance is absolutely without prejudice to the defendant. As we have said, it is not even suggested that a true copy of the testimony given before the grand jury was not in fact served upon defendant in ample time to enable him to make such defense as he had.

[6] There is nothing in the claim that all powers and duties of the reporter appointed by the grand jury end with the discharge of that body. The law by express provisions defines the duties of one so appointed, among which is the duty to transcribe the testimony in all cases where an indictment is returned. There is nothing in the law requiring this to be done during the life of the grand jury that appointed him; and it is manifest from the language used that it was contemplated that in some cases it would necessarily be done after that body had adjourned. The appointment of the reporter vests him with the power and makes it his duty to make and furnish this transcription, even though the body that appointed him has been finally discharged; and when he makes and certifies the transcription he does it as the officer or agent upon whom the law has devolved that duty, regardless of whether or not the grand jury has been discharged. It follows from what we have said that there was no error whatever on the part of the trial court in this matter, and that the failure to serve defendant with a copy of the testimony within five days after the adjournment of the grand jury does not warrant a reversal.

[7] 2. The indictment charged that the defendant, on the 16th day of February, 1912, at and in the county of Marin, state of California, willfully, unlawfully, feloniously, and of his malice aforethought, did kill and murder one William Kaufman, a human being, contrary to the form, force, and effect of the statute in such case made and provided and against the peace and dignity of the people of the state of California. That such language sufficiently charges the crime of murder for all the purposes of an indictment or information is too well settled in this state to require discussion. See People v. Suesser, 142 Cal. 354, 75 Pac. 1093, and cases there cited; People v. Hyndman, 99 Cal. 1, 33 Pac. 782, and cases there cited. The trial court therefore did not err in overruling the demurrer and the motion in arrest of judgment.

[8] 3. On cross-examination of the defendant, he having testified substantially on direct examination that he did not remember anything about having attacked either Peterson or the deceased during the morning of February 16th, the district attorney asked him various questions as to his want of recollection, among others, "You don't remember laying in wait in that alley for Mr. Peterson?" This was assigned as error by counsel for defendant; the claim being that there was no evidence to show lying in wait on the part of defendant, and therefore nothing to warrant such a question. The trial court thought it was proper cross-examination, and a careful reading of the testimony theretofore given satisfies us that the court was correct in its conclusion. Nor are we able to see that the question was such as to warrant us in holding that the defendant was prejudiced by the asking thereof, even if it were not proper cross-examination. The question does not appear to have been answered.

[9] The defendant could not have been prejudiced by the asking of the question: "And then when you had stabbed him [Kaufman] and knew he was a dead one, you do not remember leaving; you do not remember that?" The only objection made on account of this question was that it improperly assumed that defendant knew that Kaufman was dead. The defendant answered substantially that he had no recollection of any of these things.

If we assume that the district attorney exceeded the bounds of legitimate argument in the few words he said regarding the defense of insanity, which we do not at all concede, it is very clear to us that it cannot be held, especially in view of the instructions of the court in regard to such defense, that the defendant was at all prejudiced thereby.

[10] 4. Two physicians, Dr. Miller and Dr. Hayden, were allowed to testify substantially that in their opinion the defendant was sane on January 30, 1909. The only objection to Dr. Miller's testimony was that his period of observation was too short to enable him to form an opinion; and the objection to Dr. Hayden's testimony was that no proper foundation had been laid. The competency of Dr. Miller as an expert on insanity was not questioned by the objection to his testimony, and such competency was fully shown by the evidence as to both witnesses. Each of these witnesses had officiated as a commissioner on an examination of defendant for insanity in Fresno county, which was had on January 30, 1909, and the knowledge of each as to defendant was acquired at that time, except that Dr. Miller also had defendant under his observation for an hour or more six days prior to such examination. We think that the evidence shows a sufficient opportunity for examination and observation on the part of the witnesses to warrant the court in allowing their opinions as to sanity or insanity of defendant on January 30, 1909, to go to the jury.

[11] 5. Warden Hoyle had the custody of defendant in the California State Prison at San Quentin for something like three years next preceding the date of the homicide, and the evidence as to his observation of him and his conversations with him during this period were such as to support the conclusion of the trial court that he was suffi

ciently "an intimate acquaintance" of defendant, within the meaning of that term as used in subdivision 10 of section 1870, Code of Civil Procedure, to give his opinion as to his mental sanity. No other objection was made to his testimony on this subject.

[12] 6. The question whether the deceased, Kaufman, had the reputation in the prison of being a busybody was, of course, absolutely immaterial to any issue involved on the trial of this case. No objection on this ground, however, was interposed on the trial to the question asked Warden Hoyle in this regard. In asking the question, the district attorney was undoubtedly seeking to rebut certain immaterial testimony on the part of witnesses for the defendant to the effect that deceased was both a "stool pigeon" and a trouble maker. We are of the opinion that there was no error in overruling the specific objection made, viz., that no proper foundation for the question had been laid, and that it had not been shown that the warden had any knowledge on the subject. But in any event it is clear that the whole matter was of very small importance and without prejudice to defendant's cause.

No other point is made for reversal. We have considered the whole record and find no reason to doubt that the defendant had a fair trial on the merits, and that the judgment should be affirmed.

The judgment is affirmed.

We concur: SHAW, J.; LORIGAN, J.; HENSHAW, J.; SLOSS, J.; MELVIN, J.

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163 Cal. 457

Ex parte MONTGOMERY. (Cr. 1,699.)

(Supreme Court of California. Aug. 6, 1912.)

1. MUNICIPAL CORPORATIONS (§ 616*)—ORDINANCES—REGULATION OF BUSINESS—VALIDITY.

Los Angeles Ordinance No. 22,798 (New Series), which makes it unlawful to operate a lumber yard or other specified industries within the residence district described by the ordinance, is a constitutional exercise of police power.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1355, 1356; Dec. Dig. § 616.*]

2. MUNICIPAL CORPORATIONS (§ 611*)—ORDINANCES—REGULATION OF BUSINESS—VALIDITY.

A city has a large discretion in enforcing such police measures as ordinances prohibiting the operation of industrial establishments, etc., in the residence district.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1344-1349; Dec. Dig. § 611.*]

3. MUNICIPAL CORPORATIONS (§ 616*)—ORDINANCES—REGULATION OF BUSINESS—VALIDITY.

Los Angeles City Charter (St. 1911, p. 2064) art. 1, § 2, subd. 21, which authorizes the city to regulate or prohibit, etc., specified business enterprises, does not limit the city's general police power, under subdivision 34, or under Const. art. 11, § 11; and hence Ordinance No. 22,798 (New Series), which prohibits operation of lumber yards, etc., within the residence district, is not invalid, because lumber yards are not specified in subdivision 21.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1355, 1356; Dec. Dig. § 616.*]

In Bank. Application by W. F. Montgomery for a writ of habeas corpus. Writ discharged, and petitioner remanded.

E. J. Fleming and James S. Bennett, for petitioner. Guy Eddie, City Prosecutor, for respondent.

MELVIN, J. [1] A writ of habeas corpus was issued from this court, directed to the chief of police of the city of Los Angeles, by whom petitioner was imprisoned by virtue of a warrant issued out of the police court of that city. Petitioner was charged with misdemeanor, in that he did "erect, establish, maintain, and carry on a lumber yard at No. 132 West avenue 61 within the residence district of said city" of Los Angeles. The sole question presented therefore is the sufficiency of Ordinance No. 22,798 (New Series) of the city of Los Angeles in its application to petitioner. The contention is, first, that the ordinance is in excess of the legislative powers of the mayor and city council of the city of Los Angeles under the charter of said city; and, second, that it is in violation of private rights secured by the Constitution of the United States and the Constitution of the state of California.

[2] The ordinance in question was adopted instead of, and by its terms repealed, Ordinance No. 19,563 (New Series). Like that ordinance, it declared all of the city, except certain enumerated industrial districts, to be a residence district, and prohibited the conduct of certain sorts of business therein. Section 2 of the later ordinance differs in no material particular from the identically numbered section of its predecessor. By that section it is declared unlawful for any person, firm, or corporation to "erect, establish, maintain or carry on within the residence district described in said section 1" of said ordinance "* * * any stone crusher, rolling mill, machine shop, planing mill, carpet-beating establishment, hay barn, wood yard, lumber yard, public laundry, or wash-house." In Ex parte Quong Wo, 118 Pac. 714, we had occasion to examine Ordinance No. 19,563 (New Series), and to determine that it was a legitimate and constitutional exercise of the police power. What was there said applies with equal force to the portion of the later ordinance now before us, and that case disposes of this petitioner's second objection regarding the constitutionality of said municipal by-law. Petitioner affirms that the ordinance is discriminatory by reason of the placing of a "business center" within the lines of the "residence district." Upon

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

this point the evidence is conflicting. It is shown that certain wooden buildings near petitioner's lumber yard are occupied for business purposes; but the return seeks to show by affidavit and by photographic exhibits that the lumber yard is situated in the midst of a section of the city devoted almost exclusively to residences. In any view of the evidence, we cannot say that the city council violated the large discretion vested in it with reference to police measures of the kind here considered; and, unless such abuse of discretion appears, courts are never inclined to nullify ordinances on the ground of their unfairness. See Ex parte Quong Wo, supra, and cases there cited.

[3] Petitioner's most important contention is that the enumeration in the charter of Los Angeles of certain trades, callings, and occupations which may be prohibited excludes the prohibition by ordinance of others not so enumerated. The charter provides (subd. 21 of section 2 of article 1) that the city of Los Angeles, in addition to its other powers, shall have the right "to license, regulate, restrain, suppress, or prohibit any or all laundries, livery and sale stables, cattle and horse corrals, slaughterhouses, butcher shops, brick yards, dance halls or academies, public billiard or pool halls or tables, bowling and tenpin alleys, boxing contests, sparring or other exhibitions, shows, circuses, games and amusements. To license, regulate or prohibit the construction and use of billboards, signs and fences." This, petitioner contends, is a limitation upon the general police power conferred by section 11 of article 11 of the Constitution, and by a similar section of the charter (subdivision 34 of section 2 of article 1, Stats. 1911, p. 2064), which gives the city power "to make and enforce within its limits such local, police, sanitary and other regulations as are deemed expedient to maintain the public peace, protect property, promote the public morals and to preserve the health of its inhabitants." By specifying certain occupations that may be prohibited, petitioner maintains, the charter withholds from the city council the power to prohibit any others; for, he says, the legislative body of a city having a freeholders' charter may be limited in the exercise of police power by a charter provision, citing Rapp & Son v. Kiel, 159 Cal. 709, 115 Pac. 651, and In re Pfahler, 150 Cal. 81, 88 Pac. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911. We do not think that these cited cases sustain the position of petitioner. In both of them the court was passing upon the place of lodgment of the power of a city, and not upon the limitation of the power itself. In Rapp & Son v. Kiel the court was discussing a function of the board of supervisors to impose a certain restriction which, under the limitations placed upon the said board, it, as a legislative body, was not authorized to enact. In re Pfahler also dealt with the place of lodgment of legislative function; but in neither of the opinions in those cases was it held nor implied that a charter may cut down the constitutional power of a city itself. In the Pfahler Case we find the court approving the doctrine announced in the opinion in Odd Fellows' Cemetery Ass'n v. City and County of San Francisco, 140 Cal. 226, 73 Pac. 987, and using the following language with reference to that case: "It was held that nothing contained in the charter could affect the grant made by the Constitution, and that the city, under such constitutional grant, had the right to exercise the whole police power of the state, so far as local regulations were concerned, subject only to the control of general laws." The provisions of the charter of Los Angeles, quoted above, are not in terms limitations at all, but enumerations of powers. They are expressly given to the city of Los Angeles "in addition to any other powers now held by or that may hereafter be granted to it under the Constitution and laws of the state." If, therefore, the ordinance here considered may be upheld under the general police powers of the city as exercised by its legislative body, it will not fall merely because the city has specific authority under its charter to suppress certain kinds of business. It is to be noted, also, that the ordinance is not one intended to suppress, but to regulate, specified occupations. As a regulatory measure, it comes clearly within the principle of such cases as Ex parte Quong Wo, supra; Ex parte Lacey, 108 Cal. 326, 41 Pac. 411, 38 L. R. A. 640, 49 Am. St. Rep. 93; Grumbach v. Lelande, 154 Cal. 683, 98 Pac. 1059. While a lumber yard is not per se a nuisance, it takes no extended argument to convince one that in a residence district such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there.

Let the writ be discharged and the petitioner remanded.

We concur: ANGELLOTTI, J.; SLOSS, J.; SHAW, J.; LORIGAN, J.

19 Cal. App. 355

MOSSI v. FAIRBANKS. (Civ. 966.)

(District Court of Appeal, Third District, California. June 28, 1912. Rehearing Denied by Supreme Court Aug. 26, 1912.)

LANDLORD AND TENANT (§ 276*)—FORFEITURE FOR NONPAYMENT OF RENT—DEMAND FOR RENT.

The common-law rule requiring a lessor in a lease stipulating for re-entry by him, on default in the payment of rent, to demand payment of the rent due before a forfeiture of the lease can be decreed is not abrogated by Civ. Code, § 791, providing that when the right of re-entry is given the re-entry may be made, after the right has accrued, on three days' notice, as provided in Code Civ. Proc. §§ 1161,

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1162, or by section 793, authorizing an action for the possession of real property, leased with a right of re-entry at any time after the accrual of the right of re-entry, without the notice prescribed in section 791; and the right of re-entry for nonpayment of rent does not accrue until a demand has been made for its payment.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 1168; Dec. Dig. § 276.*]

Appeal from Superior Court, Humboldt County; George D. Murry, Judge.

Action by Chris Mossi against Marvin Fairbanks. From a judgment of dismissal, plaintiff appeals. Affirmed.

A. W. Hill, for appellant. Pierce H. Ryan, for respondent.

BURNETT, J. The only question involved is whether a demand for the payment of rent is a condition precedent to the enforcement of the forfeiture of a lease. The premises were rented for the term of seven years and four months, commencing on the 4th day of July, 1910, for the monthly rental of $7.50, payable monthly in advance on the 4th day of each month during said term. It was provided in the lease "that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the party of the first part to re-enter said premises and to remove all persons therefrom." The action was brought to recover possession of the property in consequence of the failure of the lessee to pay the rent as agreed. In the complaint there was no allegation of demand for the rent, and for this omission the court sustained defendant's general demurrer. Plaintiff declining to amend, judgment of dismissal was entered, from which the appeal was taken.

Undoubtedly the general rule is that a demand for the rent must be made before forfeiture will be decreed. In Sauer v. Meyer, 87 Cal. 34, 25 Pac. 153, it is said: "The appellant here claims that she has the right to recover, because there has been a forfeiture of the lease for nonpayment of the rent. Forfeitures are not favored; and our Civil Code contains this provision: 'A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created. Section 1442.' To give a landlord a right of re-entry for nonpayment of rent, a demand of the rent, upon or after the last day upon which the lessee has to pay, is essential to complete the forfeiture, and to enable him to maintain an action in ejectment. Taylor on Landlord and Tenant (8th Ed.) § 297; Wood on Landlord and Tenant (2d Ed.) § 514." This case and other authorities are cited in Ciapusci v. Clark, 12 Cal. App. 53, 106 Pac. 440, in support of the statement: "Regarding the $5 payment as rent, there could be no forfeiture under this agreement without demand by plaintiff of the rental upon or after the last day given the lessee on which to pay." The decisions in this state, as pointed out by respondent, seem to be uniform in holding that a demand for the rent is required.

In Gaskill v. Trainer, 3 Cal. 335, the right to re-enter for nonpayment of the rent was reserved in the contract; but it was declared by the Supreme Court that "the failure to pay cannot alone create a forfeiture. There was an equal necessity that a formal demand should have been made on the day it became due. Nor for the purpose of forfeiture will a waiver of demand ever be implied; but a forfeiture, from its very nature, cannot take place by consent, and it is not favored by the rules of law." It is not disputed that the common law was very strict in its requirement that the demand for rent be made upon the leased premises and at a late hour of the very day when and for the exact amount that was due; but in some respects this strictness has been relaxed, as will be observed by an examination of the cases. Indeed, a change in the statute has modified the rule. The question is fully discussed in McGlynn v. Moore, 25 Cal. 384, Gage v. Bates, 40 Cal. 384, and O'Connor v. Kelly, 41 Cal. 432; but in no decision in the state has it been held, under like conditions as those involved herein, that a request or demand for the rent is not required before a suit can be maintained for a forfeiture of the lease.

In 24 Cyc. p. 1354, the rule is stated as follows: "Ordinarily a demand of performance is necessary after the lessee's breach of a covenant to pay taxes or assessments, or a failure to pay rent, before the lessor can declare a forfeiture. However, the common-law necessity for a demand of rent may be obviated by a statute providing otherwise, by provisions in the lease dispensing with a demand, or by acts of the tenant amounting to a waiver."

It is not contended by appellant that the lease contains any provision dispensing with a demand, or that there has been any waiver on the part of the lessee; but the claim is made that the action was brought under section 793 of the Civil Code, and that this section authorizes recovery without any demand or request for the payment of the rent. The language of the section is: "An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time, after the right to re-enter has accrued, without the notice prescribed in section seven hundred and ninety-one." We think, however, respondent is right in his contention that "appellant has fallen into the error of confusing the *notice* prescribed in section 791 with the *demand* required by law before a forfeiture can be declared. Section 791 of the Civil Code provides: 'Whenever the right of re-entry is given to a grantor or lessor in any grant or

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lease or otherwise, such re-entry may be made at any time after the right has accrued upon three days' notice, as provided in sections 1161 and 1162 of the Code of Civil Procedure.' Section 1161, C. C. P., provides that a tenant in default for nonpayment of rent is guilty of unlawful detainer after three days' notice to pay the same or surrender possession. Section 1162 provides the manner of service of such notice. Neither section 791 nor 793, C. C., changes the common-law rule requiring a demand for the rent before a forfeiture of the tenant's estate can be declared. Section 791, C. C., in connection with sections 1161 and 1162, C. C. P., simply gives to the landlord a new and summary remedy unknown to the common law, whereby he can in a summary proceeding recover possession from the delinquent tenant, together with treble damages or rents by way of penalty for the tenant's refusal to quit. But before such summary recovery can be had and such penalties enforced, the statute provides, for the protection of the tenant, the service of three days' notice. Simple demand shall not be sufficient; but notice in writing shall be served on him after default made, which notice must be served at least three days before the summary proceedings can be instituted or maintained. Section 793, C. C., does not dispense with the demand required by law, but merely reserves to the landlord his common-law action of ejectment, in addition to his summary remedy under section 791, C. C. Section 793, C. C., simply makes clear by statute that, if the landlord does not desire to avail himself of the summary proceeding provided by the Code, it will not be necessary for him to serve three days' written notice; but it does not relieve him from the necessity of making demand, verbal or otherwise, for the rent." In other words, the right of re-entry for nonpayment of rent does not *accrue* until a demand has been made for its payment, regardless of the section of the Code under which the action is brought.

It is manifest that this requirement imposes no hardship upon the landlord, and it is in keeping with the general attitude of the law towards forfeitures. It is a very simple matter to provide in the lease that no demand for rent shall be required; or, if this is not done, it should not be considered a very grievous burden to exact of the landlord a request of the tenant for the payment of the rent before depriving him of his possession. It is true that the statute does not expressly require this demand; but it is affirmed by the authorities to be a just and equitable prerequisite to the enforcement of the drastic penalty of forfeiture, and we think it should be left undisturbed until the Legislature has clearly spoken to the contrary. Appellant, speaking of his contention, admits that "we are somewhat embarrassed by a contrary ruling in Sauer v. Meyer, 87 Cal. 34 [25 Pac. 153], and in Ciapusci v. Clark, 12 Cal. App. 53 [106 Pac. 436];" but he thinks they should not be followed. The suggestion, however, is not inappropriate that appellant could easily have followed the doctrine of those cases in preparing the lease, or in making the demand before bringing suit, and thus have saved himself unnecessary trouble and expense.

We think the judgment should be affirmed; and it is so ordered.

We concur: CHIPMAN, P. J.; HART, J.

19 Cal. App. 390

PECK v. COYLE. (Civ. 918.)

(District Court of Appeal, Third District, California. July 2, 1912.)

1. CONTRACTS (§ 71*) — EXTENSION OF TIME FOR PAYMENT—CONSIDERATION.

Payments to be made under a contract to purchase land are of themselves sufficient consideration for an extension of time for payment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 295, 296, 298, 316–324; Dec. Dig. § 71.*]

2. VENDOR AND PURCHASER (§ 187*) — CONTRACT TO CONVEY — TIME FOR PAYMENTS — WAIVER.

A vendor waived a provision in the contract, which made time for making payments the essence of the agreement, by receiving payments after they were due by extending the time for other payments, and by telling the purchaser to make what payments he could; that it would "be all right"; that the vendor desired the purchaser "to have the property," etc.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. § 187.*]

3. SPECIFIC PERFORMANCE (§ 121*) — TENDER OF PERFORMANCE—EVIDENCE—SUFFICIENCY.

In an action to specifically perform a contract to convey, evidence *held* to sustain a finding that the purchaser was able to pay when he offered to pay the amount due under the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

4. SPECIFIC PERFORMANCE (§ 87*)—RIGHT TO RELIEF.

One is not entitled to specific performance of a contract as to which he is himself in default.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 225, 238–241; Dec. Dig. § 87.*]

5. SPECIFIC PERFORMANCE (§ 121*)—DEFAULT BY PLAINTIFF—EVIDENCE—SUFFICIENCY.

In an action to specifically perform a contract to convey, evidence *held* insufficient to show that plaintiff was ever in default in making payments after demand therefor, etc.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

6. SPECIFIC PERFORMANCE (§ 121*)—TENDER—EVIDENCE—SUFFICIENCY.

In an action to specifically perform a contract to convey, evidence *held* insufficient to sustain a finding that plaintiff deposited with the bank the amount of a tender of payment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

7. Specific Performance (§ 97*)—Tender of Performance.

Suit lies to specifically perform a contract to convey where proper tender has been made by plaintiff purchaser, though the tender has not been kept good under Civ. Code, § 1500.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 286–298; Dec. Dig. § 97.*]

8. Appeal and Error (§ 1071*) — Harmless Error—Immaterial Findings.

In an action to specifically perform a contract to convey, any error in finding that all interest on deferred payments was paid was harmless to defendant vendor, where it appeared that the amount tendered by plaintiff purchaser was larger than the total amount of interest and principal remaining due.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Charles W. Peck against B. M. Coyle. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Holl & Holl and White, Miller & McLaughlin, for appellant. De Ligne & Jones, for respondent.

HAWKINS, Special Judge. The plaintiff and defendant entered into a written contract, whereby plaintiff agreed to buy and defendant agreed to sell certain real property. The purchase price, amounting to $3,870, was fair and adequate, and was to be paid as follows: $30 a few days after the execution of the agreement, and the balance in six annual installments of $640 each, on the 15th of November of each year, the first payment to be made November 15, 1905. Time was made the essence of the contract, and in case of default on the part of plaintiff all payments were to be forfeited as liquidated damages. The plaintiff had the privilege of paying the entire purchase price at any time before maturity; and upon receiving payment defendant agreed to execute a good and sufficient deed, conveying the land to the plaintiff free and clear of all incumbrance. The plaintiff entered into possession of the property and made valuable improvements. He made the first payment of $30, but failed to pay the installments at the time specified in the contract, but did make certain payments, which were accepted by the defendant. At the time fixed for the fifth payment, a dispute arose as to the amount due and to be paid; whereupon the defendant demanded the entire balance under the contract, and, it not being promptly paid, gave written notice of forfeiture and also that she would at once take possession of the property. The plaintiff thereupon tendered the balance due and demanded a deed, and, the defendant declining to take the money or execute the deed, the plaintiff brought this action to enforce specific performance of the contract. The court found that the tender was made in the time provided by the contract and as extended by defendant; and that the money was immediately deposited in the name and to the credit of defendant in a bank of good repute and decreed specific performance. The defendant appealed, and presents several points to this court for determination.

[1, 2] First. It is claimed that the evidence does not support the fifth finding of fact to the effect that the defendant waived the provision of the contract, providing that time should be the essence thereof, and extended the times of the payment thereof from time to time. The first payment was made by note on November 15, 1906, and was paid November 17, 1908. The third payment was due November 15, 1907, and $227.98 was paid thereon on November 17, 1908. At the same time defendant, in writing, extended the time for the payment of the balance of said third payment to November 15, 1909. The record is silent as to the fourth payment; but the extension of the third payment of itself operated to extend the time of the payment of the subsequent installment also to November 15, 1909. The defendant stated at the time the payments were made: "Make what payment you can. It will be all right." "I want you to have the property, and pay all you can." "Raise all the money you can, and it will be all right."

The witness Henderson, who figured the matter up for the parties, was in the best position to know, and he testified that each time she granted an extension defendant told plaintiff and witness that "she reasoned she was getting a good price for the property; that she consulted with witness, and the witness told her why she would consent to it each time." The reasonable inference, under such circumstances, is that the extension was granted to enable defendant to get what money she could, and that payment would not have been made, unless the extension had been granted. The payments themselves were a sufficient consideration for the extension.

The circumstances, coupled with the acts and declarations of the defendant above set out, were a waiver of that portion of the contract which made time of the essence thereof. Noyes v. Schlegel, 9 Cal. App. 516, 99 Pac. 726; Boone v. Templeman, 158 Cal. 290, 110 Pac. 947, 139 Am. St. Rep. 126.

[3] Second. Appellant also attacks the seventh finding of fact, in so far as it finds that on November 15, 1909, plaintiff offered to pay the amount then due under the contract, and was ready and willing and able to pay it. The attack is on the ability of the plaintiff to pay. The plaintiff testified that he had at the house at that time enough

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money to make the balance of the third and all of the fourth payment. This would amount to $851.02, not counting interest. The fifth payment fell due that day, making a total of $1,491.02, not including interest. By agreement the further consideration of the subject was postponed until the next day. In the meantime the plaintiff saw Mr. Gerber and Mr. Henderson, and the latter, in the words of plaintiff, said: "He would see us through with this affair"; or, as expressed by Mr. Henderson: "I assured Mr. Gerber I would see these people through it financially." He also testified that on November 22d plaintiff had money in a sack; that witness did not let him have that money, but that witness let him have money afterwards. Mrs. Alice Cozzens testified that there was $2,900, more or less, in the sack; she being present when the money was thrown on the table. The plaintiff testified it was over $2,900. On November 28th, through the witness McKinney, plaintiff tendered in actual coin $2,907. We therefore conclude that the evidence justifies the finding that plaintiff was able to pay.

[4, 5] Third. Appellant claims that plaintiff cannot demand specific performance, unless he first makes tender on his part and then keeps the same good under section 1500 of the Civil Code. It is true that plaintiff was not entitled to specific performance while he was in default; but was he in default? As already seen, the plaintiff's time had been extended until November 15, 1909. In the meantime defendant had given a power of attorney to her son, and when plaintiff, on that date, met the son for the purpose of settling matters he informed plaintiff, "We came here for the whole payment on the property." After considerable argument, the son said they would meet the next day and settle up, and plaintiff said, "The money is ready for you any time." The next day the son at first said he had no time to come up, and then said he had to see his sister first. The plaintiff asked for the abstracts of the property. The son said, "We will have them." Plaintiff then said: "Let me know when you are ready, and I will be ready for you." On the 18th the son served written notice on plaintiff that the contract was forfeited, and that defendant would take possession at once. No prior demand had ever been served upon plaintiff that defendant would strictly enforce the contract; nor had notice of any time been served within which plaintiff was required to pay within a specified time. However, an appointment was then made for the next day and, at the request of the son, was postponed until the next afternoon, and this last appointment the son failed to keep. Plaintiff then immediately went to see the defendant, who sent word to her son to take the money and settle up. When the message was delivered, the son said he had to see his sister first. The plaintiff replied he was ready to see him any time. Again the plaintiff sought the defendant, and she requested that Mr. Henderson, cashier of the bank, come out the next day, November 22d, and plaintiff took Mr. Henderson out and tendered the money by placing it on the table. The defendant said she wanted the money and did not see why she could not take it; but the son went into a rage and threatened violence, and prevented settlement. The plaintiff then again made a formal tender of the actual cash and demand for the deed; the last notice being served November 28, 1909. At no time did the defendant say that she refused the money because it was not paid in time; and she always said she wanted the plaintiff to have the place, and she wanted to take the money if her son would consent. Under such circumstances, it cannot be said that the plaintiff was ever in default; but the defendant was in default from the time that the money was tendered and she refused to take it and execute the deed.

[6] The third finding is to the effect that plaintiff deposited the amount of the tender in the name of the vendor with a bank of good repute in this state, and gave notice thereof to defendant. If this finding is supported by the evidence, it operates to extinguish the obligation of payment by plaintiff. But does the evidence support the finding? The record shows that written notice of the necessary facts was given to plaintiff. The notice alone does not prove the facts. The only other evidence in the record is the statement of the witness, Mrs. Alice Cozzens, that the entire amount of money which is now on deposit at the Sacramento Bank was thrown on the table. This is only a recital, and is not sufficient evidence to support the finding that the money was deposited in the bank in the name of the defendant.

[7] We are of the opinion, however, that the action for specific performance can be maintained where a proper tender has been made, though the tender be not kept good under section 1500 of the Civil Code. Haile v. Smith, 113 Cal. 656, 45 Pac. 872; Latta v. Tutton, 122 Cal. 279, 282, 54 Pac. 844, 68 Am. St. Rep. 30; Kerr v. Moore, 6 Cal. App. 305–308, 92 Pac. 107. The tender operated to relieve the plaintiff from default, and the defendant was thereafter in default until she executed and tendered the deed. Had plaintiff deposited the money to the credit and in the name of defendant, there would remain nothing for him to do when the deed was presented; but, as it is not shown as an affirmative fact by the testimony that the money was so deposited, the plaintiff will be required to pay the money upon delivery of the deed. The failure to make the deposit goes to the form of the judgment only. The law does not require the purchaser to deposit the money in the vendor's name, and thus place himself at the vendor's mercy be-

fore he can maintain an action for specific performance to compel the delivery of the deed. He must, however, be ready with his money when he receives his deed. The intention of the law is that the acts should be concurrent.

[8] Fourth. Appellant also contends that there is no evidence to support that part of the second finding of fact, to the effect that, in addition to the sum of payments of principal therein mentioned, there was also paid all of the interest on the deferred payments up to the 15th day of November, 1908. The witness Henderson testifies that he was present at the time and made a computation as to the amount due under the contract, and that the computation was agreed to as being correct by both plaintiff and defendant. On cross-examination he testified that the amount paid was $869.96. This must have included only a very small amount of interest. The plaintiff testified that he understood that everything was closed up to November 15, 1908. Conceding that the witnesses were mistaken, and that the whole amount paid was only $1,537 on principal, and that no interest was paid, still the amount tendered by the plaintiff to the defendant, to wit, $2,907, was an amount even larger than the total amount of interest, plus the total amount unpaid on principal; and therefore the finding, even if erroneous, becomes immaterial.

Some other points are made in appellant's brief; but, under the view we take of the entire matter, it will not be necessary to discuss them.

While the evidence, as we have held, is insufficient to sustain the finding that the plaintiff deposited the money in the name of defendant in a bank of good repute, such finding is immaterial and may be disregarded. The judgment should be modified by adding to the first paragraph of the decree, and after the order that defendant make, execute, and deliver to plaintiff a good and sufficient deed, the words, "Upon receiving from plaintiff the sum of $2,907," and, as so modified, affirmed, and it is so ordered; plaintiff to recover costs on the appeal.

We concur: CHIPMAN, P. J.; BURNETT, J.

(19 Cal. App. 338)

WESTERN PAC. LAND CO. v. WILSON.

(Civ. 1,014.)

(District Court of Appeal, First District, California. June 27, 1912. Rehearing Denied by Supreme Court, Aug. 26, 1912.)

1. New Trial (§ 137*)—Insufficiency of Evidence—Specifications—Sufficiency.

Where, in an action for money had and received, defendant set up a counterclaim for services, and alleged a payment of the difference between the sum demanded and the value of the services, and the verdict was for him, a notice of motion for new trial on the ground of the insufficiency of the evidence, in that the evidence and admissions showed that defendant had in his possession at the commencement of the action and at the time of the trial the sum demanded, of which sum defendant claimed for services a less sum, and that under the verdict defendant was awarded the full amount demanded by plaintiff, did not attack the evidence as insufficient to support the implied finding of the reasonable value of the services rendered; and, under Code Civ. Proc. § 659, providing that the notice of motion for new trial on the ground of the insufficiency of the evidence must specify the particulars in which the evidence is insufficient, the court could not grant a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 277, 278; Dec. Dig. § 137.*]

2. New Trial (§ 66*)—Grounds—Disregarding Instructions.

Where the instructions are contradictory, but one of them authorizes the verdict rendered, a new trial on the ground that the jury disregarded an instruction must be denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132–134; Dec. Dig. § 66.*]

3. New Trial (§ 66*)—Grounds—Disregarding Instructions.

A new trial will not be granted on the ground that the jury disregarded an erroneous instruction.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132–134; Dec. Dig. § 66.*]

4. Payment (§ 76*)—Payment by Check—Question for Jury.

Where a check was given and offered by a debtor as payment, and the creditor retained the check, without expressly refusing it, for about a month, and until after the bank on which it was drawn had closed its doors as insolvent, the question whether the giving and retention of the check was a payment was for the jury, under proper instructions.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 240–248; Dec. Dig. § 76.*]

5. Payment (§ 21*)—Payment by Check—Question for Jury.

Where a check is given as payment, the creditor, not refusing it, must return it; and unreasonable delay in returning it may make it a payment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 86; Dec. Dig. § 21.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the Western Pacific Land Company against Edgar M. Wilson. From an order granting a new trial after verdict for defendant, he appeals. Reversed.

Powell & Dow, for appellant. Humphrey & Hubbard, for respondent.

HALL, J. This is an appeal by defendant from an order granting plaintiff's motion for a new trial.

Plaintiff sued defendant to recover the sum of $5,500 had and received by defendant for the use and benefit of plaintiff. Defendant answered, and, without denying the receipt of the $5,500 set up by way of counterclaim a demand for the sum of $4,145.75 as and for the reasonable value of certain services rendered by defendant to plaintiff as its attorney for a period of 3½ years, and further alleged that on the 14th day of October, 1907, he paid to plaintiff the sum of $1,404.25, which was the difference between the said sum of $5,500 and the amount alleged and claimed as the reasonable value of defendant's services to plaintiff, and prayed that plaintiff take nothing by its action. The jury rendered a verdict for the defendant.

The plaintiff in due time gave notice of its intention to move for a new trial, to be heard upon the minutes of the court, which was afterwards made and granted.

The verdict of the jury, being for the defendant, necessarily was in effect a finding that defendant rendered the services as alleged in his answer, and that the reasonable value thereof was $4,145.75, and that defendant had paid to plaintiff $1,404.25, the difference between $5,500, claimed by plaintiff, and said sum of $4,145.75 set up as a counterclaim.

In its notice of intention to move for a new trial, respondent set forth as grounds for its intended motion all the statutory grounds; but there is absolutely nothing in the record to justify the order on any one of the first six grounds specified, and no claim has been made in this court in support of any of said grounds.

The seventh ground is set forth as insufficiency of the evidence to justify the verdict in certain enumerated particulars. Both appellant and respondent have discussed the question as to the sufficiency of the evidence to support the implied finding that the reasonable value of the services rendered by defendant to plaintiff was $4,145.75; but appellant in his opening brief also makes the point that the specifications of the insufficiency lay no basis for the contention that the services rendered by defendant to plaintiff were not of the value of $4,145.75. An examination of the record convinces us that this point must be sustained.

[1] Section 659, subd. 4, Code of Civil Procedure, provides that "when the motion is to be made on the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient. * * * If the notice does not contain the specifications here indicated, when the motion is made on the minutes of the court, the motion must be denied."

In the notice of motion, the seventh ground is stated as "insufficiency of the evidence to justify the verdict in the following particulars: (a) In that the undisputed evidence and admissions on the part of the defendant showed that the defendant had in his possession at the time of the commencement of the action and at the time of the trial the sum of $5,500, of which sum the defendant claimed for his legal services only the sum of $4,145.75, and no more, and that under the verdict of the jury as rendered, namely, in favor of the defendant, the defendant is awarded the full $5,500."

This is in no sense an attack on the sufficiency of the evidence to support the implied finding that the services were of the value of $4,145.75. It is a statement that the defendant claimed for his services the sum of $4,145.75, and no more, which is true. It seems to be also a statement that by the verdict in favor of defendant the defendant was awarded for his services the full sum of $5,500, which is not true. By the verdict the jury in effect found the value of the services to be $4,145.75, and also found that the defendant had paid the difference between $5,500 and $4,145.75, to wit, the sum of $1,404.25, to plaintiff, as alleged in his answer.

This particular specification does not hint at any attack upon the sufficiency of the evidence to support the implied finding that the services rendered were not of the value claimed by defendant, to wit, the sum of $4,145.75. Under (b) is set forth another specification in all essentials similar to the one under (a). It does not hint at any attack on the evidence as insufficient to support a finding that the reasonable value of the services rendered by defendant was $4,145.75.

Other specifications follow under various subheads; but none of them hint or suggest that the evidence does not support the implied finding that the reasonable value of the services was the sum of $4,145.75.

These specifications, if they do anything, raise the point that the verdict for the defendant was contrary to law, in that it was contrary to an instruction given by the court to the effect that the jury should disregard all evidence as to a check for the sum of $1,404.25 drawn by defendant, payable to plaintiff, and by him claimed to have been in payment of the balance in his hands at the time the check was given.

[2] The order of the court granting the new trial cannot be justified or supported upon any claim that the evidence does not support the verdict or the finding implied therefrom as to the value of the services rendered by defendant to plaintiff, as the specifications are wholly insufficient to raise this point.

The only other point that can be, or that is, urged in support of the order is the claim that the verdict is contrary to law, in that the jury, in rendering the verdict, disregarded an instruction given by the court to disregard the evidence as to the check above referred to.

The evidence discloses that on or about the 14th day of October, 1907, defendant, who was a director of plaintiff, as well as its attorney, delivered to the secretary of plaintiff an account of services rendered by him for plaintiff, including moneys collected, and an itemized bill for such services, together with his check, drawn on the California Safe Deposit & Trust Company, and payable to plaintiff, for the balance shown to be due plaintiff, after deducting the amount of his bill from the amount of money ($5,500) in his hands belonging to plaintiff. This account, bill, and check were presented to the board of directors on the 22d day of October, 1907, but no final action was taken thereon at that time; but the matter seems to have been held for investigation. The check was not cashed, though retained in the possession of plaintiff. Subsequently, on the 30th day of October, 1907, the California Safe Deposit & Trust Company closed its doors as insolvent. At the time of drawing the check, and ever since, defendant had on deposit to his credit with said company upwards of $10,000. The evidence tends to show that subsequent to November 19, 1907, which was after the closing of the bank, plaintiff offered to return the check to defendant. Subsequently it sued for the full amount of $5,500 received by him for plaintiff.

Under this state of the evidence and the record, as hereinbefore set forth, as to the pleadings, the court instructed the jury to disregard entirely the evidence as to the check. While the instruction upon this point is not, perhaps, as clear as it might be, the instruction seems to have been intended to prevent the jury from giving or allowing defendant any credit for the amount thereof as a payment on account of the $5,500 admitted to have been received by him for plaintiff. Nevertheless the court instructed the jury that "there are two possible verdicts that you may render. One might be: 'We, the jury in the above-entitled action, find a verdict in favor of the defendant.' The other possible form is: 'We, the jury in the above-entitled action, find a verdict in favor of the plaintiff in the sum of ———,' putting down so many dollars accordingly as may be your verdict." The court further stated that it in no way intimated which of these verdicts the jury should select, but stated "that is entirely for you."

Under these latter instructions, it is clear that the jury were authorized to find the verdict which they in fact rendered. The most that can be said is that the instructions were contradictory, and the case does not come within the reason of the rule laid down in Emerson v. Santa Clara County, 40 Cal. 543; Altoona Q. M. Co. v. Integral Q. M. Co., 114 Cal. 100, 103, 45 Pac. 1047.

[3] But if it can be said that the verdict of the jury was contrary to the instruction given by the court to disregard all evidence as to the check, it does not necessarily follow that a new trial should or could have been properly granted on account thereof. While at one time it was held that a verdict rendered in disregard of an erroneous instruction was a verdict against law, and as such entitled the defeated litigant to a new trial (Emerson v. Santa Clara Co., 40 Cal. 543), such is no longer the rule followed in this state. The rule now is that a new trial should not be awarded because of the disregard by the jury of an erroneous instruction. O'Neil v. Thomas Day Co., 152 Cal. 357, 92 Pac. 856, 14 Ann. Cas. 970.

This brings us to an examination of the instruction which, it is claimed by respondent, the jury disregarded in its verdict.

[4] This instruction in effect directed the jury to disregard all evidence concerning the check. But it was the giving of this check by defendant, and its subsequent retention by plaintiff, that defendant claimed amounted to a payment. The court determined, as a matter of law, that the giving and retention of the check, under the circumstances disclosed by the evidence, did not amount to a payment. In this we think that the court erred, and the instruction as given was erroneous, and not a correct charge as a matter of law. The check was given and offered as payment. The plaintiff retained the check, without expressly refusing it, for about one month, and until after the bank had closed its doors as insolvent. Under such circumstances, we think it should have been left to the jury to determine, under proper instructions from the court, whether or not the giving and retention of the check had the effect of payment.

[5] Where a check is given as payment, unless it be refused, it is the duty of the creditor to return it; and unreasonable delay in returning a check may make it equal to payment. Conde v. Dreisam Gold M. Co., 3 Cal. App. 583, 589, 86 Pac. 825. Whether or not plaintiff in this case had kept the check for an unreasonable time was a question for the jury to determine, and was not a matter that should have been determined, as a matter of law, by the court. The fact that the check was not returned, or offered to be returned, until after the failure of the bank is significant, and may account for this litigation.

No other grounds are urged, or can be urged upon the record before us, to justify the order granting a new trial.

The order cannot be sustained because of any insufficiency of evidence to support the verdict, because of want of any specification of particulars of insufficiency that even hints at the attack attempted to be made as to insufficiency of evidence; and for the reasons above set forth the verdict is not against law.

The order is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

19 Cal. App. 349

HARLAN v. LAMBERT et al.

(Civ. 925.)

(District Court of Appeal, Third District, California. June 28, 1912.)

1. Attorney and Client (§ 165*)—Action for Legal Services—Issues—Proof.

One suing for the reasonable value of legal services rendered must allege the nonpayment thereof; and where nonpayment is put in issue by answer he must prove nonpayment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 365–367; Dec. Dig. § 165.*]

2. Trial (§ 397*)—Findings—Issues.

Where, in an action for the reasonable value of legal services, the nonpayment of the claim was put in issue by answer, and findings were not waived, the court, to support a judgment for plaintiff, must find that the services had not been paid for.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

3. Attorney and Client (§ 167*)—Action for Compensation—Findings—Issues.

Where, in an action for reasonable value of legal services rendered, the nonpayment of the claim was put in issue by answer, a finding that plaintiff rendered legal services for defendant, that the same were reasonably worth $650, and that $150 had been paid, was a finding that the balance had not been paid, and supported a judgment therefor, especially where the court, under the designation "conclusion of law," found that plaintiff was entitled to a judgment for $500.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 373–375; Dec. Dig. § 167.*]

Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by Paul C. Harlan against Leonard Lambert and another. From a judgment for plaintiff, defendant Dennie May Lambert appeals. Affirmed.

T. T. C. Gregory, for appellant. Paul C. Harlan, in pro. per.

BURNETT, J. The appeal is on the judgment roll from a judgment against Dennie May Lambert for the sum of $500. A reversal is sought upon the sole ground that the court failed to find upon the issue of payment. The action was brought to recover the reasonable value of legal services performed by plaintiff for appellant at her special instance and request. The court found that the value of the services was $650; but it is the contention of appellant that as to nonpayment the court found simply that $150 had been paid, and that there is no finding that the remainder of the sum had not been paid.

[1, 2] It will not be disputed that it was necessary to allege the nonpayment of the claim, and, since it was put in issue by the answer, that it was equally necessary to prove it. Wise v. Hogan, 77 Cal. 184, 19 Pac. 278; Richards v. Lake View Land Co., 115 Cal. 642, 47 Pac. 683; Dodge v. Kimple, 121 Cal. 580, 54 Pac. 94; Knox v. Buckman, 139 Cal. 599, 73 Pac. 428. Since findings were not waived, it would, of course, follow, in order to support the judgment, that it should be found by the court that the money had not been paid.

[3] The basis for appellant's argument is found in the asserted circumstance that the following are the only findings of fact upon the point: "That said representation of said Dennie May Lambert by said plaintiff and said legal services as attorney and counselor at law rendered, as aforesaid, by said plaintiff to said Dennie May Lambert were and are reasonably worth the sum of six hundred fifty dollars ($650). That one hundred fifty dollars ($150) of said last-mentioned sum have been paid." Appellant's claim is that the finding is totally insufficient, in that it does not exclude the inference that the balance of the $650 may have been paid also; while respondent contends that at most an uncertainty is produced, and therefore the judgment should be upheld by reason of the rule that "an uncertain finding on payment must be construed so as to support the judgment, rather than to defeat it. Warren v. Hopkins, 110 Cal. 506 [42 Pac. 986]."

In support of her contention that the said finding is not sufficient to cover the balance of $500, appellant cites the case of Barney v. Vigoreaux, 92 Cal. 631, 28 Pac. 678, wherein it is stated in the syllabus that, "in an action upon a promissory note, a failure to allege in the complaint that no part of the sum for which the note was given, except certain payments indorsed upon it, had been paid constitutes a fatal defect, for which a judgment in favor of the plaintiff will be reversed upon appeal." In that case there was a default judgment, and there was not only no allegation that any sum remained *unpaid*, but there was no positive averment that any *definite sum* had been paid; the statement being that "the defendants executed and delivered to the plaintiff their promissory note, in writing, in the words and figures following, to wit: * * * And indorsed with the following thereon, to wit." Then follow certain purported payments of interest and parts of the principal and a demand for judgment. It was not alleged that the payee had made the indorsements or received the money; and it is apparent that the complaint was exceedingly weak in the matter suggested. The gist of the opinion is found in this declaration: "The omission to allege in the complaint that some part of the said note had not been paid constituted a fatal defect, for which the judgment must be reversed. Frisch v. Caler, 21 Cal. 71; Davanay v. Eggenhoff, 43 Cal. 395; Scroufe v. Clay, 71 Cal. 123 [11 Pac. 882]."

In the Frisch Case the question was, as stated by the court, "whether a plea of payment is new matter in the sense of the statute." This question was determined, and it was said in conclusion that "this disposes of the only question raised in the case; but it is proper to suggest an objection to the complaint, which, though apparently technical, is of the essence of good pleading. The fact of nonpayment is not directly alleged, the allegation being that there is now due, etc., which is a mere conclusion of law, and would not have stood the test of a demurrer." There was an allegation of the payment of a certain sum; but the sufficiency of this allegation to negative the payment of the balance was not argued by counsel nor considered by the court. Likewise, in the Davanay Case, it was contended that it was necessary for the defendant to plead payment; but the point decided, and the only one involved, was that the general denial, the complaint being unverified, "put in issue the averment of the complaint that the promissory note remained due and unpaid." In Scroufe v. Clay, supra, it was held that an averment that the defendant "has refused and still refuses to pay the principal or interest of the note, or any part thereof, and that there is now due the sum," etc., was insufficient.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

These cases are not directly in point; and it may be said also, without stopping to specify particularly, that they are not altogether in harmony with the more mature and deliberate expression of the Supreme Court embodied in the opinion of Chief Justice Beatty, in the case of Penrose v. Winter, 135 Cal. 289, 67 Pac. 772, wherein it is held that, though the allegation of nonpayment was "in the form of a legal conclusion, in which the material fact was merely implied, but in the absence of any demurrer such faults of pleading are cured by the judgment."

But the truth is that we have here a reasonably clear and unequivocal finding of fact that the $500 had not been paid. It is plain that the court in its decision had in view three questions of fact, viz.: Were the services performed? If so, how much were they reasonably worth, and how much had been paid for them? The court found, as we have seen, that the services were performed, that they were reasonably worth the sum of $650, and that $150 had been paid. This last is equivalent to a finding that $500 had not been paid, for the simple reason that it clearly implies that $150 was all that was paid. No one fairly familiar with reputable usage of the English language, unless obsessed by his veneration for ancient forms and ceremonies relating to legal proceedings, so as to obscure his understanding of the paramount importance of the practical administration of justice, would fail to reach the conclusion that B still owed A $500, if a court should find that the latter had performed for the former services that were worth the sum of $650, and that "$150 of the last-mentioned sum have been paid." If the action were by A against B for the recovery of horses, and the court should find that B had received 650 horses which belonged to A, and that he had returned 150 of them, it would be readily understood that the others had not been returned. In truth, our use of the language in every transaction of life is based upon the assumption that such statements as the one here in controversy involve and imply what the logicians call "a universal affirmative." In other words, the affirmation that the defendant paid $150 is equivalent to a statement that $150 is all that he paid. Jevons, in his work on Logic, simply expresses the common understanding when he declares that "wherever a term is used alone it ought to be interpreted as meaning the whole of its class." It is also true, as he says further, that "the mark of universality usually consists of some adjective of quantity, such as 'all,' 'every,' 'each,' 'any,' 'the whole'; but whenever the predicate is clearly intended to apply to the whole of the subject one may treat the proposition as universal." If appellant is right in her contention as to said finding, then, of course, respondent would have reason to complain that the court failed to find that his services were not worth more than $650. The point, however, has not been urged that the finding that the services were worth the sum of $650 does not mean that they were worth $650, and no more.

But aside from the foregoing, under the authority of Jessen v. Peterson, Nelson & Co., 123 Pac. 219, there can be no doubt that the findings here are sufficient to support the judgment. In that case, in which a rehearing was denied by the Supreme Court, plaintiff had sued for damages for personal injuries, and she recovered judgment for $1,000. There was a finding that she had expended $122.50 for medical attendance, but the court omitted to designate the specific amount in which the plaintiff was damaged on account of personal injuries; but it was declared, as a conclusion of law, "that the plaintiff is entitled to judgment against the defendant in the sum of $1,000." The Court of Appeal of the First district held that this should be treated as a finding of fact, and, when so considered and read in conjunction with the other probative facts found by the trial court, it was sufficient to support the judgment upon the issue of damages. See, also, McCray v. Burr, 125 Cal. 636, 58 Pac. 203. Here, also, under the designation of "Conclusion of law," we have the finding "that plaintiff is entitled to a judgment herein for the sum of five hundred dollars." But whether regarded or not as a finding of fact, in connection with the findings already recited, it should be held sufficient to support the judgment, in harmony with the spirit of Penrose v. Winter, supra.

It is believed that the contention of appellant is entirely without substantial merit.

It is undoubtedly true, as said by the Supreme Court in Millard v. Legion of Honor, 81 Cal. 342, 22 Pac. 865, through Mr. Justice McFarland, that "one main object of the provision [in reference to the court's 'decision'] seems to have been to prevent a court from summarily ordering judgment without giving any reasons for it—without stating any facts or legal conclusions upon which it is based. There was also, no doubt, some intent to facilitate the review of a judgment on appeal. But surely the main object was not to afford a cover under which a losing party might successfully set a trap to capture a just judgment. The findings come after the case has been tried, considered, and determined, and after the character of the judgment—whether it is right or wrong—has been fixed. They are merely incidental to the main thing—the judgment; and to test their sufficiency by a standard which exacts the extreme of accurate statement and minute detail is to put the incident in the place of the principal. Of course, there ought to be findings on the material issues raised by the pleadings and evidence; but, if it appears that there are in substance such findings, it is not necessary that they should be in the exact language of the pleadings, or in any particular form."

The case here measures up to all the just requirements of legal procedure, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

(19 Cal. App. 370)

PEOPLE v. BALLO. (Cr. 181.)

(District Court of Appeal, Third District, California. July 1, 1912.)

Larceny (§ 14*)—False Pretenses (§ 16*)—Property Subject to Larceny—Acquisition of Possession by Trick.

Where prosecutor intrusted his money to a confederate of accused, under the agreement that accused and the confederate should each contribute a like sum to a common fund for the benefit of all, but did not intend to vest title in the confederate, and it was the fraudulent purpose of accused and his confederate to obtain possession of the money by a trick and appropriate the same to their own use, and neither accused nor his confederate put any money in the common fund, and had no intention of doing so, the money remained the property of prosecutor, and was the subject of larceny; and accused and his confederate, appropriating the money to their own use, were guilty of larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34–38; Dec. Dig. § 14;* False Pretenses, Cent. Dig. §§ 20, 25; Dec. Dig. § 16.*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

Frank Ballo was convicted of grand larceny, and he appeals. Affirmed.

Webster & Webster and S. N. Blewett, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. The defendant was convicted of the crime of grand larceny, and from the judgment of conviction and the order denying him a new trial he prosecutes this appeal.

The assault upon the judgment and order is founded principally upon alleged errors of the trial court in the statement of the law to the jury.

The facts are briefly these: The complaining witness, one G. Saloni, an Italian laborer, went to the city of Stockton with an acquaintance of his in the month of December, 1911. They registered at the Roma Hotel, which was conducted by one of their countrymen. Saloni had for some time prior to his arrival at Stockton worked as a laborer for the Feather River Lumber Company, near Portola, in Plumas county, and when he reached Stockton had approximately $200, a portion of which he carried in two checks, one for $57 and another for $54.80. These checks he deposited, for safe-keeping, with the proprietor of the Roma Hotel. It appears that, shortly after his arrival at Stockton, he began drinking rather heavily, and remained more or less in a state of intoxication for several days. While thus conducting himself, he made the acquaintance of the defendant, with whom thereafter he had conversations and drank several times. On the morning of the Thursday following the date of his arrival at Stockton, upon going out on the sidewalk in front of the Roma Hotel, he again met the defendant. Ballo invited Saloni to join him in a drink, and the two, with a third party, went to the Gem Saloon for that purpose. After securing a drink, the defendant and Saloni returned to the sidewalk, when the former declared that he expected some mail, and that he thought he had better go to the post office and ascertain whether any was awaiting him. Accordingly, accompanied by Saloni, he left the place at which they were standing for the ostensible purpose of going to the post office. He took Saloni through various streets and over a devious route until they reached the corner of two streets, at which was located a feed stable. There they met one Manuel Schenone. It appears that, as the defendant and Saloni were in the act of passing Schenone, the latter accosted them by the inquiry: "You are Italian boys, too, aren't you?" The defendant and Saloni, in reply, said that they were; whereupon Schenone exhibited to them what purported to be a bill of the denomination of $100 and began crying—evidently simulated, judging from subsequent events—and proceeded to explain that he had given a bill of like denomination to a friend, with a request that he take it to the Imperial Hotel, pay his (Schenone's) board bill, and return to him with the change. Schenone said that his alleged friend had been gone a long time, and that he was satisfied he would never again see him or his money. Schenone then proceeded to unfold to the defendant and Saloni a tale of how, through his father, he had acquired a small fortune, amounting to $30,000. He declared that, being without education and business judgment, he was ignorant of how he should handle his wealth. He then suggested that he would like to have the benefit of the business companionship of some of his countrymen who were honest and could be trusted to treat him squarely, and further suggested that the defendant and Saloni join him, and that the three in the future remain together and act and be as brothers to each other. Saloni assured Schenone that he and Ballo were in sympathy with his suggestion, and that he and Ballo would deal squarely with him, and thereupon an association between the three, for the purposes of business and mutual protection, was established. Schenone inquired whether Ballo and Saloni had any money, and was informed that they had; Ballo claiming to have $300, and Saloni saying that he also had some money. Schenone then suggested that the three pool their money in one common fund, from which each could draw such sums from time to time as his necessities required. Saloni and the defendant readily acceded to this proposition, and Saloni, to carry out his part of the agreement, secured his checks, cashed them, and delivered the money, with some other cash, amounting in all to the sum of $137, to Schenone. Ballo pretended to deliver to Schenone his share of the pool. Schenone, upon receiving the money of the complaining witness, gave him a handkerchief, saying that it contained some paper money which Saloni could use for present purposes or convenience. Immediately after this transaction, Schenone complained that he had suddenly been attacked by gripings in the stomach and pretended to be suffering intense pain. Several remedies were suggested, when it was finally agreed that, perhaps, peppermint candy might have the effect of allaying the pain. Saloni was dispatched for the candy; Schenone and Ballo remaining together to "await his return." But, upon returning to the place where he had left his "associates," the latter were not to be found, and were not again seen by Saloni until he saw them at the police station; they having been arrested on his complaint.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Schenone, having been separately tried on an information charging him with grand larceny, said charge growing out of the same transaction as that of which the charge against the appellant here is the outgrowth, was convicted of said crime and thereupon appealed to this court from the judgment and the order denying him a new trial, and said judgment and order were affirmed; the opinion in said cause having been filed on the 17th day of June, 1912. People v. Schenone, 125 Pac. 758.

The instructions given in the case at bar were substantially the same as those given in the Schenone Case; and the objections registered against the court's charge in the present case are precisely the same as those urged against the charge given at the trial of the former case.

Counsel for the appellant claim, as they did in the Schenone appeal, that, if the defendant here was, under the evidence, guilty of any crime at all, it was of that of obtaining money by false and fraudulent pretenses, and not of that of grand larceny; and they therefore particularly complain of the refusal of the court to take that view of the evidence.

But the circumstances (some of which are embodied in the statement above given), as disclosed by the evidence, were sufficient to convince any fair-minded body of men that the defendants were acquaintances prior to the time at which Ballo first met Saloni; that the meeting of Schenone by Ballo and Saloni was no adventitious circumstance, so far as Ballo was concerned; and that the taking of Saloni's money was only the consummation of a preconceived and premeditated scheme or trick hatched by the defendants to effect a criminal design, of which they hoped to make some one a victim, and which they finally worked out on Saloni.

The court, in its charge to the jury, pointed out with clearness and accuracy the distinction between the crime of larceny and that of obtaining property by false pretenses, and, moreover, instructed the jury that, if the evidence was of a character to convince them that the defendant had committed some offense other than that charged in the information, it would be their duty to acquit.

But in the Schenone Case Justice Burnett treats this contention fully and satisfactorily; and there is therefore no necessity for further consideration of it here. But it may here not inappropriately be repeated, as it was declared in that case, that it is very clear that the jury were justified in the case at bar in concluding from the evidence that the prosecuting witness did not intend, when parting with his money under the circumstances shown, to vest in the defendant the title to said money, and that "it was the defendant's purpose at all times to obtain possession of the money by trick and device and afterwards appropriate it to his own use." All the circumstances go to show that neither Ballo nor Schenone put any money in the common pool, and had no intention of doing so, and, as said in the Schenone Case, "until they did so the title to the money remained in the prosecuting witness, and was the subject of larceny." The general charge of the court was full and fair and correctly stated the law pertinent to the evidence, and the evidence amply justifies the verdict.

No other objections to the record are particularly pointed out or urged.

The judgment and order are affirmed.

We concur: CHIPMAN, P. J.; BURNETT, J.

19 Cal. App. 334

MARSICANO v. LUNING.

(Civ. 1,012.)

(District Court of Appeal, First District, California. June 26, 1912.)

Adverse Possession (§ 27*) — Evidence — Sufficiency.

Evidence *held* to support a finding that plaintiff in ejectment to recover a strip adjacent to his lot had never been in possession of the strip, and could not acquire title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 121, 122, 652, 664, 684; Dec. Dig. § 27.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by P. Marsicano against Oscar T. Luning. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

D. Freidenrich, for appellant. Bourdette & Bacon, for respondent.

KERRIGAN, J. This is an appeal by plaintiff from a judgment in favor of defendant, and from an order denying a motion for a new trial in an action in ejectment to recover possession of a strip of land 6¾ inches in width with a uniform depth of 57 feet 6 inches.

Plaintiff alleges in his complaint that on the 1st day of May, 1906, and for more than 30 years next prior thereto, he had been the owner and seised in fee and entitled to the possession of the 6¾ inches described in his amended complaint; that on said date the defendant unlawfully ejected him therefrom, and has ever since withheld and still wrongfully withholds possession thereof from him, to his injury and damage in the sum of $1,000, for which sum, together with the alleged value of the rents, issues, and profits, he prays judgment. The defendant filed an answer, the cause was tried, and the court held against plaintiff, and decided that he was never in possession of said strip of land. Defendant contends that the evidence is insufficient to support the findings.

Ever since the year 1864, plaintiff has been the owner and has held the record title to a certain 20-foot lot on the east line of Stockton street, north of Vallejo street, in San Francisco. The defendant and his predecessors in interest have owned and held the record title to the land adjoining both sides of plaintiff's lot since 1853. At the time plaintiff purchased his lot, there was a building on it. Subsequently he put a brick foundation under the building on the northerly and southerly side thereof. The building remained on the ground until the great conflagration in April, 1906, when it was destroyed by that fire. In the month following the defendant commenced to erect a building on his lot just north of plaintiff's property. Plaintiff, evidently believing that defendant's building overlapped his lot, wrote him to that effect, and informed him that he would resist any encroachment upon his property. Thereupon the defendant had a survey made of the properties, which showed that his building was within his lines, and he so notified the plaintiff. It was doubtless after this that plaintiff became convinced that his building, which had been destroyed, had encroached upon defendant's lot, and, being unable to induce defendant to accede to his demands, instituted this suit for the purpose of establishing title to the strip of land involved by adverse possession.

If the plaintiff ever had possession of the 6¾ inches, it was by mutual mistake, which was not discovered until just before the commencement of this action, and, perhaps, title by prescription cannot be acquired under such circumstances. Unger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; American Co. v. Bradford, 27 Cal. 360; Alta v. Hancock, 85 Cal. 219, 24 Pac. 645, 20 Am. St. Rep. 217; Faulkner v. Rondini, 104 Cal. 140, 37 Pac. 883; Smith v. Roberts, 9 Pac. 104.[1] But the findings are so drawn that this proposition is not involved; and the only question we are called upon to decide is whether or not the findings are supported by the evidence.

We think they are. The building having been destroyed, the only reason the plaintiff had for believing that his house had stood partly on the strip of land in question was the presence after the fire of a brick foundation, which he testified he had caused to be constructed under the northerly side of his home. That foundation, he said, was now under defendant's new building. Defendant, on the other hand, testified that the brick foundation wall referred to by plaintiff was a new foundation built by his contractor. Defendant testified: "I built a building on the line of the survey as shown on the map introduced in evidence, and followed the line shown there as the exterior line of the property, the deeds of which have been read. My building is within those lines. On the northerly line of the 20 feet owned by Mr. Marsicano, and north of the 20 feet as described in his deed, there is a wall under that building; it is a new wall, built by C.

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 68 Cal. xx.

P. Moore Building Company. It is a part of a new wall under my entire building. There is no old wall there. * * * I had this property surveyed before I built my building. I had it surveyed, and cleaned the lot up and built there. I know, as a matter of fact, that that is a new brick wall, and was built by myself; there is no old wall there."

It is true that counsel for the defendant at one time during the trial made an admission that strongly tended to sustain plaintiff's view; but later, after a few days' adjournment, and after an amended complaint was filed and the parties were more familiar with the situation, the admission was in effect withdrawn by defendant's counsel, and the cause was submitted on the evidence introduced by the parties.

Under the findings of the court, plaintiff has the 20 feet covered by his deed, and the defendant has the adjoining land, to which the record shows he is entitled. Each has exactly what he thought himself entitled to for over 40 years, and on which during all of that time he has paid taxes.

The judgment and order are affirmed.

We concur: LENNON, P. J.; HALL, J.

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19 Cal. App. 364

CITY OF VERNON v. LOS ANGELES GAS & ELECTRIC CORPORATION.

(Civ. 1,109.)

(District Court of Appeal, Second District, California. June 29, 1912.)

1. Gas (§ 7*) — Gas Companies—Use of Streets.

Under Const. art. 11, § 19, which provides that in cities where there are no public works for supplying water or light any duly incorporated company, or any individual, may, under direction of the superintendent of streets, etc., use the streets for laying pipes, etc., neither gas nor water companies are required to show any contracts or existing demands for either commodity, on the part of the city or its inhabitants, in order to entitle them to enter upon the streets.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

2. Gas (§ 7*)—Use of Streets—Gas and Water Companies.

Under Const. art. 11, § 19, which provides that in cities where there are no public works for supplying water or light any individual or company, duly incorporated, may, under the direction of the superintendent of streets, and under such general regulations as the municipality may prescribe for damages and indemnity for damages, use the streets for laying pipes, etc., the superintendent has no authority, in the absence of ordinance, to require any indemnity, the extent of his authority being to see that the constitutional grant of franchise is not exceeded, and that the work is done in a proper, safe, and expeditious manner; and it is not necessary that he have notice of any change in the size of pipe lines or other matters pertaining merely to the proper manner of laying the pipes.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

Appeal from Superior Court, Los Angeles County; Curtis D. Wilbur, Judge.

Action by the City of Vernon against the Los Angeles Gas & Electric Corporation. Judgment for defendant, and plaintiff appeals from an order denying a new trial. Affirmed.

Gesner Williams, for appellant. Wm. A. Cheney and Le Roy M. Edwards, for respondent.

ALLEN, P. J. Plaintiff by its action sought to enjoin the defendant from making excavations in the public streets of the city of Vernon, or laying gas pipes therein, as well as for a mandatory injunction requiring defendant to remove certain pipes already laid.

It is conceded that defendant is a corporation engaged in supplying gas; that the city of Vernon owns and controls no public works for such purpose; that the city of Vernon had an officer performing the duties of street superintendent during all of the times mentioned in the proceedings; that, prior to the 6th day of June, 1910, the defendant entered upon the streets and commenced laying gas mains therein for the purpose of distributing gas from its works at Los Angeles—the two cities being contiguous. This entry and the work of excavation and the laying of pipes were known by the street superintendent, who interposed no objection to the character of the work or the manner in which the same was being done. The city at that time had passed no ordinance regulating such work, or for the damages or indemnity for damages occasioned thereby. After having laid in the streets certain pipes of lesser diameter, on the 23d day of May, 1910, defendant commenced the laying of pipes having a diameter of 12 inches, and continued to lay pipes of such character for a considerable time. On the 6th day of June, 1910, the city passed an ordinance providing that all excavation should be done under the supervision of the street superintendent of said city of Vernon, and that a deposit of 10 cents per square foot of proposed excavation in unimproved streets should be made with the street superintendent as indemnity for damages before any excavation should be made. Thereupon, after the passage of such ordinance, the defendant tendered to the street superintendent the sum of $750 as indemnity, being the amount required by said ordinance for work thereafter to be done, which sum the street superintendent refused to accept; no objection, however, being made as to the amount tendered. Upon the hearing of the action, the court found that $1,200 was a sufficient indemnity for damages occasioned by the laying of pipe before the passage of the ordinance, which amount it directed the defendant to pay to the street superintendent, who refused to receive such sum, and the same was deposited in the treasury of the court for the use and benefit of plaintiff. The court finds that the laying of this 12-inch main was necessary to supply the inhabitants of the city of Vernon with illuminating gas, and, as a conclusion of law, determined that under section 19, art. 11, Constitution of the state, the defendant had a right to enter upon the streets and lay its pipes, and that the plaintiff should be enjoined from interfering with such work. Judgment was accordingly entered, and from an order denying a new trial plaintiff appeals.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It is appellant's contention that the constitutional grant of franchises to gas and water companies is restricted to instances where a necessity is shown to exist for supplying an existing demand of either the city or its inhabitants, and that it does not appear that the 12-inch main was necessary in order to supply such demand as then existed in the city. As we construe this constitutional grant, neither gas nor water companies are required to work up or show or have any contracts or existing demands for their commodity in the city, either upon the part of the city or its inhabitants, in order to entitle them to enter upon the streets and lay their pipes. Either of said companies possess the right, having a commodity for sale, to enter upon the streets, lay their pipes, and put themselves in position to supply any demand made upon them, regardless of any existing demand. In section 19, referred to, the right to lay down pipes is given "so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight or other illuminating light." The most that can be said of this restriction with reference to the necessity which must exist is that they may not excavate the streets and lay down pipes therein in a manner other than that necessary to a complete and practical system for supplying gas or water to the entire city and its inhabitants. It is probably true that, were a company of this character to undertake to make excavations and lay pipes, and it could be shown to the court that a complete and practical system, necessary and proper for the distribution of its gas to all the inhabitants of the city, did not require certain streets to be used for that purpose, such court might, by an appropriate order, prevent excavations therein.

[2] But in the case at bar the court finds a necessity for all of the pipes for the purposes intended; that the same is not a commercial pipe line, as claimed by plaintiff, which is being laid only for the purpose of conveying gas to points beyond the city, and we find evidence in the record to sustain this finding. This being true, we can see no reason why defendant was not, as to the pipe laid after the enactment of the ordinance, acting within the clear letter of the law; and, while we do not find any support for the finding that the street superintendent had knowledge of the laying of 12-inch pipe at the time it was commenced and during its continuance until the passage of the ordinance, nevertheless we think this finding is of no particular materiality. The street superintendent did have knowledge of the excavation and laying of pipes for the purpose of introducing gas into the city; he made no objection thereto. He had no authority, in the absence of an ordinance, to require any indemnity. The most that could be said was that his authority existed to the extent only of seeing that the constitutional grant of franchise was not exceeded, and that the work being done was done in a proper, safe, and expeditious manner. Having the right to enter for this purpose, and the street superintendent having knowledge of that fact, it was not necessary that he should have notice of any change in the size of pipe lines, or other matters pertaining merely to the proper and correct manner of laying such pipe. We think all the other findings of the court have some support from the evidence, in so far as they were material in the action, and that, the city having been, by the action of the defendant and through the order of the court, fully indemnified on account of damages, the court was warranted in denying plaintiff any relief and in granting relief to defendant. The material findings, as before said, having support, the motion for a new trial was properly denied; the action of the court in reference thereto being the only question before this court.

The order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

MEMORANDUM DECISIONS

Ex parte MAZE. (Cr. 1,722.) (Supreme Court of California. June 6, 1912.) In the matter of the application of Fred L. Maze, on habeas corpus.

PER CURIAM. The writ is discharged, and the petitioner is remanded to custody.

Ex parte SCOGGAN. (Cr. 1,721.) (Supreme Court of California. June 6, 1912.) In the matter of the application of John Scoggan, on habeas corpus.

PER CURIAM. The writ is discharged, and the petitioner is remanded to custody.

CALIFORNIA REPORTER

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163 Cal. 476

PEOPLE v. ROGERS. (Cr. 1,737.)

(Supreme Court of California. Aug. 7, 1912.)

1. Criminal Law (§ 1023*) — Appealable Orders—Denial of Motion in Arrest.

No appeal lies from an order denying a motion in arrest of judgment, which is always reviewable on an appeal from the final judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2583–2598; Dec. Dig. § 1023.*]

2. Homicide (§ 234*)—Murder—Evidence—Sufficiency.

Evidence *held* to sustain a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482–493; Dec. Dig. § 234.*]

3. Criminal Law (§ 438*) — Evidence — Photographs—Admissibility.

In a murder trial, where accused's identity as the assailant was in issue, it was proper to admit in evidence a photograph of decedent's head, showing the nature of the wound, which was claimed to have been inflicted by a hatchet similar to those used by the company which employed accused, under the general rule that photographs may be used to exhibit particular locations or objects, to give the jury a clear idea thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.*]

4. Criminal Law (§ 1037*)—Review—Objections Not Made Below.

Objections to the district attorney's argument, not made at the trial, are not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645, Dec. Dig. § 1037.*]

5. Criminal Law (§ 1137*)—Continuance—Waiver of Motion.

Accused is not entitled to complain of an order refusing a continuance, when the case was called for trial March 1st, where the trial was subsequently postponed to March 4th, when motion for continuance was not renewed, and no objection to going to trial was made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007–3010; Dec. Dig. § 1137.*]

6. Criminal Law (§ 665*) — Exclusion of Witnesses from Courtroom — Judicial Discretion.

A request that witnesses for the prosecution be excluded from the courtroom while they were not testifying, respectively, was addressed largely to the trial court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549–1566½; Dec. Dig. § 665.*]

7. Criminal Law (§ 656*)—Trial—Remarks of Trial Judge.

A statement by the trial judge that testimony called for by questions asked by accused's counsel on cross-examination was not material, and direction to counsel to desist from that line of questions, was not erroneous, as tending to prejudice accused before the jury· it not appearing that the matter to which the question related was important, or that exclusion of the question was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524–1533; Dec. Dig. § 656.*]

8. Criminal Law (§ 720½*) — Argument of Prosecuting Attorney—Propriety.

In a murder trial, it was not improper for the prosecuting attorney in his argument to say, "What was" accused "doing at that time? Where was he? The greater portion of that time he was in the basement of the S., murdering" decedent, "and taking from his possession the jewelry"—it being clear that the attorney was merely drawing his conclusion from the evidence, and not some fact outside the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1677; Dec. Dig. § 720½.*]

9. Homicide (§ 307*)—Instructions—Lesser Degrees of Offense.

In a murder case, it was proper to omit to instruct on murder in the second degree or on manslaughter, where under the evidence accused was either guilty of murder in the first degree or innocent of any offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 638–641; Dec. Dig. § 307.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

10. Homicide (§ 311*) — Instructions — Nature of Punishment.

Under Pen. Code, § 190, which provides that one guilty of murder in the first degree shall suffer death or imprisonment for life at the jury's discretion, it is not error to instruct that the discretion is not an arbitrary one, and should be employed only when the jury is satisfied that the lighter penalty should be imposed, and that, if the evidence shows accused's guilt in the first degree, but not any extenuating fact or circumstance, the jury should find a simple verdict, and leave with the law the responsibility of fixing the punishment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 662, 663; Dec. Dig. § 311.*]

11. Criminal Law (§ 824*)—Instructions—Request—Necessity.

In a trial for murder in connection with robbery, accused is not entitled to complain of a failure to instruct as to what constitutes robbery, or attempted robbery, nor omission to instruct that his neglect to testify could not be used against him, in the absence of a request for such instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996–2004; Dec. Dig. § 824.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank R. Willis, Judge.

John S. Rogers was convicted of murder, and he appeals. Affirmed.

W. D. Cardwell, Eugene G. Strickler, and D. F. Conway, for appellant. U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., and James F. Brennan, Asst. Dist. Atty., for the People.

ANGELLOTTI, J. The defendant was charged, by information filed in the superior court of the city and county of San Francisco on January 4, 1912, with the crime of murder, alleged to have been committed on November 18, 1911, in willfully, unlawfully, feloniously, and with malice aforethought killing one Benjamin A. Goodman, a human being. Having entered a plea of not guilty, his trial resulted in a verdict of the jury finding him guilty of murder in the first degree, without recommendation. On March 16, 1912, judgment of death was pronounced.

[1] This is an appeal by defendant from such judgment, and from the order denying his motion for a new trial. There is also an appeal from the order denying his motion in arrest of judgment; but no appeal lies from such an order, which is always reviewable on an appeal from the judgment, and there was absolutely no merit in the motion.

[2] It is suggested that the evidence was insufficient to support the verdict. The evidence was such as to force the conclusion that the deceased, who was a salesman for a jewelry company, was murdered in the basement of the place of business of the San Francisco Produce Company at the corner of Oregon and Front streets, San Francisco, late in the afternoon of November 18, 1911, and that the murder was committed in the perpetration of, or attempt to perpetrate, a robbery. Deceased then had in his possession 14 or 15 watches, several chains, and some valuable rings, all of which were taken from his body by the person or persons who killed him. The only real question in the case was as to the identity of the murderer or murderers. While the evidence connecting this defendant, who was an employé of the Produce Company, with the matter, was entirely circumstantial, it was of such a character as to leave little, if any, room for doubt in the mind of any one reading the record as to his guilt. It certainly was amply sufficient to support the verdict of the jury.

[3] The claim most seriously urged by counsel for defendant is that the trial court erred in overruling his objection to the introduction in evidence of a photograph of the right side of the head and face of the deceased, taken by Police Officer Blum, who had been police photographer for 8 years. This photograph was taken on November 21, 1911, a few hours after the body was found. There was evidence sufficient to warrant a conclusion that nothing had been done to the head, after the discovery of the body and prior to the taking of the photograph, except to wash the blood from the face and out of the hair, and also that the photograph was an exact photograph of the portion shown of the head and face of the deceased as they appeared on November 21, 1911, which was the day upon which the body was discovered, after the blood had been washed from the hair and face. The photograph showed a wound in the neighborhood of the right temple, where there was a fracture of the skull. There were three other fractures of the skull; but this, in the opinion of Dr. Magnus, was the most serious, and undoubtedly sufficient to cause death. The testimony showed that this wound had been made with some blunt instrument, and from the marks on the face apparently with an instrument that had grooves in it which were impressed on the face, leaving the skin corrugated.

One object of the prosecution in introducing the photograph was to give to the jury a better idea of the actual appearance of the skin of the face in this regard; it being the theory that the wound was inflicted with a hatchet similar to those used by the employés of the Produce Company, which had heads grooved in such a way as to be capable of leaving such an impression. We have no doubt that a photograph was admissible for the purpose mentioned, under the general rule that photographs may be used "to exhibit particular locations or objects, where it is important that the jury should have a clear idea thereof, and the situation may thus be better indicated than by the testimony of witnesses, or where they will conduce to a better or clearer understanding of such testimony" (State v. Miller, 43 Or. 325, 328, 74 Pac. 659), and we are satisfied that the preliminary proof was sufficient to warrant the court in admitting in evidence the photograph in question. The action of the trial court in overruling the objection to the photograph of incompetency, irrelevancy, and immateriality, and lack of a proper foundation, cannot, therefore, be held to have been erroneous.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[4] Some complaint is made in the closing brief of defendant and in the oral argument that an improper use was made of this photograph by the district attorney in his argument, by calling attention to the fact that the head of defendant's hatchet, which it was claimed was larger than those used by other employés of the Produce Company, "fits to a nicety" the impressions found on the face of deceased as shown by the photograph. Without discussing the merits of defendant's objection to this line of argument, it is sufficient to say that no objection whatever was made by him thereto at the trial.

[5] Complaint is made that the trial court erred in denying a motion of counsel for defendant for a continuance when the case was called for trial on March 1, 1912. But it appears that the court did subsequently postpone the commencement of the trial to March 4, 1912, and that when the case was called on the day last mentioned no request for a further continuance was made, and defendant, through his counsel, "answered ready for trial." The motion for a continuance on March 1st was based on the claim that defendant had not been able to make necessary preparations to proceed with the trial, because the shorthand reporter officiating at the preliminary examination had not filed his longhand transcript of the proceedings at such examination with the county clerk. No objection on that score being made when the case was called on March 4th, and defendant expressing his readiness to then proceed with the trial, presumably the transcript had been filed, and defendant was, as he said, ready for trial.

[6] Complaint is made that the trial court refused to exclude the witnesses for the people from the courtroom during the taking of testimony. This, of course, is a matter largely within the discretion of the trial court. We find no error in the action of the court in this regard. The record shows that what defendant specially desired and asked for was that all the police officers except the one actually being examined should be excluded, and the court ruled that it would "exclude the police officers not on the witness stand during the time the testimony of the other police officers is being taken."

[7] At a certain stage in the cross-examination of one of the police officers, the court remarked, as to a question asked by counsel, "I do not think this is material at all," and directed counsel to desist from that line of questions. No claim is made that the matter as to which the question was asked was at all important, or that the court erred in refusing to allow further questions on that line to be put, and there is nothing in the record to warrant any such claim. The point appears to be that the language of the court was such as to injure defendant's cause with the jury, but we can see no force in any such claim.

The briefs do not specify any instance wherein the testimony of admissions made by the defendant to police officers was improperly admitted on the trial, but simply states generally that such admissions were made under such circumstances as to require their exclusion. We have carefully examined the record in this regard, and find no foundation for the claim.

[8] In his argument to the jury the assistant district attorney, after saying that the defendant was missing at the store from 4:30 p. m. to 5:50 p. m. on November 18th, said: "What was he doing at that time? Where was he? The greater portion of that time he was in the basement of the San Francisco Produce Company, murdering young Goodman, and taking from his possession the jewelry." Defendant's counsel excepted to these remarks and assigned them as misconduct, saying there was nothing in the evidence to warrant the statement. As substantially suggested by the trial court in response to the objection and exception, the assistant district attorney was apparently stating, not some fact of which he pretended to have any knowledge outside of the evidence given on the trial, but his deduction or conclusion from the evidence so given. The statement was entirely within the domain of legitimate argument.

[9] The effect of the instructions given to the jury was to confine the jury to one of three verdicts, viz., murder in the first degree, murder in the first degree with the penalty of life imprisonment, and not guilty. The jury were not instructed that they might find a verdict of murder in the second degree, or one of manslaughter. In this action of the trial court there was no error. The evidence was such that the defendant was necessarily either guilty of murder in the first degree or not guilty at all. Section 189 of the Penal Code provides that "all murder * * * which is committed in the perpetration or attempt to perpetrate * * * robbery * * * is murder of the first degree." It is thoroughly established in this state that it is proper to refuse to instruct a jury as to a lesser offense or degree included within the offense charged, where the evidence is of such a nature as to warrant, in the event that the defendant is guilty at all, only a verdict for the higher offense or degree. See People v. Swist, 136 Cal. 520, 69 Pac. 223; People v. Keith, 141 Cal. 689, 75 Pac. 304; People v. Lopez, 135 Cal. 23, 66 Pac. 965; People v. Chaves, 122 Cal. 140, 54

Pac. 596; People v. Chaves, 103 Cal. 407, 37 Pac. 389; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183; People v. Turley, 50 Cal. 469. This rule is clearly applicable in a case like this, where the murder was committed in the perpetration or attempt to perpetrate the crime of robbery, and the statute in terms makes such a killing murder of the first degree.

[10] The court instructed the jury as follows: "The court instructs you that if the jury in this case should find the defendant, John S. Rogers, guilty of murder in the first degree, and they also shall find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant, John S. Rogers, from the extreme penalty of the law. The Penal Code invests a jury in a criminal case for murder with the discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment."

Section 190 of the Penal Code has provided, ever since 1874, that "every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same." It is substantially urged that the discretion of the jury here referred to is one to be exercised without any instruction from the court as to the grounds or reasons for the mode in which they shall exercise it. As was said in People v. Bawden, 90 Cal. 195, 27 Pac. 204, if the question here presented were a new one, there would be strong reasons for holding in accord with defendant's claim. In that case a similar instruction was given to the jury, and this court upheld the action of the trial court in view of previous decisions on the same question. People v. Brick, 68 Cal. 190, 8 Pac. 858, was one of these decisions, and in that case the instruction approved was word for word the instruction here given. See, also, People v. Jones, 63 Cal. 168; People v. Murback, 64 Cal. 369, 30 Pac. 608; People v. Olsen, 80 Cal. 122, 128, 22 Pac. 125. The law of this state thus appears to be thoroughly settled to the effect that the instruction in question is not erroneous.

[11] The court failed to instruct the jury as to what constituted robbery or attempted robbery, and also that the neglect of defendant (who did not take the stand as a witness) to be a witness cannot in any manner prejudice him or be used against him on the trial or proceeding. Pen. Code, § 1323. No request for an instruction as to either of these matters was made by defendant. So far as the failure to instruct as to what constituted robbery or attempted robbery is concerned, we are quite satisfied that the general rule obtains to the effect that, where a party in a criminal case fails to ask the court to give instructions to the jury upon a particular point, he cannot complain of error on the part of the court in not giving the instructions. See People v. Gray, 66 Cal. 271, 5 Pac. 240; People v. Christensen, 85 Cal. 568, 571, 24 Pac. 888; People v. Ahern, 93 Cal. 518, 29 Pac. 49.

Nor can we see how any possible prejudice could have resulted to defendant because of the absence of an instruction on that point. The same rule has been applied by this court where, under the same circumstances that existed here, the trial court neglected to instruct the jury in reference to the failure of the defendant to take the stand as a witness in his own behalf. The court said that, in the absence of a request for such an instruction, defendant could not be heard to complain. People v. Flynn, 73 Cal. 511, 15 Pac. 102. This appears to be the conclusion reached in other states where the question has been presented, except in Washington, where a statute in terms provided that "*it shall be the duty of the court to instruct the jury* that no inference of guilt shall arise against the accused if he fail or refuse to testify as a witness in his own behalf." See State v. Myers, 8 Wash. 183, 35 Pac. 582. We have no statute here that specifically requires any instruction on this subject. No reason appears why the decision in People v. Flynn, supra, on this point, is not correct, and we adhere to the views there expressed.

No other point is made for reversal, and after a careful consideration of the whole record we fail to find any substantial error in the proceedings.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

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163 Cal. 469

MARSHALL v. VALLEJO COMMERCIAL BANK et al. (Sac. 1,941.)

(Supreme Court of California. Aug. 7, 1912.)

1. MECHANICS' LIENS (§ 111*) — SUBCONTRACTORS — PAYMENTS TO CONTRACTOR — ABANDONMENT OF WORK.

Under Code Civ. Proc. § 1200, which provided that, where a building contractor failed to complete his contract, the amount available for liens of persons other than the contractor shall be fixed by deducting the payments then due and actually paid from the value of the work and materials already done and furnished, estimated by the standard of the whole contract price, such estimated value was such proportion of the actual value of the work already completed as the total contract price bore to the actual total reasonable cost of the complete improvement; the last-mentioned figure being reached by adding to the actual value of the work done and materials furnished at the time of abandonment the reasonable cost of completing the building.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 144–146; Dec. Dig. § 111.*]

2. Mechanics' Liens (§ 290*)—Foreclosure—Findings—Ultimate Facts.

In an action to enforce subcontractors' liens after abandonment of the work by the principal contractors, it was unnecessary to specifically find the reasonable cost of completed work; the ultimate fact to be found being the value of the work done and materials furnished when the work ceased, estimated as required by Code Civ. Proc. § 1200, upon which the cost of completion was merely evidentiary.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 591–597; Dec. Dig. § 290.*]

3. Mechanics' Liens (§ 115*) — Subcontractors' Liens — Allowance for Payments to Contractor.

Under Code Civ. Proc. § 1184, which provides that premature payment to a contractor shall not affect subcontractors' liens, and under section 1200, which provides for the apportionment of the contract price on the contractor failing to fully perform, the owner, in a suit to foreclose a subcontractor's lien, is not entitled to allowance for payments made to the original contractor before they were due under the contract, though, under agreement between the owner and the principal contractor, the payments were made directly to subcontractors, materialmen, and laborers; and where a portion of such payments were made to plaintiff, without notice to him that they involved a premature payment under the original contract, he could retain the amount of such payments, and claim the benefit of the statute as to the balance due him.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150–159; Dec. Dig. § 115.*]

4. Mechanics' Liens (§ 115*) — Subcontractors' Liens—Premature Payment by Owner.

Under Code Civ. Proc. § 1184, which makes a premature payment to an original contractor invalid as against liens of subcontractors, an owner cannot excuse such payment, because it was made pursuant to architect's certificates, and the specifications provided that payments would be made on such certificates "as per agreement in contract," which contained nothing on the subject.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 150–159; Dec. Dig. § 115.*]

5. Mechanics' Liens (§ 111*) — Subcontractors' Liens — Deductions — Damages for Contractor's Delay.

Under Code Civ. Proc. § 1200, which fixes the amount applicable to the payment of liens, where a principal contractor leaves work unfinished, in a suit to foreclose subcontractors' liens, the owner is not entitled to deduct the amount of damages sustained through the contractor's failure to complete the building within the stipulated time.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 144–146; Dec. Dig. § 111.*]

Department 1. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

Action by E. E. Marshall against the Vallejo Commercial Bank and another. From a judgment for plaintiff, and from an order denying a new trial, defendant bank appeals. Reversed.

Frederick W. Hall, for appellant. Jordan, Rowe & Brann and E. S. Page, for respondent.

SLOSS, J. The plaintiff in his own right, and as assignee of the Coast Electric Company and of J. W. Mitchell, brought this action to foreclose three mechanics' liens upon the property of defendant, Vallejo Commercial Bank, in the city of Vallejo.

On the 19th day of August, 1907, the Vallejo Commercial Bank, as owner, entered into a written contract with Newton-Sandford Construction Company, as contractor, for the making of certain alterations and additions to a brick building owned by the bank. The contract price was $13,800. The validity of the contract, although questioned by the complaint, was declared by the findings and is not now disputed.

The plaintiff and his assignors were subcontractors of the Newton-Sandford Company, and filed claims of lien for the following amounts: The plaintiff, $2,950; J. N. Mitchell, $393.77; Coast Electric Company, $223.50. The propriety of these demands, as against the contractor, and the regularity of the steps to claim liens therefor, are not questioned. The only controversy is over the amount due from the owner, Vallejo Commercial Bank, and applicable to the satisfaction of these liens.

It appears that the contractor commenced performance of the contract, and continued until on or about January 28, 1908, when it ceased work. Notice of cessation of labor was duly filed by the owner, which proceeded to complete the work itself. The rule for ascertaining the amount available for liens of persons other than the contractor was, under this state of facts, to be fixed according to the provisions of section 1200 of the Code of Civil Procedure, which though repealed in 1911 (Stats. 1911, p. 1319), was still in force at the time of the accrual of the rights asserted in this action.

The court found that at the time of the cessation of labor upon the building by the contractor the value of the work done and materials furnished by the said contractor was the sum of $10,767.34, "estimated according to the standard of the said contract price," and that at said time there had been paid by the Vallejo Commercial Bank on account of said contract the sum of $8,800.51. Of said amount $892.86 was paid before the dates fixed by the contract for payment, and $67.03 of this was paid in excess of progress payments; but all of said $892.86 was paid to subcontractors, materialmen, and laborers having contracts with the Newton-Sandford Construction Company, "and for that reason should now be allowed as a credit to defendant, the Vallejo Commercial Bank." Deducting the sum of $8,800.51 from the sum of $10,767.34, the amount fixed as the value of the materials and labor furnished, estimated according to the contract price, the court found the balance of $1,966.83 to be the amount owing from the bank. From this it deducted $560, the damage found to have been sustained by the bank through the failure of the contractor to complete the building within the agreed time. This left the sum of $1,406.83 which the court, in its conclusions of law, found to be due from the bank, and applicable to the discharge of plaintiff's liens. A decree of foreclosure was entered accordingly. Thereafter, upon motion of the plaintiff, the court amended its conclusions of law and entered a new judgment. The second judgment was based upon the view that, in ascertaining the amount due from the bank, the premature payments of $892.86, and the damages claimed for delay, amounting to $560, should not have been deducted from the value of the materials furnished and labor done at the time when work on the building ceased. The result was to make the balance due from the appellant and applicable to the payment of liens $2,859.69; and the conclusions of law and the decree so declare.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The bank moved for a new trial, which was denied. It appeals from the order denying its said motion, and from the parts of the decree adjudging that the sum of $2,859.69, with interest and costs, is a lien upon its property, and ordering a sale to realize such sum.

[1] The first point urged by the appellant is that the evidence is insufficient to sustain the finding that at the time of the cessation of labor the value of the work done and materials furnished "was the sum of $10,767.34, estimated according to the standard of the said contract price." This contention must be upheld. There is virtually no dispute in the evidence regarding the items which must be taken into account in computing the amount in question. The contract price was $13,800. The *actual* value of the labor done and materials furnished up to the time of cessation of labor was $10,767.34. The amount reasonably and necessarily expended in completing the building was $3,703.06. This made the total cost of the completed building $14,470.40. To this must be added the reasonable cost that would have been incurred in completing, according to the contract, two items of construction, one of which was altered by the substitution of a cheaper material and the other omitted from the building. Accordingly, the value of the work done and materials furnished, "estimated as near as may be by the standard of the whole contract price," as provided by section 1200, was to be fixed by taking such proportion of the actual value of the work and materials done and furnished at the time of abandonment as the total contract price bore to the actual, total reasonable cost of the complete improvement; the last-mentioned figure being reached by "adding to the actual value of the work done and materials furnished at the time of the abandonment the reasonable cost of completing the building." Hoffman-Marks Co. v. Spires, 154 Cal. 111, 97 Pac. 152. Such computation would have resulted in the ascertainment of an amount considerably less than $10,767.34, which was the sum found by the court. This sum was the actual value of the labor and materials, and not the value estimated according to the standard of the contract price.

The alteration above referred to consisted in the substitution of metal for Spanish tile, reducing the actual cost by $225. A heating plant, called for by the contract, was not installed. The appellant claims that the reasonable value of installing this item would have been $375; but the respondent contends, and we think correctly, that there is no sufficient evidence to show this. But whether the cost of the heater be taken into account or not, the finding under discussion cannot stand. If we accept appellant's view on this point, a calculation, under the rule above stated, shows the value of labor done and materials furnished, estimated according to the standard of the contract price, to be $9,859.45, or $907.89 less than the amount found by the court. Omitting any consideration of the heater, the value of the labor and materials, thus estimated, would be $10,110.53, or $656.81 less than the amount found. The error cannot be rectified by modifying the judgment, as suggested in respondent's brief; for the reduction thus proposed is only $499.61, which is not sufficient to meet the requirements of the case. Upon a new trial there can be little difficulty in ascertaining the correct figure, and the court may then have before it sufficient data from which to determine and to take into account the reasonable cost which would have been incurred in installing the heating plant according to the plans and specifications.

As a guide to the court below in its further proceedings, the other points raised by appellant may be briefly discussed.

[2] There was no occasion to make a specific finding of the reasonable cost of completing the work after the cessation of labor by the contractor. The ultimate fact was the value of work done and materials furnished at the time of cessation, estimated as required by section 1200. This was found. The cost of completion was a factor to be considered in finding the ultimate fact, but it was evidentiary merely.

[3] The other points raised go, in the main, to the right of the owner to have allowance for payments made before they were due under the contract. We think the court

rightly held, in its modified conclusions of law and second decree, that such payments were not to be considered. In cases where the contractor has failed to complete his contract, section 1200 supplies, or, rather, supplied, the rule for ascertaining the amount applicable to the payment of liens of persons other than the contractor. From the value of the work done and materials furnished is to be deducted "the payments then due and actually paid, according to the terms of the contract and the provisions of sections 1183 and 1184." Section 1184 provides that "no payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person, except the contractor, but as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding that the contractor to whom it was paid may thereafter abandon his contract. * * *" This language is plain, and leaves no room for a construction which would permit the owner to deduct from the balance applicable to the payment of liens under section 1200 the amount of payments prematurely made. What he is entitled to deduct is the sum of the payments *then due*, and actually paid *according to the terms of the contract*. The statute made a special rule for ascertaining, in cases of abandonment, the amount applicable to payment of liens. It fixed a standard for estimating the value of the work done and materials furnished; and the value, so measured, might be, as in this case it was, considerably less than the actual value. If the owner is to have the benefit of the contract in fixing the sum which shall represent the value to him of the improvement, there is manifest justice in holding him to the terms of the contract when he seeks deductions for payments made to or for the contractor. And such is the express provision of the Code.

The question is not affected by the fact that, under an agreement between the owner and the contractor, these payments were made directly to subcontractors, materialmen, and laborers. It is argued that these persons had a right, equal or superior to that of plaintiff, to share in the fund, and that payment to them could not have injured the plaintiff. But the validity of the claims so paid was not a subject of adjudication in this action; and, in any event, the plaintiff is entitled to stand upon the rights given him by the statute. Nor are these rights lessened by the fact that a part of the premature payments came to his own hands. He had no knowledge that the sums so paid were not yet payable as between the owner and the contractor, and he received no more than was due him. We see nothing inequitable in his retaining these amounts, and still insisting that, for the rest of his claim, he may look to the fund created for his benefit by section 1200. If the owner has to pay more than it contracted to pay, the result is due to its own failure to comply with its contract.

[4] There is no merit in the contention that the payments under discussion are not to be regarded as premature, because made pursuant to architects' certificates. The specifications provide that "payments will be made only on the certificate of the architect as per agreement in contract." The contract contains nothing upon the subject. This provision does not purport to make the certificate of the architect conclusive in favor of the owner or against lienors. It was for the protection of the owner alone (McLaughlin v. Perkins, 102 Cal. 502, 36 Pac. 839), and did not enable him to bind third parties by the act of his agent. Furthermore, the finding that $892.86 was paid before it became due under the contract is not assailed by the specifications of insufficiency of evidence.

[5] It is contended that the bank was entitled to deduct from the balance applicable to liens the damages ($560) suffered by it through the failure of the contractor to complete the building within the stipulated time. The foregoing discussion with reference to the right to deduct premature payments in effect answers this point. Where the work is unfinished, the method of fixing the amount applicable to the payment of liens is fixed by section 1200; and a deduction for damages caused by delay is neither permitted by the section, nor is it appropriate to the special scheme thereby provided to meet a special contingency.

The judgment and the order denying a new trial are reversed.

We concur: ANGELLOTTI, J.; SHAW, J.

163 Cal. 493

BRIDGE et al. v. KEDON. (S. F. 5,796.)

(Supreme Court of California. Aug. 9, 1912. Rehearing Denied Sept. 7, 1912.)

1. ASSIGNMENTS (§ 3*)—EXPECTANCIES—STATUTES.

The provisions of Civ. Code, § 700, that a mere possibility, such as the expectancy of an heir, is not to be deemed an interest of any kind, of section 703, that no future interest in property is recognized by the law, except such as is defined in this division, and of section 1045, that a mere possibility, not coupled with an interest, cannot be transferred, do not change the pre-existing rules of equity on the subject, but merely declare the pre-existing rules of law relating thereto.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 5; Dec. Dig. § 3.*]

2. ASSIGNMENTS (§ 8*)—EQUITABLE ASSIGNMENT—EXPECTANCIES.

An assignment of a mere possibility, such as that of an heir in the estate of his living ancestor, is good in equity, as is one of a vested interest in property to come into existence in the future.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. § 8.*]

3. ASSIGNMENTS (§ 88*)—EQUITABLE ASSIGNMENT—ENFORCEMENT.

Where an assignment, good only in equity, is to secure a loan, it will be enforced only to the extent of the sum actually advanced and reasonable interest.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 135. 136; Dec. Dig. § 88.*]

4. BANKRUPTCY (§ 433*)—DISCHARGE—"LIEN"—EQUITABLE ASSIGNMENT.

The right created by the assignment, as security, of one's expectancy in the estate of his living ancestor, being a present equitable charge, which, when the descent is cast, at once ripens into a "lien" on the property, is within Bankr. Act July 1, 1898, c. 541, § 67, 30 Stat. 564 (U. S. Comp. St. 1901, p. 3449), exempting from its operation and preserving all liens created by the bankrupt, and therefore enforceable against the bankrupt after his discharge, especially where the property did not come into the possession of the assignee in bankruptcy, because not then acquired by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808–823; Dec. Dig. § 433.*

For other definitions, see Words and Phrases, vol. 5, pp. 4144–4153; vol. 8, p. 7707.]

5. ASSIGNMENTS (§ 88*)—EQUITABLE ASSIGNMENT—ENFORCEMENT.

It is not the making of a new contract, but merely the enforcing, so far as just and reasonable, of an assignment to secure a loan at exorbitant interest, to adjudge the amount of the loan and interest at a fair rate a charge on the assigned right.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 135, 136; Dec. Dig. § 88.*]

6. ASSIGNMENTS (§ 8*)—ASSIGNMENT OF EXPECTANCY—CONSENT OF ANCESTOR.

An assignment of the expectancy of an heir in the estate of his living ancestor does not have to be with the approval or consent of the ancestor to be enforceable in equity.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. § 8.*]

7. ASSIGNMENTS (§ 8*)—ASSIGNMENT OF EXPECTANCY—ASSIGNEE.

An assignment of the expectancy of an heir in the estate of his living ancestor, to be enforceable in equity, does not have to be made to one already having some interest, or some possibility of an interest, in the property.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 13; Dec. Dig. § 8.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry S. Bridge and another against Martin Kedon, Jr. Judgment for plaintiffs. Defendant appeals. Affirmed.

Cushing & Cushing and Wm. S. McKnight, for appellant. Thomas E. Haven, for respondents.

SHAW, J. The plaintiff sued to enforce a grant or assignment of the expectant interest of the appellant in the state of his mother, who was then living, to Henry S. Bridge as trustee. Apparently he was trustee for Carrie E. Bridge, and for that reason she is made a party plaintiff, although she was not named in the assignment. It was made as security for the payment of certain sums of money loaned by Bridge to the appellant, for which he executed four notes, amounting to $1,400. Prior to the death of his mother, Kedon was duly adjudged a bankrupt, under the United States Bankrupt Act of 1898, and was in said proceeding duly released and discharged from all debts and claims provable in bankruptcy, including the debts arising from said loans of Bridge to him and the notes given in consideration thereof. Three of the notes bore interest at the rate of 2½ per cent. per month, the other at the rate of 3 per cent. per month, in each case payable in advance and compounded monthly. Kedon's mother died on April 29, 1908, and a decree has been made distributing to Kedon, as one of her heirs, a share of her estate. It is against this share that the plaintiff seeks to enforce the assignment. At the specified rates of interest, there would have been due on these notes, at the time of the judgment below, something over $11,000. The court below found that the rates of interest were exorbitant, and that the contracts were to that extent unfair and unconscionable, and that simple interest of 12 per cent. per annum would be a reasonable and fair amount to be allowed. This reduced the amount owing to Bridge to $2,905.95, which was adjudged to be a charge upon Kedon's share of his mother's estate. Kedon appeals.

[1] The Civil Code provides that "a mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind." Section 700. Also: "No future interest in property is recognized by the law except such as is defined in this division." Section 703. And further: "A mere possibility, not coupled with an interest, cannot be transferred." Section 1045. Notwithstanding these provisions, the courts of this state have recognized and applied the doctrine of equity that a conveyance or release by an heir of his expectancy in the estate of his ancestor will, under some circumstances, be enforced against his share of such estate, after it has devolved upon him by the death of the ancestor. In Pierce v. Robinson, 13 Cal. 123, the court, referring to proceeds of future crops, said that equity will uphold assignments of things which have no present existence, but rest in possibility, and that "an agreement for such interests will take effect as such assignment when the subjects to which they refer have ceased to rest in possibility and have ripened into reality," if fairly made and not against the policy of the law. Similar statements regarding assignments of things not yet existing are made in Bibend v. Insurance Co., 30 Cal. 86, and Bergson v. Insurance Co., 38 Cal. 544, in which the right to the money due upon a

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fire insurance policy assigned as collateral security before the loss occurred was involved.

In Estate of Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, Merritt, a nephew of the deceased, Catherine Garcelon, had, for an adequate consideration and with full knowledge of all the facts, made an agreement with his aunt, whose heir apparent he then was, that he would not assert any right or interest as heir in or to certain of her property, except such as she might give him by her will, and that he would not dispute or question any disposition thereof which she might make by her deed or will. This was said to be, in effect, a release by him to her of his expectancy in that part of her estate to which it related. It was held that the agreement was not contrary to public policy, that it was valid, and that Merritt was thereby estopped from maintaining a contest of his aunt's will. The case involved only the effect of the agreement that he would not contest the will. But the court said that the release of his expectancy was valid, and that the sections aforesaid, 700 and 1045 of the Civil Code, merely declare the rule of law, and did not affect or change the doctrine of equity on the subject of equitable assignments of expectant estates. The question was carefully considered, and the conclusion clearly announced. In Estate of Wickersham, 138 Cal. 362, 70 Pac. 1076, 71 Pac. 437, the court stated the doctrine that such a contract, made on adequate consideration and otherwise unobjectionable, would be enforced in equity "as an agreement to convey, or by way of estoppel or otherwise"; but this, the court said, was not material to the case. The Garcelon Case was cited with apparent approval. In Estate of Ryder, 141 Cal. 370, 74 Pac. 993, it was held that a conveyance of his expectancy by an heir apparent is not such a conveyance of the legal title as will enable the grantee therein to obtain distribution as grantee of the heir under section 1678 of the Code of Civil Procedure. Again the Garcelon Case was cited with apparent approval. It was not necessary in the Ryder Case to determine further the effect of such conveyance, or the rights of the parties thereto between themselves.

The Garcelon Case must be taken as establishing the proposition that the Civil Code does not change the pre-existing rules of equity on the subject, but merely declares the pre-existing rules of law relating thereto. Specifically, the case decides that an heir may, by contract with his ancestor, if not with others, bind himself to refrain from contesting the will of such ancestor. The specific question of the effect of an assignment of an expectant interest by an heir has not been actually involved in any other California case. We must therefore look to general principles, established by the decisions which gave rise to the equity doctrines on the subject, for a guide to our decision.

[2, 3] There is sometimes mentioned a distinction between assignments of property or rights not existing at the time, but which will or may issue as the result of the performance of an existing contractual relation or of an existing executory contract, as, for example, future crops under an existing tenancy, wages not earned under an existing employment, or money payable on an insurance policy in case of a loss, these being of the class considered in the California cases first above cited; that is, possibilities coupled with a present interest, and a grant or assignment by an heir apparent of his expectancy, in which he has no present estate or interest. Mr. Pomeroy mentions this in his work on Equity Jurisprudence. Volume 3, § 1286. The California cases relating to contingent results of existing contracts do not refer to such distinction, and they state the rule as a general one that equity will uphold assignments, not valid at law, of any future interest, as a rule applying alike to those which are vested, but relate to property to come into existence in the future, and those which rest only in possibility, provided they are fairly made and not against public policy.

The general rule in equity is well established. Mr. Tudor, the author of Notes to White & Tudor's Leading Cases in Equity, says: "A mere expectancy, as that of an heir at law to the estate of his ancestor (Hobson v. Trevor, 2 P. Wms. 191; Wethered v. Wethered, 2 Sim. 183, 192; Smith v. Baker, 1 Y. & C. C. C. 229), or the interest which a person may take under the will of another then living (Beckley v. Newland, 2 P. Wms. 182; Bennett v. Cooper, 9 Beav. 252; Flower v. Butler, 15 Ch. D. 665), or the share to which such person may become entitled under an appointment (Musprat v. Gordon, 1 Anst. 34), or in personal estate as presumptive next of kin of a person then living (Hinde v. Blake, 3 Beav. 235; Meek v. Kettlewell, 1 Ph. 347), is assignable in equity for a valuable consideration; and when the expectancy has fallen into possession, the assignment will be enforced." Part 2, vol. 2, p. 839. The cases cited support the text. The numerous cases cited in the extensive note show that the validity of such assignments may be presented either in a suit by the assignor to set aside the assignment, or in a suit by the assignee to enforce it, but that in whichever way it may come before the court, if it is founded upon a valuable consideration and is not contrary to public policy, it will be upheld and enforced to the extent that it is fair and reasonable.

The cases referred to as contrary to public policy are those involving champerty, assignments of salaries, pensions, and the like. Nothing of the kind is presented in this case, and this qualification need not be considered. In regard to the consideration, the decisions are to the effect that where it is a loan, and the interest is exorbitant, or the terms unconscionable, the courts will compel each party to do equity. The assignee, on the one hand, will be allowed to enforce the equitable charge on the property only to the extent of the sums actually advanced and reasonable interest; and the heir, on the other hand, will be given a decree setting aside the assignment only upon the condition that he shall repay the sums advanced, with interest and costs. Id. pt. 2, vol. 1, pp. 678, 692. It is said that the doctrine "was independent of the laws of usury, and it was in force before the statutes relating to usury came into existence." Id. pt. 2, vol. 1, p. 687. Mr. Pomeroy says that "possibilities not coupled with an interest, mere possibilities or expectancies, * * * are, according to the general course of decisions, assignable in equity for a valuable consideration; and equity will enforce the assignment when the possibility or expectancy is changed into a vested interest or possession." 3 Pom. Eq. Jur. § 1287. See, also, 2 Story's Eq. Jur. (13th Ed.) § 1040a. We do not find in any of the decisions or in any of the authorities any difference between the rule as applied to the assignment of property not existing, but which will be the produce or result of an existing contract or contractual relation, and assignments of a mere possibility, such as that of an heir in the estate of his living ancestor, at least so far as the right in either case to enforce such an assignment in equity is concerned.

Under these authorities, there can be no doubt that the grant or assignment of Kedon to Bridge of his expectancy as security for the loan was valid to the extent of the sum loaned and reasonable interest thereon, and that it may be enforced against the part of his mother's estate which on her death descended to Kedon, unless it is barred by the discharge in bankruptcy.

[4] When we look to the reasoning by which the rule is upheld, it is obvious that a discharge in bankruptcy does not invalidate the charge or lien which equity imposes upon the property. Mr. Pomeroy, in explaining the general doctrine on the subject and referring to assignments of expectancies, as well as other interests, says: "The assignee of an expectancy, possibility, or contingency acquired at once a present equitable right over the future proceeds of the expectancy, possibility, or contingency which was of such a certain and fixed nature that it was sure to ripen into an ordinary equitable property right over those proceeds as soon as they came into existence by a transformation of the possibility or contingency into an interest in possession. There was an equitable ownership of property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event." 3 Pom. Eq. Jur. § 1271. And with regard to bankruptcy in section 1291 he says: "According to the general doctrine of equity, established beyond any doubt by the highest judicial authority, the equitable assignment or the equitable lien upon the property to be acquired in the future is valid and enforceable, not only against the contracting party himself, but also against subsequent judgment creditors, assignees in bankruptcy, and all other volunteers holding or claiming under him, and against subsequent purchasers from him with notice of the assignment of lien." As we understand the theory, as stated in section 1271 aforesaid, it is that as soon as the assignment is executed the assignee becomes vested of an equitable right to receive the property ultimately, a right which, by the rules of equity, is sure to become an ordinary vested property right when the event occurs by which the possibility is realized as a certainty. He does not mean to say that the possibility by which the estate becomes an estate of the heir in possession is sure to happen, but that, if it does happen, the equitable right is then sure to ripen into an ordinary property right. The language has been criticised in some cases which attribute to this passage the contrary meaning, that it was the possibility which was sure to ripen into an ordinary property right in the assignee. McCall v. Hampton, 98 Ky. 166, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335. In the case of a loan, according to these principles, there is created by the assignment a present equitable charge on the property, which equity recognizes as vested, although it is neither vested nor valid at law, and which, when the descent is cast, at once ripens into a lien upon the property for the security of the money loaned.

This being the nature of the equitable right created by the assignment, it would follow, in analogy to the rule concerning ordinary liens, that the discharge in bankruptcy did not divest Bridge of his then existing equitable right to Kedon's prospective inheritance. The general rule is well established that an assignment, invalid at law, but good in equity, is valid in equity against the assignor in bankruptcy, whether the thing is assigned absolutely or only as security for a debt. In the latter case, the discharge in bankruptcy terminates the legal personal obligation to pay the debt, and the right granted or assigned is limited to the enforcement of the payment of the money loaned, with interest, out of the property which is the subject of the grant or assignment. 3 Pom. Eq. Jur. § 1291; 5 Am. & Eng. Ency. of Law & Prac. p. 963. The assignment is treated in equity as a present contract to convey the future interest, a contract which creates a trust as soon as the interest becomes absolute; and this is a present existing right by contract, which the discharge in bankruptcy does not avoid or terminate. The continued existence of the debt as a personal obligation to pay money is unnecessary to the enforcement of an equitable charge or lien upon specific property. In Fletcher v. Morey, 2 Story, 555, Fed. Cas. No. 4,864, and Parker v. Muggridge, 2 Story, 345, Fed. Cas. No. 10,743, it was held that the Bankruptcy Act of 1841 excepted from its operation specific equitable liens and charges, as well as legal liens, and that an equitable charge could be enforced against the assignee in bankruptcy. This was put upon the ground that "every such agreement for a lien or charge in rem constitutes a trust," which binds the conscience of the assignor. It is said, further, that the act "was by no means intended to affect any of the equitable liens or other equitable claims of parties, arising under their contracts," and that "the property will be followed and affected with the trust in the hands of the assignee [in bankruptcy] in the same manner and to the same extent as it would be in the hands of the bankrupt."

The Bankrupt Act of 1898 expressly exempts from its operation and preserves all liens created by the bankrupt in good faith and for a valuable consideration more than four months before the filing of the petition in bankruptcy. Section 67, Bankrupt Act; 5 Cyc. 364. The act is in this particular identical with the Bankrupt Act of 1841 (5 Stat. 440, c. 9), and the above decisions apply to it with equal force. It is scarcely necessary to say that, if such an equitable charge in rem can be enforced against the assignor in bankruptcy, it must necessarily be enforceable against the bankrupt himself after his discharge, and especially in cases where the property which is subject to the charge did not get into the possession of the assignee, because at that time it had not been acquired by the bankrupt.

[5] The suggestion that the plaintiff cannot prevail, because equity will not enforce unfair or inequitable contracts, is answered by the fact that, by the refusal to allow the stipulated rate of interest, the court has eliminated the unfair and inequitable elements of the transaction. In doing this it did not make a new contract for the parties. It merely enforced the performance of the contract so far as it was just and fair. An examination of the cases in which the assignments of expectancies have been upheld and enforced discloses that the court has almost invariably deducted exorbitant interest or other unconscionable charges imposed on the necessitous heir at law, and has enforced the charge only to the extent that it was just, fair, and reasonable. The existence of inequitable or unconscionable features does not prevent the enforcement of the grant or assignment so far as it is just and reasonable.

[6] It is claimed that such assignments are not enforced in equity, unless at the time they were executed they were approved or consented to by the ancestor. In suits to set aside such an assignment for fraud or inadequacy of consideration, such consent or want of consent by the ancestor is usually referred to as a material fact bearing upon the fraud or inadequacy; but an examination of the cases shows that this circumstance does not avoid the assignment, but is merely evidence relating to the cause of action, and that, when the assignment is set aside, it is only upon the condition that the real consideration is repaid, with interest.

[7] It is also suggested that an assignment will not be valid, except when it is made to one who already has some interest in the property, or some possibility of an interest, as, for example, a coheir or one of the ancestors. We have found no case in which this doctrine has been announced. On the contrary, a very large number of the cases in which such assignments have been enforced are cases where the assignment was made to an entire stranger both to the family and to the estate.

Our conclusion is that the court below did not err in allowing the enforcement of plaintiff's claim to the extent that it was equitable, fair, and reasonable. It is not claimed that the findings as to what was a fair and reasonable rate of interest under the circumstances are contrary to the evidence.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

(163 Cal. 485)

NAVAJO COUNTY BANK v. DOLSON et al.

(L. A. 2,711.)

(Supreme Court of California. Aug. 7, 1912.)

1. Bills and Notes (§ 396*)—Indorsers—Liability—Notice of Dishonor or Nonpayment.

Notice of dishonor and nonpayment is essential to the liability of indorsers on a negotiable instrument, in the absence of waiver of such notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1022–1028; Dec. Dig. § 396.*]

2. Bills and Notes (§ 145*)—Negotiability—Law Governing.

The negotiability of a note is determined by the law of the place where it was made.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 362; Dec. Dig. § 145.*]

3. Contracts (§ 145*)—Execution—Law Governing.

Ordinarily the place where a contract is made depends, not upon the place where it is written, signed, or dated, but where it is delivered as consummating the bargain.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 728; Dec. Dig. § 145.*]

4. BILLS AND NOTES (§ 145*)—NEGOTIABILITY—LAW GOVERNING.

Where a note was mailed in Kentucky to plaintiff bank in Arizona for negotiation, and was accepted at the bank's place of business, and the amount was thereupon advanced to the maker, the note became an Arizona contract, as affecting the question whether it was negotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 362; Dec. Dig. § 145.*]

5. BILLS AND NOTES (§§ 155, 164*)—NEGOTIABILITY.

A note was negotiable, as affecting the liability of indorsers, who were not given notice of dishonor and nonpayment, where it recited that it was payable nine months after date, though it contained an agreement by the maker "that after maturity this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension had been made," though the obligors waived "all homestead and exemption laws and rights thereunder," since Civ. Code Ariz. 1901, § 3308, provides that the negotiable character of an instrument is not affected by waiver of benefit of any law, and since section 3305 provides that the sum payable is a sum certain, though to be paid "with costs of collection or an attorney's fee in case payment shall not be made at maturity."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 407–414, 417; Dec. Dig. §§ 155, 164.*]

6. BILLS AND NOTES (§ 146*)—NEGOTIABILITY—STATUTORY PROVISIONS.

Civ. Code Ariz. 1901, § 3305, which provides that a note is for a sum certain as affecting its negotiability, though it is to be paid with costs of collection or an attorney's fee, in case payment is not made at maturity, and section 3308, which provides that the negotiability of an instrument is not affected by waiver of the benefit of any law intended for the obligor's protection, were not affected by the enactment in 1905 of section 3847, which defines a negotiable note as an unconditional promise in writing to pay a certain sum of money.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 361; Dec. Dig. § 146.*]

In Bank. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by the Navajo County Bank against A. O. Dolson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. J. Parsons and U. T. Clotfelter, for appellant. J. N. O. Rech, for respondents.

ANGELLOTTI, J. This is an action by plaintiff corporation to recover the amount due upon a note executed and delivered by the White Mountain Health Resort, a corporation, against three persons who, before the delivery of the note, signed their names in blank upon the back thereof. No notice of nonpayment or dishonor of said note was ever given to defendants, or either of them; the first notice or demand upon them for payment being the complaint filed herein. The question presented is whether notice to defendants of such nonpayment or dishonor was essential to a recovery against them. The trial court held, upon the facts found by it, that said notice was essential and gave judgment for defendants. This is an appeal by plaintiff from such judgment.

There is no dispute as to the material facts, which, in addition to the matters already stated, are as follows: Plaintiff is a banking corporation, organized under the laws of Arizona; its place of business being Winslow, Ariz. The note in suit is as follows: "$2000.00. Winslow, Arizona, April 23, 1908. Nine months after date, for value received, waiving grace and protest, I, we or either of us, jointly and severally, promise to pay to the order of the Navajo County Bank of Winslow, Arizona, two thousand dollars with interest at the rate of 10 per cent. per annum from date until paid, principal and interest payable in U. S. gold coin, with ten cent additional on amount unpaid if placed in the hands of an attorney for collection. We agree that after maturity this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension had been made. We hereby expressly waive all homestead and exemption laws and rights thereunder. Interest payable monthly in advance. Payable at the Navajo County Bank, Winslow, Arizona. The White Mountain Health Resort, by Geo. P. Sampson, Pres. Attest: W. C. Kirker, Sec'y."

This note was written at Winslow, Ariz., and there signed by Geo. P. Sampson, the president of the maker, as follows: "The White Mountain Health Resort, by Geo. P. Sampson, Pres." It was then sent to the defendants, at Los Angeles, Cal., and they there indorsed the same by signing their names in blank upon the back. It was then sent by the indorsers by mail from Los Angeles, addressed to W. C. Kirker, the secretary of the corporation maker, at some place in the state of Kentucky. W. C. Kirker there attested the note: "Attest: W. C. Kirker, Sec'y."—and then mailed it, addressed to plaintiff at Winslow, Ariz. It was stipulated that the note was signed by the defendants and all of the parties to it "before it was delivered to the bank." The note, fully signed, was received by plaintiff at Winslow, Ariz., and accepted by it, and plaintiff thereupon paid the consideration therefor to the corporation maker at that place. There was nothing in the evidence to indicate that anything done in reference to the note prior to the time it was received by plaintiff at Winslow, Ariz., fully signed, was done by direction or authority of plaintiff. So far as appears from the record, plaintiff was an absolute stranger to the whole transaction at all times prior to the receipt of the note, fully signed, at Winslow, Ariz., whereupon it there accepted it and made the loan.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It cannot be doubted that if the note was a negotiable instrument the defendants were mere indorsers, with no other liability than that of indorsers. As such, notice of dishonor or nonpayment would be essential to their liability, in the absence of waiver on their part of the right to such notice—an element not present in this case. This is true whether the case is governed by the law of Arizona (which, as far as applicable, is set forth in the findings of the trial court), or by the law of California, or by the law of Kentucky, as to which there is no evidence, and which, consequently, must be presumed to be the same as the law of California. Both by the law of Arizona and California, one placing his signature upon a negotiable instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he indicates by appropriate words his intention to be bound in some other capacity. Rev. Stats. of Ariz., § 3366; Civ. Code Cal. § 3108. And it has been specially provided in both jurisdictions, owing to the divergence of authority as to the character of one indorsing prior to the original delivery of a note or bill (whether indorser, maker, surety, or guarantor), that, where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery to the payee, he is liable as *indorser* (Rev. Stats. Arizona, § 3367; Civ. Code Cal. § 3117), in the absence, of course, of words indicating his intention to be bound in some other capacity. There is absolutely nothing in the California law that dispenses with the necessity of notice of nonpayment to such an indorser of a negotiable instrument (see O'Connor v. Clarke, 44 Pac. 482;[1] Fessenden v. Summers, 62 Cal. 484), and we see no force in the claim of appellant that the Arizona law differs from our law in that regard. The subdivisions of the Arizona section relied on by appellant in this regard simply specify in terms the persons in whose favor the indorser's liability runs, and the liability of every indorser without qualification is declared in section 3369, Revised Statutes. He agrees to pay only if the instrument be dishonored and the necessary proceedings on dishonor be taken; and if notice of dishonor is not given him he is discharged. Section 3392, Rev. Stats. Ariz.

[2-4] Whether or not the note involved here was a negotiable instrument must be determined by the law of the place where the contract between the parties was made. 1 Daniel on Negotiable Instr. § 367. Ordinarily the place where a contract is made depends, not upon the place where it is written, signed, or dated, but upon the place where it is delivered as consummating the bargain. Id. § 868. The learned judge of the trial court was of the opinion that this place was Winslow, Ariz., and that the contract was an Arizona contract. He found from the evidence as we have detailed it, that the secretary (Mr. Kirker) mailed the note in Kentucky to plaintiff at Winslow, Ariz., "*for negotiation*"; that the plaintiff received it at said Winslow, and "accepted said note so indorsed *at its banking rooms in said city of Winslow*," and then and there advanced the principal sum to the maker. Undoubtedly there are many cases holding substantially that the deposit by one party in the mails of an instrument properly addressed to the other party, with postage thereon prepaid, constitutes a delivery to the other party at the place where and the time when it is so deposited. But clearly this cannot be the case, unless the deposit in the mail was under such circumstances that the carrier can reasonably be considered the agent of the party to whom the instrument is adressed, rather than purely the agent of the other party. We can see no ground for doubting the correctness of the conclusion of the learned trial judge upon the evidence before him that Kirker sent this note from Kentucky to plaintiff at Winslow for negotiation and acceptance at the *latter place;* that the carrier in transporting the instrument was in no sense the agent of plaintiff; and that there was no contract between plaintiff and any of the other parties until *it received and accepted the note at Winslow*, Ariz., and consented to make the loan. As we have said, so far as appears, plaintiff was an absolute stranger to the whole transaction up to the time it received the note through the mail. The presumption afforded by the note itself, dated and expressly made payable at Winslow, Ariz., that it was given and accepted in Arizona, was certainly not so overcome by the facts shown by parol evidence as to require a contrary conclusion at the hands of the trial court. There is nothing in Ivey v. Kern City Land Co., 115 Cal. 196, 46 Pac. 929, opposed to our conclusion. We are in no way concerned here with the rule there discussed, to the effect that when a letter is deposited in the mail properly addressed to the proposer, unconditionally accepting a proposal theretofore made, the contract is complete. Under the conclusion of the trial court, which is sufficiently supported by the evidence, the deposit in the mail in Kentucky by Secretary Kirker was the deposit of a mere offer or proposition to plaintiff; and the place where the proposition was received, accepted, and acted upon by plaintiff was, to use the language of the opinion in the case last referred to, "the place where the last act is performed which is necessary to

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[1] Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 112 Cal. xvii.

render the contract obligatory." Loud v. Collins, 12 Cal. App. 786, 789, 790, 108 Pac. 880, also relied upon by appellant, is easily distinguishable from the case at bar. There was ample evidence in that case to support a conclusion that the deposit of the note in the United States post office at Chicago by Alderson was an *acceptance* of a proposition theretofore made to him by the payee, which completed the contract.

[5, 6] We are satisfied that the note must be held to have been a negotiable instrument under the law of Arizona. Under express provision of the statutes, the negotiable character of an instrument otherwise negotiable is not affected by a provision which waives the benefit of any law intended for the advantage or protection of the obligor (section 3308, Revised Stats.), and the sum payable is a sum certain, within the meaning of the law defining negotiable instruments, although it is to be paid "with costs of collection or an attorney's fee in case payment shall not be made at maturity." Section 3305, Revised Stats. Clearly neither of these provisions can be held to have been affected by the enactment, in the year 1905, of a new section defining a negotiable promissory note as "an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to order or to bearer." Section 3847, Rev. Stats. This was practically but a re-enactment as to promissory notes, in more concise phraseology, of the old section defining negotiable instruments. Section. 3304, Rev. Stats. There is no warrant for holding that it was intended to repeal such other provisions as those defining the term "a sum certain in money," or the provision for waiver of exemption. The only other provision which is claimed to affect the negotiable character of the note is that declaring: "We agree that after maturity this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension has been made." The point made by appellant is that this provision makes the time of payment uncertain and unascertainable from anything stated in the face of the note; the statute requiring, as we have seen, that the promise to pay must be "on demand or at a fixed or determinable future time." When it is said that the time of payment must be stated with certainty, the time referred to is that when the holder can insist on payment. Therefore, if the time when the holder has the absolute right to demand payment is prescribed with certainty, the note is negotiable, so far as this objection is concerned. See National Bank, etc., v. Kenny, 98 Tex. 293, 83 S. W. 368; Missouri, etc., Co. v. Long (Okl.) 120 Pac. 291; Cunningham v. McDonald, 98 Tex. 316, 83 S. W. 372; First Nat. Bank v. Buttery, 17 N. D. 326, 116 N. W. 341, 16 L. R. A. (N. S.) 878, 17 Ann. Cas. 52. There is nothing uncertain in this note about the date of maturity. The provision refers only to something that may be done by the maker, if the holder agrees thereto "after maturity." Clearly the provision referred to is in no way binding upon the holder of the note. No one can reasonably claim that the effect thereof is to give the maker the right to extend the time of payment, without the consent of the holder. The note was dated April 23, 1908, and by its terms, unaffected by anything in the provision referred to, was to mature "nine months after date," at which time the holder, so far as anything contained therein is concerned, had the absolute right to insist on payment. There was no provision under which the time so specified could be changed, or the right of the holder to insist on payment at such time be held to be affected. Where the time is thus definitely and irrevocably fixed at which the note shall mature, and the holder shall be at liberty to compel payment, we are unable to see how a provision looking to a possible agreement between the parties, after maturity, for an extension renders the executed note at all indefinite or uncertain as to the time when it is payable. The reasoning of the authorities already cited fully supports our conclusion on this point. Most, if not all, of the cases cited by appellant on this point are distinguishable by reason of the nature of the provision held to render the instrument uncertain and indefinite as to the time of payment.

It is to be noted that there does not appear to be contained in the Arizona law any provision similar to our section 3093 of the Civil Code, declaring that a negotiable instrument must not contain any other contract than such as are specified in the article relating to such instruments.

We are forced to conclude upon the record that the note here involved was a negotiable instrument; that the defendants were mere indorsers thereon; and that they were relieved from liability on account thereof by the failure of plaintiff to give them notice of its dishonor and nonpayment.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.; LORIGAN, J.

(163 Cal. 503)

ALDERSON v. CUTTING. (L. A. 2,869.)

(Supreme Court of California. Aug. 12, 1912.)

1. DEEDS (§ 173*)—BUILDING RESTRICTIONS—VIOLATION—RIGHT OF ACTION.

The deed of each of the lots into which a tract is platted being conditioned that a residence shall not be erected on the lot within less than 25 feet of its front line, and this being declared to be for the benefit of the other lots, action for violation thereof on one lot may be brought by the owner of one of the other lots.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 543; Dec. Dig. § 173.*]

2. DEEDS (§ 171*)—BUILDING RESTRICTIONS—VIOLATION.

The condition in a deed of a lot that a residence shall not be erected less than 25 feet from the front line of the lot is violated by the outer line of the roof extending over a porch to within 22 feet 8 inches of the street, and pillars supporting the outer side of the porch encroaching 5 inches; these being substantial parts of the building.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 537–542; Dec. Dig. § 171.*]

3. DEEDS (§ 171*)—BUILDING RESTRICTIONS—VIOLATION.

Steps leading to the building are not an integral part of it, within the restriction of a deed against erecting a dwelling within 25 feet of the front line of the lot.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 537–542; Dec. Dig. § 171.*]

4. DEEDS (§ 175*)—BUILDING RESTRICTIONS—VIOLATION—WAIVER.

Plaintiff, owning one of the lots into which a tract was platted, the deeds of each of which contained a restriction against building within 25 feet of the street, did not waive her right to complain of defendant's violation thereof on his lot, damaging her property, because not having complained of prior violations on other lots which did not damage her.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 545, 548; Dec. Dig. § 175.*]

5. DEEDS (§ 175*)—RESTRICTIONS—WAIVER—KNOWLEDGE OF FACTS.

There can be no waiver, in the absence of knowledge of the facts on which the claim of waiver is based.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 545, 548; Dec. Dig. § 175.*]

6. STIPULATIONS (§ 14*)—OPERATION—FINDINGS OF FACT.

A stipulation that certain allegations of the answer are true amounts to an agreed statement of facts as to such issues, as to which findings are not required.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. § 14.*]

7. INJUNCTION (§ 195*)—TRIAL OF ISSUES—CONFORMITY TO PLEADING—DAMAGES.

The complaint stating two causes of action, one for injunction, the other for damages, both for violation of a building restriction, the denial of injunction is no reason why the judgment for damages, to which the facts show plaintiff entitled, cannot stand.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 415; Dec. Dig. § 195.*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Maude W. Alderson against Freeman J. Cutting. Judgment for plaintiff. Defendant appeals. Affirmed.

Harris & Swanwick, for appellant. Smith, Miller & Phelps and William A. Alderson, for respondent.

SLOSS, J. The plaintiff recovered judgment for $300 damages for the violation of a building restriction. The defendant appeals from the judgment and from an order denying his motion for a new trial.

The parties are owners of adjoining lots in block A of West Park tract in the city of Los Angeles. The plaintiff acquired her lot, No. 38, in 1907. Lot 39 was purchased by the defendant in 1909. The tract had been platted by its owners for purposes of sale, and all deeds made by them, including the deeds to plaintiff and defendant of lots 38 and 39, respectively, contained provisions to the effect that no building other than a residence with the customary outbuildings should be placed upon the lot conveyed, and that such residence should be erected not less than 25 feet from the front line of the premises. Each of said deeds declared that the conditions stated should, as to each owner of any other lot in the tract, his heirs, successors, or assigns, operate as covenants running with the land for the benefit of such other lots or their owners. The plaintiff had erected a residence upon her lot before the defendant made his purchase. After purchasing, the defendant commenced the erection of a residence upon lot 39. The plaintiff promptly protested against the erection of the proposed structure, on the ground that the building would be nearer the street line than 25 feet. Notwithstanding the protest, the defendant proceeded with the construction. The court finds that a substantial and integral part of defendant's building extended 2 feet 4 inches within the restricted distance of 25 feet from the street line, and that thereby the defendant violated the restriction, and damaged plaintiff's property in the sum of $300.

[1] The validity of restrictions like those here involved is not open to question. Firth v. Marovich, 160 Cal. 257, 116 Pac. 729. In case of a violation, relief may be sought by the owner of any lot in the tract for the benefit of which the restrictions were imposed.

[2] The evidence supports the finding that the defendant, in erecting his house, exceeded the limits permitted by the terms of his deed. It appears that the defendant's building was a one-story dwelling, the roof extending on the front over a porch. There are five pillars, supporting the roof, at the outer side of the porch. The outer line of the roof is 22 feet 8 inches from the street. The pillars, too, encroach by 5 inches, and their caps slightly more. The purpose of the restriction is to prevent the encroachment of substantial parts of buildings. Ogontz Land, etc., Co. v. Johnson, 168 Pa.

178, 31 Atl. 1008. The projecting roof and pillars occupied such a relation to the building as to warrant the finding that they were substantial parts of the structure. Bagnall v. Davies, 140 Mass. 76, 2 N. E. 786; Reardon v. Murphy, 163 Mass. 501, 40 N. E. 854.

[3] On the other hand, a provision like the one in question does not prohibit the placing of steps within the restricted space. Kirkpatrick v. Peshine, 24 N. J. Eq. 206; Ogontz Land, etc., Co. v. Johnson, supra; Tripp v. O'Brien, 57 Ill. App. 407. The steps leading to a building are not an integral part of it, within the meaning of the clause under consideration. There is, therefore, no force in appellant's contention that plaintiff cannot maintain this action because she herself had built her house within the 25-foot limit. The evidence shows that the only part of plaintiff's house extending over the line consisted of the front steps and the buttresses supporting the same.

[4, 5] It is further urged that plaintiff's right to complain of the location of defendant's house had been waived by reason of the fact that, before defendant bought his lot, buildings had been put upon various other lots in the tract in violation of the restriction, and no objection on account of such buildings had been made by plaintiff or other lot owners. But there is nothing to show that any of the other violations had caused any damage to plaintiff. Under these circumstances, her failure to object did not affect her right of action for a violation which did damage her property. Payson v. Burnham, 141 Mass. 547, 6 N. E. 708; Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936; Zipp v. Barker, 40 App. Div. 1, 57 N. Y. S. 569. Furthermore, the court finds, and the finding is sustained by the evidence, that the plaintiff did not know, until the filing of the answer herein, that the restriction had been violated by any person other than the defendant. There can be no waiver, in the absence of knowledge of the facts upon which the claim of waiver is based. Bucklen v. Johnson, 19 Ind. App. 406, 420, 49 N. E. 612, and cases cited; Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990.

[6] The claim that the court failed to find upon certain issues raised by the answer may be disposed of by pointing out that there was a written stipulation to the effect that these allegations of the answer were true. To the extent of the issues thus covered, this amounted to an agreed statement of facts. No finding is required with respect to facts which have thus been settled by agreement of the parties. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364.

[7] The only other point made by the appellant is that the judgment, denying to plaintiff the injunction which she sought, and giving her damages alone, cannot stand. Quoting from appellant's brief, his contention is that "the giving of damages by the court is an alternative remedy, which may be administered in place of the injunction, but that there is no right to damages independent of an injunction." No sufficient reason in support of this claim is suggested, and none occurs to us. The complaint stated two causes of action; one seeking equitable, the other legal, relief. If plaintiff's rights were invaded, as the findings show they were, she is entitled to recover such damages as she sustained, notwithstanding the conclusion of the court that the equitable remedy of injunction should not be granted.

The judgment and the order denying a new trial are affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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163 Cal. 507

VANDERBILT v. ALL PERSONS CLAIMING ANY INTEREST IN OR LIEN UPON THE REAL PROPERTY HEREIN DESCRIBED OR ANY PART THEREOF.

(S. F. 5,537.)

(Supreme Court of California. Aug. 14, 1912. Rehearing Denied Sept. 13, 1912.)

1. QUIETING TITLE (§ 23*)—PLAINTIFF'S POSSESSION—SUFFICIENCY.

That from the San Francisco earthquake, April 18, 1906, until September 21, 1906, a lot was not occupied by any one, except that a watchman visited the place daily, the ruins of the building, which was practically destroyed, remaining, does not show such lack of actual possession by the owner as to prevent her from suing on the later date to quiet title, under the McEnerney Act (St. 1906 [Ex. Sess.] p. 78).

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 55, 56; Dec. Dig. § 23.*]

2. STATUTES (§ 267*)—RETROACTIVE OPERATION—EVIDENCE—PENDING ACTIONS.

Erroneous admission in evidence of abstracts of title in a suit to quiet title was not cured by subsequent enactment of Code Civ. Proc. § 1855a (St. 1911 [Ex. Sess.] p. 64), which authorizes admission of such evidence.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350–359; Dec. Dig. § 267.*]

3. STATUTES (§ 263*) — RETROACTIVE OPERATION.

Retroaction is never allowed to a statute, unless required by express legislative mandate or unavoidable implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.*]

4. QUIETING TITLE (§ 25*) — PAYMENT OF TAXES.

Right to have title to a strip of land quieted is not defeated by another's payment of taxes without claim of title and under a mistaken assessment.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 58; Dec. Dig. § 25.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Virginia Vanderbilt against all persons claiming any interest in or lien upon the real property herein described. From a judgment for plaintiff, Owens & Unger, a corporation, appealed to the District Court of Appeal, and a rehearing was granted by this court. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Houghton & Houghton, for appellant. Tobin & Tobin and Geo. A. Clough, for respondent.

MELVIN, J. [1] After decision by the District Court of Appeal a rehearing was granted in this case, in order that we might further examine the two principal questions, which were as follows: (1) Was the evidence of plaintiff's actual possession of the property sufficient? (2) Was the abstract of title offered and accepted in evidence by the trial court properly admissible under the provisions of section 1855a of the Code of Civil Procedure? As we agree with the answer of the District Court of Appeal to the first question, we adopt a part of its opinion upon that subject, as follows:

"This is an action to quiet title, under the so-called McEnerney Act (St. Ex. Sess. 1906, p. 78), to certain lots in the city and county of San Francisco. Plaintiff had judgment, from which, and from the order denying its motion for a new trial, defendant corporation, Owens & Unger, appeals.

"The action concerns several different parcels of real estate, only one of which is involved in this appeal, referred to as parcel 6 in paragraph IV of the complaint, described as follows: 'Commencing at the point of intersection of the northerly line of Pacific street with the westerly line of Front street; thence running northerly along the westerly line of Front street 147 feet 5 inches; thence at right angles westerly and parallel with the northerly line of Pacific street, 137 feet and 6 inches; thence at right angles southerly and parallel with the westerly line of Front street 147 feet 5 inches to the northerly line of Pacific street; thence easterly along the northerly line of Pacific street 137 feet 6 inches to the point of commencement.'

"Defendant, Owens & Unger, in its answer, claimed 'an easement appurtenant of and for a right of way over and upon a portion of the said real property in said complaint described,' as follows: Then follows the description of a strip of land, 'being the northerly nine (9) feet eleven (11) inches of the real property described in the said complaint herein,' sometimes referred to herein as strip A. In an amended answer said defendant pleaded sections 318, 319, and 325 of the Code of Civil Procedure in bar of the action, alleging that neither the plaintiff nor any of her grantors have paid all or any of the taxes, state, county, and municipal, which have been levied and assessed upon the said strip of land. At the close of the testimony defendant was granted leave to file a second amended answer 'to conform to the proof offered on the trial of this case.' By this amendment defendant pleaded adverse possession of a tract of land 128 feet 7½ inches on Front street by 137 feet 6 inches running north. It is then alleged that 'of the land above described' a strip 12½ inches fronting on Front street, 'taken from the south end of the land hereinbefore described, is a part of the land described in the sixth paragraph or description of land in the complaint herein.' It is next, and lastly, alleged that 'for more than 10 years prior to the commencement of this action, the whole of the 50-vara lot of land situate on Broadway and Front street in the city and county of San Francisco, and described as follows: [137 feet 6 inches along Front street and of like depth]—and the buildings and improvements on said land, have been each and every year of said 10 years, and for each and every year since this action was commenced, assessed to the defendant Owens & Unger, and its grantors,' and by them paid, 'and that at no time within said period has plaintiff paid any of the taxes levied and assessed on said land or any part thereof.'

"Plaintiff, as we have seen, claims a frontage of 147 feet 5 inches on Front street, which thus overlaps the lot claimed by defendant 9 feet 11 inches. The complaint was filed September 21, 1906."

Here follows a catalogue of appellant's specifications of alleged error, and then the opinion thus proceeds:

"1. The first point made in the attack upon the findings and judgment is that proof of actual possession when the action is brought is necessary to the jurisdiction of the court and to the rendering of judgment for plaintiff, and is insufficient; citing Lofstad v. Murasky, 152 Cal. 64, 91 Pac. 1008. In that case the court said: 'In order to constitute such possession, there must be an appropriation of the land by the claimant such as will convey to the community where it is situated visible notice that the land is in his exclusive use and enjoyment; an appropriation, manifested by either inclosing it, or cultivating it, or improving it or adapting it to such uses as it is capable of.' The court also held that there must be such actual possession as is required under the statute 'to maintain title by adverse possession when such title is founded upon a written instrument.' It was also held that this same possession 'must be stated or shown in his affidavit,' and 'upon the hearing before the court for the purpose of obtaining the decree authorized under the act he must prove actual possession of the property at the time of filing his complaint and making his affidavit as it is defined by these authorities.' The averments of actual possession both in the complaint and the affidavit in its support are sufficient.

"It is claimed by plaintiff that James G. Fair, plaintiff's testate, acquired the property in controversy in 1889, and witnesses testified that in 1890 or 1891 Fair built a five-story brick building covering the entire lot now claimed by plaintiff; that the north wall was up to or against the south wall of the building formerly on the lot at the corner of Broadway and Front street, or, if not quite to that wall, that the Fair building extended over the entire 147 feet 5 inches along Front street. Aside from the question of title, and addressing ourselves to the question of actual possession at the commencement of the action, it appears from the evidence that the Fair building was practically destroyed by the earthquake and fire of April 18, 1906, and on September 21st following this action was commenced. Witnesses testified to the then condition of the ruins, and it appeared that the building had a basement some 7 or 8 feet below the level of the pavement on Front street; that the walls of this basement up to the level of the pavement were intact; that at places the wall of the building was standing several feet above the basement. Witness Brock testified that 'the westerly wall was standing to the height of about three stories, perhaps four—the building was formerly a five-story building—and on the north wall there were probably 20 feet of the wall above the street line and foundation'; that in the disaster the walls had fallen into the basement, substantially filling it with brick and débris, and that the brick had also fallen on the pavement of both Front and Pacific streets; in this mass of material in the basement were the remains of machinery which had been used by tenants of the building; that plaintiff's agents had a watchman and caretaker of plaintiff's property, whose duty it was to visit this and other of plaintiff's property daily, and that he did so look after it; that at one point on Pacific street about 20 feet of the pavement had fallen in, and the agents put a fence around that opening to prevent accidents to pedestrians; that plaintiff was not herself, nor was any one for her, in actual physical possession of the property at the commencement of the action.

"In the case of Lofstad v. Murasky, supra, as we understand the facts, the land was open, vacant, unoccupied, and unimproved. There was nothing to show to the community that the land had an owner, or that there was or ever had been possession of the land by any one, except constructive possession, and the affidavit and complaint stated that this was the only possession claimed by plaintiff. We do not think the court intended by its decision to hold that actual physical occupancy by the owner or a tenant must be shown in all these cases, or that evidences of possession or occupancy such as under normal and ordinary conditions are required, and as pointed out in the opinion, must be made to appear in every case. Without undertaking to say to what extent the condition in which the great fire of April 18th left a building which had occupied a lot will be satisfactory evidence of actual possession by the owner, within the meaning of the remedial act, we have no hesitation in holding that, in the present case, in view of the facts shown, and the fact that the action was commenced so soon after the disaster, and so soon after the act went into effect, the requirements of the statute are satisfactorily met."

[2, 3] The trial court permitted the introduction in evidence of certain abstracts made up and certified long after the fire of April 18, 1906, and based partially upon Edwards' Abstracts of Records or Breviate. Under section 1855a of the Code of Civil Procedure, as it existed at the time of the trial, this ruling was erroneous. Dahler v. All Persons, etc., 124 Pac. 995. It is suggested, however, that, section 1855a of the Code of Civil Procedure having been so amended since the trial that the evidence offered in the case at bar would be now admissible, it would be useless to remand the cause for retrial. We do not doubt that the section in its present form would justify the rulings admitting the abstracts, if the case were tried now, because section 1855a at present provides that "when, in any action, it is desired to prove the contents of any public record or document lost or destroyed by conflagration or other public calamity and after proof of such loss or destruction, there is offered in proof of such contents * * * any abstract of title, or of any instrument affecting title, made, issued and certified as correct by any person, firm or corporation engaged in the business of insuring titles or issuing abstracts of titles, to real estate, whether the same was made, issued or certified before or after such loss or destruction and whether the same was made from the original records or from abstracts and notes, or either, taken from such records in the preparation and upkeeping of its, or his, plant in the ordinary course of its business, the same may, without further proof, be admitted in evidence for the purpose aforesaid." Stats. 1911, Extra Session, p. 64.

But, conceding that now the policy of the law is to admit abstracts in evidence in the court below, does that justify this court in affirming a judgment supported by evidence erroneously admitted at the time of the trial? Section 1855a does not in terms, at least, assume any retroactive effect, and, while it marks a change in legislative policy, it contains no express authority for this court to apply that amended policy to pending appeals. Appellant, relying upon the plain terms of the section as it existed at the time of the trial, may have omitted to put in all of the proofs of its asserted title. For aught we know, it may be in possession of other evidence, which would have been introduced, if the cause had been tried upon the rule which now prevails. A great injustice might be wrought if appellant were denied the opportunity of offering such proofs. When a remedy is sought which is not authorized by law, a subsequent statute giving such remedy does not operate on the existing suit. Wetzler v. Kelly & Co., 83 Ala. 443, 3 South. 747. Retroaction is never allowed to a statute, unless required by express legislative mandate or unavoidable implication. Smith v. Lyon, 44 Conn. 178. In Ex parte Sparks, 120 Cal. 400, 52 Pac. 717, this language appears: "In regard to acts concerning procedure, the question as to their retrospective operation in general has reference to pending cases. No case is cited in which it has been held that such law, in the absence of a declared intent, has rendered valid a proceeding entirely closed before the enactment of the law." We find no authority which would justify us in sustaining the judgment because of the change in the statute after the commission of error in admitting the abstracts of title without warrant in the law then in force.

[4] As the case must be again tried, it is unnecessary to discuss in detail the remaining points raised in the court below. One of these relates to the payment for years by defendant and its predecessors of the taxes upon a strip of land adjacent to its building and claimed by plaintiff. If the new trial shall reveal the fact to be (as the District Court of Appeal found upon the record before it, composed partly of the incompetent evidence) that plaintiff holds the fee to this strip of land and has occupied it by a portion of her building for many years, and that payment of taxes on it was based, not upon any claim of title by Owens & Unger, but upon a mistaken assessment, then such payment would not defeat Mrs. Vanderbilt's right to have her title to this strip of land quieted.

At the trial objection was made by appellant that plaintiff had failed to give notice, as provided in section 1855a, Code of Civil Procedure, of the intention to use certain abstracts at the trial. We need not pass upon the bearing which the failure to give such notice might have upon the rulings of the trial court, as this question may be so easily eliminated from the new trial by compliance on respondent's part with all of the requirements of that section of the Code.

The judgment and order are reversed.

We concur: LORIGAN, J.; SLOSS, J.; SHAW, J.; ANGELLOTTI, J.; HENSHAW, J.

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163 Cal. 514

In re COZZA. (S. F. 5,960.)

(Supreme Court of California. Aug. 15, 1912. Rehearing Denied Sept. 13, 1912.)

1. ADOPTION (§ 3*)—STATUTORY PROVISIONS.

The right to adopt a child exists only by statute, which may prescribe the conditions under which an adoption may be legally effected.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.*]

2. ADOPTION (§ 7*)—JUDICIAL PROCEEDINGS—CONSENT OF PARENT—STATUTORY PROVISIONS.

Under Civ. Code, § 224, providing that a child cannot be adopted without the consent of its parents, except that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of adultery or cruelty and for either cause divorced, or who has been judicially deprived of the custody of the child on account of cruelty or neglect, etc., consent of the parent to the adoption of a child is jurisdictional, unless the exceptions specified in the statute exist.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*]

3. ADOPTION (§ 13*) — JURISDICTION OF COURT—DISCRETION OF COURT.

The court, in proceedings under Civ. Code, § 224, for the adoption of a child, has no discretion to make an order of adoption merely because it deems that the interest of the child will be promoted thereby, regardless of the consent of the parent or the existence of the prescribed conditions dispensing with consent.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 23; Dec. Dig. § 13.*]

4. ADOPTION (§ 20*)—STATUTORY PROVISIONS—EFFECT OF ADOPTION.

The act of adoption severs the legal relation between parent and child, and destroys their reciprocal relations, and creates new ones between the adopting parent and the child; and the law, recognizing the natural rights of parents, will permit adoption only with the consent of the parents, unless under exceptional conditions prescribed by law, consent is unnecessary.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 29–32; Dec. Dig. § 20.*]

5. ADOPTION (§ 3*)—STATUTORY PROVISIONS—CONSTRUCTION.

A statute authorizing the adoption of a child, and thereby depriving the parent of his natural rights, must be strictly construed; and to warrant the exercise of the power of adoption conferred on the court, and sustain an order of adoption made in opposition to the wishes and against the consent of the natural parent, the existence of the statutory conditions rendering consent unnecessary must be clearly proved.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 1, 2; Dec. Dig. § 3.*]

6. ADOPTION (§ 7*)—STATUTORY PROVISIONS—CONSTRUCTION.

Civ. Code, § 224, providing that a child cannot be adopted without the consent of its parents, except that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of adultery or cruelty, and for either cause divorced, or who has been judicially deprived of the custody of the child on account of cruelty or neglect, does not dispense with the necessity of consent by a mother who has been divorced from her husband on the ground of her cruelty towards him, but awarded by the decree of divorce the custody of the children of the marriage, and does not interfere with the orders of the court in divorce proceedings as to the custody of children.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*]

7. ADOPTION (§ 7*)—CONSENT OF PARENT—NECESSITY—"ABANDONMENT."

Evidence *held* not to justify a finding that a parent has abandoned a minor child, within Civ. Code, § 224, providing that a child cannot be adopted without the consent of its parents, unless the child has been abandoned. To constitute an "abandonment," there must be an intention to do so, express or implied, from the conduct of the parent respecting the child.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Adoption, Cent. Dig. §§ 7–10; Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 1, pp. 4–13; vol. 8, p. 7559.]

8. ADOPTION (§ 15*)—JURISDICTION OF COURT.

The court, on appeal by a mother from an order of adoption made without her consent, will not, on reversing the order, direct the restoration of the child to the mother; but her remedy is by habeas corpus.

[Ed. Note.—For other cases, see Adoption, Cent. Dig. § 26; Dec. Dig. § 15.*]

Department 2. Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

In the matter of the adoption of Margaret Cozza. From an order of adoption, Filomena Setaro, formerly Filomena Cozza, the natural mother of the child adopted, appeals. Reversed.

H. A. Blanchard, for appellant. Frank H. Benson, Daisy M. Bowen, and A. M. Free, for respondents.

LORIGAN, J. This is an appeal from an order of adoption, taken by Filomena Setaro, formerly Filomena Cozza, the natural mother of the child. The father and mother of the said child were divorced by a decree of the superior court of the state of Washington, entered February 27, 1904, on the ground of extreme cruelty on the part of the wife towards her husband, and by the decree the two children of the marriage, the above Margaret and her sister Mary, were given to their mother; the father being required to pay $10 per month in aid of their support. The decree provided that the children should not be removed from the jurisdiction of the superior court rendering the decree. The mother desired to come to her sister in California and take the two children with her; but the father objected to Margaret going, and an arrangement was made between them by which Margaret should remain in Washington, the father to place her in a convent in Tacoma and pay for her support there and whenever the mother should thereafter desire it she might take the child. Margaret was then about two years of age; her sister Mary, a few years older. Margaret was accordingly placed in the convent, and the mother and Mary came to Santa Clara county, in this state, where, about two years afterwards, the mother married one A. Setaro. Margaret remained under the control of her father in Tacoma for about four years. She had been taken from the convent and placed in the custody of a family in Tacoma, with whom her father lived. Information having been received by the mother and her sister Mary that she was being cruelly treated by her father, Mary was anxious to go to Tacoma and bring Margaret back with her. It does not appear that the stepfather was informed of this intention, and, in fact, while the mother had expressed a willingness that Mary should go, the latter left for that purpose without notifying her mother that she then intended to do so, and without having obtained the permission of either her mother or stepfather. When Mary reached Tacoma, she went to live with her father, and kept house for him and Margaret for about six months. Observing that the information of ill treatment towards Margaret by her father was true, and learning, further, that he contemplated remarriage, Mary prevailed on him to allow her to take Margaret to her mother in California, to which he consented, though hesitatingly, and advanced the money to defray their expenses.

Immediately that the children came into the household of their mother and stepfather in San Jose, the latter objected to their remaining there at his charge and expense, insisting that their support should be borne by their natural father under the decree of divorce, and was particularly irritated by the circumstance that a portion of the money which had been given by their father to the children when they left Tacoma had been spent for clothing for them, instead of being given to him for their support. There is no doubt but that this attitude of the stepfather toward the children was the occasion of considerable quarreling between himself and his wife, as it is equally clear that she begged and pleaded with him to let them remain. He was, however, obdurate, and shortly thereafter consulted a deputy probation officer of the superior court of Santa Clara county, with the result that a complaint was sworn to by that officer, under the provisions of the "Juvenile Court Law Act," charging the girl Mary with persistent refusal to obey "the reasonable and proper orders and directions of her parents or guardians." Under this petition, which was filed April 29, 1909, not only Mary, but also Margaret, was taken from the custody of the mother by the officer. Mary was temporarily placed by order of the court in the custody of one of its probation officers, and Margaret was given into the charge of Mrs. I. C. Merriman, another of said officers. On May 14, 1909, Mary was by order of court returned to her mother, and on May 18, 1909, four days thereafter—Margaret being still in the custody of Mrs. Merriman—a complaint was filed against her by another of the probation officers of the court, making the same general charge as was made against her sister Mary. No notice of the filing of this last petition was given to the mother. No citation was served upon her, and it does not appear that she was present at any time when the proceedings against Margaret were heard. In fact, the evidence quite clearly shows that neither she nor the stepfather was there. On May 28, 1909, an order of court in the proceeding was made, placing this child in the custody of Mrs. Merriman (in whose custody she then actually was by virtue of the order previously made in the proceedings against Mary) until the further order of the court, and a year afterwards—on May 27, 1910—a similar order was made. From the time that this child was taken from the custody of her mother she remained theoretically in the custody of Mrs. Merriman under the order of the court. Actually, however, she was placed by Mrs. Merriman in the immediate care and custody of the petitioners in this proceeding for adoption, F. A. Marriott and his wife, the latter a daughter of Mrs. Merriman, and the child has resided in their family and been cared for by them ever since.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Soon after the original order taking the children from the custody of the mother, the stepfather repented of his conduct and took Mary back into the family. He then joined with his wife in the effort she was making, and which she has all along made, by herself and others acting in her behalf, to have her child Margaret restored to her. Both she and her husband are Italians, having but a limited and imperfect knowledge of the English language and ignorant of our laws. She was given to understand (whether correctly or incorrectly is of no consequence) that nothing could be done toward securing the restoration of her child until the end of the year, for which period she was informed the court had ordered the child to be retained in the custody of Mrs. Merriman. She stated that she was so advised by attorneys whom she had consulted, and by others. This matter of a year arose from the fact that while the original order in the proceeding against Margaret was in fact, as appears by the record of the juvenile court, that the child be retained by Mrs. Merriman until its further order, it appears from the desk book record of the judge of the superior court in whose department the juvenile court proceeding was had (and so stated by him on the hearing) that the custody was ordered for one year. This accounts for the statement, made by the mother and those aiding her, that in her efforts to have her child restored she was informed that nothing could be done until the year had expired. The mother during all of this time sought an opportunity to see and converse with her child, a privilege which was invariably denied her. It may be said here, and it is not disputed, that both the stepfather and mother of the child are shown to be industrious, honest, and frugal people, possessed of a good home and considerable means, that the mother has endeavored and been anxious and desirous of having her child restored to her, and that she and her husband are willing, competent, and able to take charge of her.

There is no evidence that the child Margaret was ever cruelly treated by her stepfather or her mother while with them, and there is no evidence of any want of maternal affection and love for the child. Failing to secure the return of her child through her own efforts and those of her relatives, and believing that she could not do so until the end of the year, some time after the expiration of that period, and on January 25, 1911, she filed a petition before the superior court, exercising jurisdiction as the juvenile court, and before the judge thereof who made the order respecting the child, asking that the court order the return of said child to her, under its power to set aside, change, or modify an order for such custody at any time during the minority of said child, and asked that a citation be issued by the court and served upon Mrs. Merriman, in whose custody said child still remained. The citation was issued and served; February 10, 1911, being fixed by the court as the time for hearing on this petition. No hearing was then had, however, nor, as far as appears, has been had since, because on the very day set for hearing thereon a petition was filed by Mr. and Mrs. Marriott for an order of court allowing them to adopt said child. This petition alleged that the child was some eight years old, had for more than one year past been under the care and direction of Mrs. I. C. Merriman and in the immediate custody of petitioners, alleged the decree of divorce between the parents of the child in the superior court of the state of Washington on the ground of cruelty on the part of the mother of the child, averred that more than two years prior to the petition the father of the child had deliberately sent her out of his home and away from him, with the intention of permanently ridding himself of her care and custody, and that more than a year before the filing of the petition the mother of the child drove her from her house and home with similar intent and for a similar purpose, that for more than one year last past neither of said parents had made any provision or agreement for the support of said infant, and nothing had been contributed by said parents or by either of them towards her support. It was further alleged that said child had been deserted and abandoned, within the meaning of section 224 of the Code of Civil Procedure of this state, and that the district attorney of the county of Santa Clara had consented to her adoption by petitioners.

No citation was issued or notice directed to the mother of the hearing of this application. In fact, the petitioners were proceeding on the theory that she was not entitled to any, even to a hearing on the alleged facts of desertion and abandonment of her child, and that the adoption could be ordered without any notice to her, or without her consent. She appeared, however, and, after objecting to the jurisdiction of the court, answered, denying all the allegations of the petition, saving that respecting the terms of the decree of divorce. After hearing, the superior court made an order for the adoption of said child by petitioners, and this appeal is taken by the natural mother from that order.

In making its order the court found the fact as to the decree of divorce just as alleged in the petition for adoption and admitted in the answer, and held that, as the decree of divorce in the state of Washington was granted on the ground of cruelty towards her husband upon the part of the mother of the child, her consent to its adoption was, under section 224 of the Civil Code, unnecessary; also found that said child had been more than eighteen months before the filing of the petition for adoption deserted by both its parents, and for more than said period had been "left by said parents in the care and custody of one Isabelle C. Merriman, without any agreement or provision for its support, and said minor child being deserted by both of its parents and abandoned by both of its parents within the meaning of section 224 of the Civil Code of the State of California"; that these conditions, within the view of the section cited, rendered the consent of the mother unnecessary, and required only the consent of the district attorney of the county of Santa Clara, which had been given.

The only question necessary for consideration on this appeal affects the construction placed by the superior court on section 224 of the Civil Code and its application under the evidence. That section provides that "a legitimate child cannot be adopted without the consent of its parents if living, * * * except that consent is not necessary from a father or mother deprived of civil rights or adjudged guilty of adultery or cruelty and for either cause divorced, * * * or who has been judicially deprived of the custody of the child on account of cruelty or neglect," and except, as further provided, "neither is consent of any parent necessary in case of any abandoned child; * * * any child deserted by both parents or left in the care and custody of another by its parent or parents without any agreement or provision for its support for the period of one year, is deemed to be an abandoned child within the meaning of this section," and "any abandoned child within the meaning of this section, if left in the care and custody of another person for one year or more, may, with the consent of the district attorney of the county where the person applying to adopt such child is a resident, be adopted by such person."

[1] The adoption of a child was a proceeding unknown to the common law. The transfer of the natural right of the parents to their children was against its policy and repugnant to its principles. It had its origin in the civil law, and exists in this state only by virtue of the statute which, as above stated, expressly prescribes the conditions under which adoption may be legally effected.

[2] Consent lies at the foundation of statutes of adoption, and under our law this consent is made absolutely essential to confer jurisdiction on the superior court to make an order of adoption, unless the conditions or exceptions exist specially provided by the statute itself and which render such consent of the parents unnecessary. Unless such consent is given, or, for the exceptional causes expressly enumerated is dispensed with, the court has no jurisdiction in the matter.

While we have set forth the circumstances surrounding the taking of this child from the custody of its mother and its retention by Mrs. Merriman under the order in the juvenile court proceeding, such evidence is to be considered here, as it could only be considered by the superior court in the adoption proceeding, for the purpose of determining whether the child was deserted or abandoned by its parents within the meaning of section 224 of the Civil Code, and hence, by the terms of that section, the consent of the mother was rendered unnecessary. Neither here nor in the superior court could it be considered in the adoption proceeding for any other purpose.

[3] Nor is discretion committed under adoption proceedings to the superior court to make an order therefor, if it deems that the interest of the child will be promoted thereby, regardless of the consent or wishes of the parent, or the existence of the prescribed conditions dispensing with such consent. Investing the court with such authority would be to make it the possible means of forcibly taking a child from its parent and transferring it to another person, against the protest and opposition of the parent, merely because the court deemed it advisable and for the benefit of the child that this should be done. No such power or discretion is contemplated or given by the law governing adoption. In the absence of consent, or of the existence of such conditions as the quoted section prescribes, it is a matter of no consequence in the proceeding for adoption what may be the conduct of parents towards their children, their environment or home surroundings, or the moral of material advantage which the children might receive by being taken from the custody of their parents and placed elsewhere.

If there exists such dereliction of parental duty as necessitates the taking of children out of the custody of their parents, the state as parens partiæ, in aid of the welfare of children, has provided ample means by which it may be accomplished without completely destroying the natural relation existing between the parent and child. This is accomplished through guardianship or other judicial proceedings, and even by virtue of the Juvenile Court Law Act itself, where temporary control of them may be taken, at the same time that there is preserved to the parents the right to have the children restored to them when conditions have changed so that the parents are fit to resume the primary obligation placed on them by nature and the law of caring for and supporting their children.

[4] As the act of adoption is to sever absolutely the legal relation between the parents and child, to destroy their reciprocal relations, and create entirely new ones between the adopting parent and the child, the law, recognizing the natural and sacred rights of natural parents to their children, will permit this to be done only with the consent of the parents, unless under exceptional conditions, which it itself prescribes, such consent is declared unnecessary.

[5] The power of the court in adoption proceedings to deprive a parent of his child being in derogation of his natural right to it, and being a special power conferred by the statute, such statute must be strictly construed, and in order to warrant the exercise of the special power and sustain an order for adoption, made in opposition to the wishes and against the consent of the natural parent, on the ground that conditions prescribed by statute exist which make that consent unnecessary, the existence of such conditions must be clearly proven, and the evidence bring them within the terms and intent of the statute. The law is solicitous towards maintaining the integrity of the natural relation of parent and child, and in adversary proceedings in adoption, where the absolute severance of that relation is sought, without the consent and against the protest of the parent, the inclination of the courts, as the law contemplates it should be, is in favor of maintaining the natural relation. Applying this rule to a consideration of the matter at bar: Here the mother was refusing her consent to the adoption, actively opposing the making of such an order, and asserting her natural and paramount right to her child. Every intendment should have been in favor of the claim of the mother under the evidence, and, if the statute was open to construction and interpretation, it should have been construed in support of the right of the natural parent.

[6] The court found that, notwithstanding her primary right to her child and its custody, she had lost all right to object to being deprived of it under the adoption proceeding, or to insist that this could not be done by order of the court without her consent, by virtue of the decree of divorce, and, further, because she had deserted and abandoned it within the meaning and intent of section 224 of the Civil Code.

We are satisfied, however, that the court improperly construed the section as to the effect on consent of the decree of divorce as the terms of that decree stand, and that the evidence does not sustain the conclusion of the court that either the child had been deserted or had been abandoned by its mother within the meaning of said section 224, or deserted or abandoned at all, so as to preclude the necessity for consent to its adoption.

Discussing these matters separately, and, first, as to the effect of the decree of divorce on consent under the section: The trial court, reading this section literally, held that, as the decree of the superior court in Washington between the parents of the child was granted to the husband for cruelty on the part of the wife, her consent to the adoption of her child was, under the section, unnecessary, ignoring entirely the fact that, notwithstanding the decree was in favor of the husband, the custody of the children was, by the very terms of the decree, awarded absolutely to her—not a limited but an absolute one as far as the custody is concerned.

Appellant here—the mother—contends that this is not the proper construction to be given to the section, and that, if it is to be so construed, it is, as far as it attempts to deprive her of the right to the custody of her children judicially awarded her by the decree of divorce without notice or her consent, unconstitutional, as depriving her of a vested right to her child without due process of law.

There is no necessity for considering this constitutional objection, because we do not think the section is subject to the literal construction which the superior court placed upon it. Such a superficial interpretation is not permissible, when the spirit of our laws and the particular purpose of the enactment of the section respecting consent and the power of courts in divorce proceedings over the custody of the children of the marriage are considered.

In the latter proceeding the court has power and authority to make such orders as it may deem necessary and proper for the custody of the children of the marriage, without being constrained in any respect by the cause for which the divorce is granted, and may at any time vacate or modify such order. While section 224 provides generally that consent shall not be necessary to the adoption of children of the marriage from the parent against whom the decree is granted on the ground of cruelty, the section stops there. It does not assume to interfere with the orders of the court in divorce proceedings as to the custody of children, or, as said in Miller v. Higgins, 14 Cal. App. 161, 111 Pac. 405, speaking generally of this section

224: "This section does not undertake, nor is it intended, to modify the other sections of the Code dealing specifically with the right of custody."

What is meant by this section, and what was intended by the Legislature, it having in mind the natural rights of parents, as also the authority of courts in divorce proceedings to award the custody of children to either spouse, was that when a divorce is granted for cruelty (we are only concerned with this ground here), and the custody of the children is awarded absolutely to the innocent party, the consent of the guilty one will not be required in adoption proceedings. It contemplates that by decree of court in such proceedings the court has deprived the guilty spouse of all right to such custody, and awarded it absolutely to the innocent party. That this is the proper interpretation of the section we think reasonably appears from the language used in the section in this same connection as to consent and with reference to other proceedings than in divorce, where it is provided that, when the parent has been "judicially deprived" of the custody of the children on account of cruelty or neglect, the consent of such parent is not necessary. The Legislature, in providing a method for adoption, whereby the legal ties between the parent and the child should be absolutely severed, could not have intended to interfere with the authority of the court in other proceedings involving the custody of the child, or that the decree of a court in a divorce proceeding which awarded such custody to the guilty spouse should be entirely ignored.

There is nothing in the fact that a mother has been guilty of cruelty towards her husband which compels the court, in awarding him a decree on that ground, to also award the custody of the children to him. The weightiest and most natural considerations looking exclusively to the welfare of the children—their tender years, her conceded affection and love for them, the mental and moral and even material advantages which they will derive by being left with her, aside from probably the consent of the husband thereto—make it highly important that the court should so decree; and the Legislature, recognizing this, could not have contemplated in the general language it used to allow interference with the decree of the court in the divorce proceeding respecting such custody, or to have intended that a spouse so under control of the children under a decree of court could, in another proceeding, be deprived of their custody without her consent.

As we have said, the whole proceeding for adoption is based on the consent of the parents thereto. Considering the natural relations to be severed and the new relations to be formally created, in the nature of things consent is necessary, and essentially made so, except as the law dispenses with it, where a decree of divorce is granted on certain specified grounds and the innocent spouse is given absolutely the custody of the children—a judicial determination that he or she, on account of specific matrimonial misconduct, should not have future control or custody of them—or where the children have been deserted or abandoned by their parents, and such unnatural conduct dispenses with such consent.

This is a proper, fair, and just interpretation of the section, and in the case at bar, as the mother was awarded the custody of the children by the decree of court, her consent was absolutely essential to the validity of any order for their adoption, unless, as further found by the court, the children had been deserted by her or abandoned, within the intent and meaning of section 224.

[7] As to these latter findings: Abandonment is principally relied on, though desertion is also found. The only claim of desertion which is made or can be made under the evidence is that the child was permitted to remain in the custody of Mrs. Merriman from the time the court in the juvenile proceeding ordered it into her custody, which is the basis also for the claim of abandonment. Up to the time of this order in the juvenile proceeding, when the child was taken from its mother, there was no desertion or abandonment by either parent in any sense. The father was in possession of the child, supporting it, in Tacoma, until she was brought to her mother in San Jose, who was entitled to her possession under the decree of divorce, and who has never relinquished that right. After one of the quarrels between the mother and the child's stepfather over probably the retention of the children in the family (though the unsworn statement of the child at the hearing was that it was because her mother whipped her), she ran away to a family living in the neighborhood, who were not on friendly terms with the mother, and who sent immediately for an officer. The child remained there about two weeks, so one of the family to whose house she went testified; while, on the other hand, it was testified that she only remained there two days. Why she was permitted to remain away from her mother at all is not disclosed, but it was probably because of the refusal of the stepfather to keep the children in the family or support them, and the inability of the mother to then overcome his objections. However long Margaret may have remained away, her sister Mary called on the family harboring her and took her back to her mother, where she remained until the stepfather, against the pleading and objection of the mother, brought both the children to the juvenile court, and they were taken from the custody of the mother by order of the court in the juvenile proceeding against Mary.

It would be a waste of time to endeavor to point out that this was not desertion of the child by the mother. In fact, as we stated, desertion is not so much relied on as abandonment, within the definition of the statute. This claim is based on the fact that the mother, after the order of the court originally placing the child in the custody of Mrs. Merriman, permitted her to remain there for over a year, without any agreement or provision for her support. That this was no abandonment within the terms of the section is so clearly shown under the evidence that it ought not to be open to discussion, although counsel for respondents contend strongly for it. Abandonment has a well-defined legal meaning. As said in Guardianship of Snowball, 156 Cal. 240, 243, 104 Pac. 444, 446: "In order to constitute abandonment, there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation, and throw off all obligations growing out of the same." To constitute abandonment, there must be an intention to do so, express or implied, from the conduct of the parent respecting the child. This is the character of abandonment contemplated by the very terms of section 224, as far as they are applicable or are relied on in this proceeding. It contemplates a case where a child has been voluntarily surrendered or left for a year in the care and custody of another, without any agreement or provision for its support.

This is not the situation here. The care and custody of this child was not so left by the mother with either Mrs. Merriman or the petitioners for adoption. It was taken away from her and placed in the custody of the former by order of the juvenile court (whether valid or not is immaterial to this inquiry), without the consent of the mother and against her wishes and desire. It was taken from her under process of court—by force of law—invoked or, at least, employed for the very purpose of depriving her of the custody of the child, and such custody has been withheld from her all along by virtue of the assumed authority of the juvenile court to do so. Since taken from her, she has endeavored, through her personal efforts and those of her relations, to secure the return of the child. Under a representation and belief that she could not do anything toward obtaining the restoration to her until the expiration of a year, which the memorandum of the superior judge sitting in the juvenile proceedings showed was the period for which he had ordered her into the custody of Mrs. Merriman, she waited until the expiration of that time, appeared and made her application to the court in the juvenile proceedings for an order to that effect, to be answered by an effort to deprive her permanently of her child through adoption proceedings, under the claim that she had abandoned her. This evidence clearly shows that there was no abandonment of the child by its mother within the terms of the Code provision, which amounts simply to the general and accepted legal definition of abandonment; but, on the contrary, the evidence clearly and affirmatively shows that there was no abandonment of the child by the mother in any sense. The findings of the superior court, both as to desertion and abandonment, are not sustained by the evidence.

It is insisted by appellant that the proceedings in the juvenile court respecting this child, and the order assigning its custody to Mrs. Merriman, were void. We are not called on to pass on that question. It is entirely immaterial as far as the present proceeding is concerned.

[8] Appellant asks for an order of this court directing the restoration of the child to its mother. We have nothing to do with the custody of the child in this proceeding. If, as claimed by appellant, the juvenile proceedings are void, and the child illegally detained thereunder from its mother, she has a clear legal way to obtain possession of it under habeas corpus proceedings.

The order appealed from is reversed.

We concur: MELVIN, J.; HENSHAW, J.

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19 Cal. App. 406

ACME LUMBER CO. v. WESSLING et al.

(Civ. 997.)

(District Court of Appeal, First District, California. July 10, 1912. Rehearing Denied by Supreme Court Sept. 7, 1912.)

1. MECHANICS' LIENS (§ 74*)—"CONTRACT"—RECORD—SEPARATE AND DISTINCT CONTRACTS.

A contract for the construction of a shed, and subsequent contracts for remodeling an adjacent stable and the removal of the partition wall between the shed and stable, so as to make both structures one building, cannot be joined together and treated as one individual "contract"; but they must be treated as separate and distinct contracts, within Code Civ. Proc. § 1183, requiring the recording of a building contract when the amount to be paid thereunder exceeds $1,000.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 109, 110; Dec. Dig. § 74.*

For other definitions, see Words and Phrases, vol. 2, pp. 1513-1534; vol. 8, pp. 7615, 7616.]

2. MECHANICS' LIENS (§ 140*)—CLAIM OF LIEN—VALIDITY—"CONDITIONS."

Code Civ. Proc. § 1187, providing that a claim of lien by an original contractor must contain a statement of his demand, less credits, the name of the owner, the name of the person by whom he was employed, a statement of the terms, time given, and conditions of the contract, and a description of the property to be charged with the lien, does not require that a claim of lien, to be valid, should set forth that the demand was based on more than one contract, and then segregate and separately state the amount of each, though the evidence in support of the lien showed that the work was performed on separate and distinct structures under separate and distinct contracts; the word "conditions" referring only to those provisions which enter into and form a part of the contract and are essential to make it binding.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 237, 238; Dec. Dig. § 140.*

For other definitions, see Words and Phrases, vol. 2, pp. 1394–1400.]

3. Mechanics' Liens (§ 134*)—Creation of Lien—Statutory Provisions.

The creation of a mechanic's lien is statutory, and to constitute a valid lien the statutory directions must be complied with.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 208; Dec. Dig. § 134.*]

4. Mechanics' Liens (§ 277*)—Issues, Proof, and Variance.

Where, in an action to enforce a mechanic's lien, the evidence showed that a structure was built for an agreed price, while the claim of lien stated that the work performed and material supplied were to be paid for on the basis of reasonable value, and there was evidence that the prices charged were the prevailing market prices, the claim of lien was substantially true, and not at variance with the evidence.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

5. Mechanics' Liens (§ 277*)—Issues, Proof, and Variance.

A claim of lien must contain a true statement of the facts required by the statute, and unless so stated the variance between the claim and the evidence is fatal.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

6. Mechanics' Liens (§ 277*)—Issues, Proof, and Variance.

Where the complaint in a suit to foreclose a mechanic's lien proceeded on the theory that the claim of lien was founded on a single contract, and the evidence showed that the lien was founded on several separate contracts, but defendant was not prevented from availing himself of any defense, the variance between the pleadings and proof was not material, and was not prejudicial to defendant.

[Ed. Note.—For other cases, see Mechanics' Liens; Cent. Dig. §§ 546–554; Dec. Dig. § 277.*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by the Acme Lumber Company against M. A. Wessling and another. From an order denying a new trial, plaintiff appeals. Reversed and remanded.

Pillsbury, Madison & Sutro, for appellant. J. Samuels, for respondent Wessling.

LENNON, P. J. This is an appeal by the plaintiff from an order denying a new trial in an action to foreclose a mechanic's lien. The claim of lien was made and filed by Hubbs & Lear as original contractors, and then assigned to the plaintiff. The contract upon which the claim of lien is founded is stated in the claim of lien to be, in substance, as follows:

Hubbs & Lear agreed with the defendant Faris to alter and repair a certain building or buildings on certain premises reputed to be owned by the defendant Wessling. By the terms of the contract, as stated in the claim of lien, "said Hubbs & Lear were to alter, reconstruct, and repair said building or buildings as directed by said Joseph Faris, furnish all the labor and materials necessary therefor, and were to be paid the reasonable value thereof. No time of payment was agreed upon between the said Hubbs & Lear and the said Joseph Faris, and no time was agreed upon when said work should be completed." It was alleged in the plaintiff's complaint and in the claim of lien that the reasonable value of the labor and material furnished and supplied in the performance of the contract was the sum of $1,915.81, of which the sum of $562.25, and no more, had been paid. The complaint and claim of lien are silent as to whether or not the contract stated therein was in writing and recorded.

The evidence adduced at the trial in support of the claim of lien was to the effect that in the month of June, 1906, the defendant Faris entered into an oral contract with the lien claimants, Hubbs & Lear, whereby they agreed to construct a shed for the stated price of $232, upon a lot of land used and occupied by Faris as a tenant of the defendant Wessling. This was the only contract entered into at this time by Hubbs & Lear with the defendant Faris. Work upon the shed was commenced and completed pursuant to this contract. Prior to and at the time of the execution of the contract and the commencement of the work thereunder. Faris, as a tenant of the defendant Wessling, was occupying a stable building situated upon the same lot of land upon which the shed was erected. A week or more after the execution of the contract for the construction of the shed, and while work thereunder was progressing, Hubbs & Lear entered into a second separate and distinct verbal contract with the defendant Faris to tear out the old stalls in the adjacent stable and replace them with new stalls. No other or additional work in or about the stable was agreed upon or mentioned at this time. The price agreed upon for this particular piece of work was the reasonable market value of the labor and material. Thereafter, from time to time and as a result of several separate and distinct agreements, further alterations of the stable were made by Hubbs & Lear; the reasonable market value thereof being agreed upon as the price of each piece of work in every instance. The work performed upon the stable was not done in accordance with any preconceived plans and specifications, but was performed from time to time as ordered and directed by the defendant Faris, and in its entirety consisted of remodeling the attic, reconstructing the stalls, floors, and mangers of the stable, and installing of harness and robe rooms and an office, and the remodeling of the entire front of the stable. The employment to install the harness room and office was made a month after the first employment to tear out the old stalls. Finally, when the shed originally contracted for and the reconstruction of the stable were both completed, the defendant Faris directed the removal of a partition wall, which was standing between the shed and the stable, and, when this was done, both structures, for all practical purposes, constituted one building.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The reasonable market value of the labor performed and material supplied in the erection of the shed and the reconstruction of the stable was shown to be the amount stated in the claim of lien, $1,915.81. It was further shown in evidence that the defendant Wessling "was present on the premises and saw all the work going on," and it was not pleaded or pretended in her behalf that she had posted the notice of nonresponsibility permitted by section 1192 of the Code of Civil Procedure, which, under the provisions of section 1185 of the same Code, if the contract had been reduced to writing and recorded, would have relieved the land from the burden of the lien for the improvements made thereon at the direction of her tenant Faris.

Although duly served with process, the defendant Faris did not appear in the case, and accordingly default was entered against him. Plaintiff was nonsuited, upon motion of the defendant Wessling, upon the grounds: (1) "That the contract as set out in plaintiff's complaint, in the notice of lien, and as sought to be proven is void for want of recordation, and that by reason thereof no cause of action lies against the defendant Wessling; (2) that the proof adduced with respect to said alleged contract demonstrated that there were at least two, if not more, separable contracts, and that by reason thereof there was a fatal variance between said proof and the notice of lien and contract as set out in the complaint."

But one point is presented and discussed in support of the appeal, and that involves the question as to whether or not the lower court was justified in granting a nonsuit upon either or both of the grounds stated. We are of the opinion that the evidence adduced at the trial in support of the claim or lien did not warrant a nonsuit upon either ground.

Counsel on both sides have devoted several pages of their respective briefs to a discussion of the question as to whether or not the contract stated in the claim of lien was void, and incapable of sustaining the lien, because not expressed in writing and recorded. Upon this phase of the case it is one of plaintiff's contentions that all of the work performed by Hubbs & Lear was done under the first contract to construct the shed, and that the several items of labor and material supplied in the subsequent alteration of the stable were but incidents of the initial contract, which must be considered as extra work and that, inasmuch as the original contract was for the sum of $232, it cannot be held to be invalid, because it was not expressed in writing and recorded, notwithstanding that the aggregate amount of the cost of the extras was far in excess of $1,000.

[1] We are not prepared to say whether or not such a contract would ordinarily fall within the purview of section 1183 of the Code of Civil Procedure, which requires that a building contract must be expressed in writing and recorded when the amount to be paid thereunder exceeds the sum of $1,000. However that may be, no such contract or question confronts us under the facts of this case; for as we have shown, and as is conceded by counsel for the defendant Wessling, it was clearly and without conflict established by the evidence that the initial contract was "a definite contract at a definite price" for a distinct piece of work, which, at its inception, had no apparent or necessary connection with the work subsequently performed under several other separate and distinct contracts for the reconstruction of the stable. This being so, it is obvious that the initial contract for the construction of the shed and the several subsequent separate contracts for the reconstruction of the stable cannot be joined together and treated as one individual contract. They must be treated as separate and distinct contracts for amounts less than $1,000 (Clark v. Beyrle, 160 Cal. 306, 116 Pac. 739), and, when so considered, it is evident that it was not necessary to their validity that they should have been expressed in writing and recorded.

[2] This view of the evidence brings us to a consideration of the alleged variance between the contract stated in the claim of lien and the contract, or rather contracts, shown by the evidence to have been actually made. It is the contention of the defendant Wessling that the claim of lien is fatally at variance with the evidence in this: That the claim of lien purports to be founded upon a single contract for the alteration of an existing building, whereas the evidence shows that the labor and materials for which the lien is claimed were actually supplied under several separate and distinct contracts. In other words, it is the contention of the defendant Wessling that the claim of lien, to be valid, should have been framed upon the theory that the work and labor was performed and supplied under several distinct contracts for separate and distinct amounts, and that those contracts and their amounts should have been seg-

regated and separately stated in the claim of lien.

Section 1187 of the Code of Civil Procedure, as it existed when the claim of lien in the case at bar was filed, required that a claim of lien by an original contractor, to be valid, should contain (1) a statement of his demand, less all just credits and set-offs; (2) the name of the owner or reputed owner, if known; (3) the name of the person by whom he was employed or to whom he furnished the materials; (4) a statement of the terms, time given, and conditions of his contract; and (5) a description of the property to be charged with the lien sufficient for identification. The requirement of the statute that the claim of lien shall state the "conditions" of the contract does not mean that the fact that the work was performed under several contracts is a circumstance which must be stated as a "condition" of the contract. The "conditions" of a contract which the statute contemplates and requires to be stated are those provisions which enter into and form a part of the contract and are essential to make it a binding contract.

[3] The creation of a mechanic's lien is statutory, and, in order to constitute a valid lien, it is necessary only to do the things which the statute directs shall be done, and, in our opinion, the claim of lien, in all of its essential particulars, conforms to every requirement of the statute. It contains a description of the property to be charged by the lien; a statement of the demand upon which the lien is founded, less credits and offsets; the name of the reputed owner; the name of the person by whom the contractor was employed, and to whom the labor and materials were furnished; and, finally, it states "the terms, time given, and conditions of the contract." This is all that the statute requires, and therefore we think it was not necessary to the validity of the claim of lien that it should set forth that the demand was based upon more than one contract, and then segregate and separately state the amount of each, even though the evidence adduced in support of the lien shows that the work and labor for which the lien is claimed was performed upon separate and distinct structures under separate and distinct contracts. Kritzer v. Tracy Engineering Co., 16 Cal. App. 287, 116 Pac. 700; Boisot on Mechanics' Liens, § 408.

[4] The fact that the evidence disclosed that the shed was constructed for the agreed price of $232, while the claim of lien stated that all of the work performed and materials supplied were to be paid for on the basis of their reasonable value, did not, under all of the evidence, constitute a fatal, or any, variance. The action was brought to enforce a lien for the reasonable value of the entire work and materials, and as there was evidence to the effect that the prices charged for each piece of work, including the construction of the shed, were "the prevailing market prices at the time for labor and materials," it results that the claim of lien was substantially true and not at variance with the evidence. Star Mill & L. Co. v. Porter, 4 Cal. App. 470, 88 Pac. 497; Lucas v. Rea, 10 Cal. App. 641, 102 Pac. 822.

[5, 6] It may be conceded that there is a variance between the pleadings and the proof to the extent that the complaint apparently proceeds upon the theory that the claim of lien was founded upon a single contract, while the evidence showed that in fact the lien was founded upon several separate contracts. A variance between the pleadings and the proof, however, is not governed by the same strict rules which apply to a variance between the claim of lien and the proof. The claim of lien must contain a true statement of the facts required by the statute, and unless so stated the variance is fatal; but a variance between the pleading and proof is not material, unless the adverse party has been thereby misled to his prejudice. Santa Monica, etc., v. Hege, 119 Cal. 376, 51 Pac. 555; Star Mill & L. Co. v. Porter, supra; Code Civ. Proc. § 469.

No good reason has been advanced for the claim that the defendant was prejudiced by the variance between the pleadings and the proof in the present case. The defendant was not thereby prevented from setting up and availing herself of any defense which she may have had to the action. The action was for the reasonable value of the labor and materials supplied under the contract as pleaded, and inasmuch as the several contracts shown in evidence were identical in substance and effect with "the terms, time given, and conditions" of the pleaded contract, we are unable to perceive how the defendant could have been misled to her prejudice by the variance. Ehlers v. Wannack Bros., 118 Cal. 310, 314, 50 Pac. 433; Hartley v. Murtha, 5 App. Div. 408, 39 N. Y. Supp. 212; Higgins v. Newtown, etc., R. R. Co., 66 N. Y. 604; Farron v. Sherwood, 17 N. Y. 227; Castagnino v. Balletta, 82 Cal. 250–259, 23 Pac. 127.

The order appealed from is reversed, and the cause remanded for a new trial.

We concur: HALL, J.; KERRIGAN, J.

19 Cal. App. 368

WALKER v. DIXON et al. (Civ. 1,118.)

(District Court of Appeal, Second District, California. June 29, 1912.)

1. Bills and Notes (§ 527*)—Discharge—Evidence—Sufficiency.

In an action on a note, evidence *held* insufficient to sustain a defense of payment and discharge.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847–1855; Dec. Dig. § 527.*]

2. Pledges (§ 30*)—Collection of Pledged Notes—Laches—Sufficiency of Showing.

A defense of laches in the collection of notes pledged, relied on to discharge the pledgors' debt to the pledgee, must fail where the date of the notes is not disclosed, nor the time when suit was brought thereon.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 75–85; Dec. Dig. § 30.*]

Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

Action by B. F. Walker against A. H. Dixon and others. Judgment for plaintiff, and defendants appeal from an order denying a new trial. Affirmed.

E. L. Foster, for appellants. C. E. Arnold and C. W. Miller, for respondent.

ALLEN, P. J. The action was upon a promissory note executed by defendants to one Walker. Walker sold and transferred the note to the Laton State Bank; this being done in 1905. In 1906 defendants, holding certain notes against J. J. Fenn and others, aggregating $1,600, transferred said notes to the bank under an agreement that when collected the proceeds should be applied, so far as necessary, to the payment of the Walker note, and the balance to be paid to defendants. Subsequently—at what date cannot be determined from the bill of exceptions—an action was brought upon the Fenn notes and $667 collected thereon, which was paid to the bank, leaving a balance due on the Walker note. Walker, upon demand of the bank, as indorser, took up the Dixon note and brought this action to recover the balance unpaid. The answer alleged the payment and discharge of the note. The action was tried by the court, which found in favor of plaintiff and against defendants upon the issue presented. From an order denying a new trial, defendants appeal.

[1] The only evidence in the record having the semblance of supporting defendants' answer is the statement of a witness that in 1906, when the Dixons transferred to the Laton State Bank notes aggregating $1,600, payable to them and signed by Fenn, there was an agreement upon the part of the bank that the note sued on should be thereby paid and discharged, and that out of the proceeds when collected the bank, after applying sufficient to discharge the note sued on, should pay the balance to the Dixons. The positive evidence on the part of plaintiff is that the Fenn notes were received by the bank as collateral security for the note sued on, and not otherwise; in fact, the whole evidence in the record indicates such to have been the contract between defendants and the bank. There is and can be no controversy that the bank properly applied all of the money it received upon the Fenn notes.

[2] Counsel for appellant suggests such laches upon the part of the bank in the collection of the Fenn notes as would have the effect to discharge the Dixons. There is nothing in this proposition. The maturity of the Fenn notes is not disclosed, the time when the action was brought does not appear, and there is nothing in the record to indicate laches, even were such a defense otherwise presented by the record.

The findings of the court have ample support from the evidence, and the order denying a new trial is affirmed.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 379

In re OLSON'S ESTATE.

JOHNSON et al. v. OLSON.

(Civ. 956.)

(District Court of Appeal, Third District, California. July 2, 1912.)

1. Wills (§ 156*)—Undue Influence—Evidence.

Testatrix's soundness of mind and body does not imply immunity from undue influence exercised by her husband.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 382; Dec. Dig. § 156.*]

2. Wills (§ 155*)—Undue Influence—Elements.

Duress, menace, or fraud need not be shown to establish such undue influence as invalidates a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*]

3. Wills (§ 155*)—"Undue Influence."

"Undue influence," such as invalidates a will, is any improper or wrongful constraint, machination, urgency, or persuasion, whereby the will of the person is overborne, and he is induced to do, or forbear to do, an act which he would not do, or would do, if left to act freely.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375–381; Dec. Dig. § 155.*

For other definitions, see Words and Phrases, vol. 8, pp. 7166–7172, 7823–7824.]

4. Wills (§ 282*)—Contests — Pleading—Sufficiency.

In a will contest, allegations that through contestee's "aforesaid relations," and through undue influence over testatrix, as averred in the complaint and grounds of opposition, contestee acquired over testatrix an influence, whereby he was enabled to and did procure her to make the will by which all her property was to go to him to the exclusion of the remaining heirs at law, sufficiently show the particular acts involving undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 640; Dec. Dig. § 282.*]

5. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS—SUFFICIENCY OF EVIDENCE.

In the absence of the evidence, it will be presumed, on appeal from a judgment sustaining the contest of a will on the ground of undue influence, that findings conforming to contestant's pleadings were sustained by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2899, 2911–2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

6. WILLS (§ 164*)—UNDUE INFLUENCE—EVIDENCE.

That testatrix's husband accompanied her to the attorney's office where she made her will, and remained in the office within hearing, and in a position so that he could see the parties in executing the will, and left the office with testatrix, was properly shown on an issue whether he exercised undue influence over her.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403–414; Dec. Dig. § 164.*]

7. WILLS (§ 166*)—CONTEST—UNDUE INFLUENCE—EVIDENCE.

On contest of a will, under which testatrix gave all her property to her second husband to the exclusion of her children and grandchildren, a statement in the will that the children and grandchildren had received their full share of her property is not conclusive against the charge of exercise of undue influence by the husband, though the statement was not denied in the grounds of contest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421–437; Dec. Dig. § 166.*]

Appeal from Superior Court, Alameda County; J. D. Murphy, Judge.

In the matter of the estate of Albertina Olson, deceased. From a decree refusing to probate decedent's will, Oliver Olson appeals adversely to William Johnson and others. Affirmed.

Crosby & Richardson and W. B. Rinehart, for appellant. Pierce H. Ryan and G. W. Hunter, for respondents.

CHIPMAN, P. J. This is an appeal on the judgment roll from the decree of the superior court of Alameda county, refusing probate of the will of Albertina Olson, wife of Oliver Olson, appellant herein. A general demurrer to the grounds of contest was overruled, no special demurrer was interposed, and Olson, contestee, answered, denying specifically the averments of the contest relating to the issue of undue influence. The cause was tried by the court, without a jury, and contestants had judgment.

The will is brief. It first declares that the testator is of sound mind, and is "not acting under duress, menace, fraud or undue influence of any person whatever;" secondly, it devises and bequeaths to Oliver Olson, her husband, all of her property, and further states: "I have eight descendants, to wit, five children [naming them] and three grandchildren [naming them] whom I purposely omit from the provisions of this will, as I have already advanced and paid to each of them his or her full share of my property;" lastly, she appoints her husband executor without bonds. The "descendants," except Elfrida Hall, a daughter, are the contestants mentioned in the will.

It is contended by appellant, first, that the written grounds of contest are insufficient to constitute grounds of opposition to the probate of the will; and, second, that the findings are insufficient to support the judgment.

The findings, with slight difference in one or two particulars, follow the language of the complaint.

The ground alleged in support of the contest is the undue influence of the husband over his wife in securing the execution of the will. It appears from the contest that Mrs. Olson died in the city of Oakland, Alameda county, on February 13, 1910, leaving estate therein and in Humboldt county of the value of over $20,000; that, prior to her death, to wit, September 11, 1908, she executed the will in question, naming her husband executor thereof; that on April 21, 1910, Oliver Olson, contestee, filed his petition in the superior court of Alameda county, praying probate of said document as the last will of his wife, Albertina, and that letters testamentary issue to him. Following these averments, it is alleged, in paragraph 7, that Oliver Olson and Albertina were married in Humboldt county on August 5, 1905, from which time and until her death, "and particularly at the time of making her alleged will and testament, the said Albertina Olson reposed great confidence in her said husband, the said Oliver Olson, and during all times the said Oliver Olson held a real authority over the said Albertina Olson, and during all said times the said Oliver Olson used such confidence and authority for the purpose of obtaining an unfair advantage over her to procure her to make her alleged will solely in his favor, and thereby disinheriting all of her said children and grandchildren." Paragraph 8 following is to like effect, alleging "an apparent authority," instead of "a real authority," as in paragraph 7.

Paragraph 9 is as follows: "That said alleged will and testament, offered for probate as the last will and testament of said Albertina Olson, was procured to be made by reason of and through the undue influence exerted upon and over her by said Oliver Olson, in whose sole favor and interest such will was made, and that said paper writing and alleged will was and is the direct result of such undue influence exerted as aforesaid, and that said Albertina Olson was not, at the time of the making of the said alleged will, free from undue influence, but was then and there, and for a long time prior thereto had been, and continued to be, acting under and subject to the undue influence of said Oliver Olson, and that the said alleged will was procured to be made by means of and through the undue influence of said Oliver Olson, and the said will was the direct result of the undue influence exerted by said Oliver Olson over and upon said Albertina Olson; and in further support of these averments of undue influence, contestants allege upon information and belief, the following facts." Then follow 23 or 24 subdivisions of paragraph 9, designated, alphabetically, "a" to "w," inclusive. Substantially the facts therein set forth are as follows:

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(a) That at the time of their said marriage Olson was a strong man, mentally and physically, of the age of 41 years, and Albertina was of the age of 63 years, and was the mother of six children, mostly grown. (b) For several years prior to the marriage of Oliver and Albertina, she resided on a farm in Humboldt county, the community property of herself and her husband, Adam Johnson, who died in May, 1898. (c) For several years prior to the marriage of Oliver and Albertina the said Oliver was employed on said farm by Albertina, and during all said time "had great and undue influence over" her, then Albertina Johnson, "and managed her said farm and business to suit himself, and sold the crops raised on said farm and collected the money received therefrom and conducted the household affairs of said Albertina Johnson," purchased the farm and household supplies, and used the income of the farm for such purposes "and for his own purposes, the same as if it was his own money." (d) Prior to and after his marriage with Albertina, and thereafter, he in like manner managed said farm and used the income therefrom. (e) On or about September, 1906, he induced Albertina to remove to Oakland to reside, "with the object and purpose in his mind of getting her where she would be more susceptible to his influence and more subject to his control." (e½) During the spring of 1898, the said Adam Johnson contemplated making a trip to the Klondike, Alaska, and on or about the 10th day of February, 1898, he, "without consideration, executed a deed to said farm to Albertina, which was placed in escrow, to be delivered at his death, which said deed was thereafter at his death delivered to her. (f) In August, 1906, Albertina sold said farm for $37,500, receiving $21,500 in cash and notes and mortgages for the balance. (g) The said Oliver took over $20,000 of said money to Oakland and deposited the same there in a bank in his own name, and drew therefrom money "as he saw fit, and invested a large part of the same and used much of the same for his own purposes." (h) Albertina was "ignorant of and inexperienced in business affairs and methods, and through the undue influence of the said Oliver" was induced to permit him to invest a large part of said money in Oakland property, amounting to $6,000, "and to take the title thereto in his own name." (i) "At all times mentioned herein," Oliver was "the sole agent, confidential adviser, and business manager of the said Albertina Olson, and as such gained a complete mastery and control over her." (j) Long prior to her said marriage with him, Oliver conceived the plan of acquiring possession of Albertina's property, and had the design to marry her for said purpose, and "during the year 1901 the said Oliver Olson proposed to one Walter James, who was then courting one of the daughters of said Albertina Olson, and said to said Walter James: 'You take the girl, and I will take the old lady. We will sell the place and get out of here.'" (k) Albertina was so "strongly under the influence of the said Oliver Olson that within two months after the death of her former husband, Adam Johnson, she permitted the said Oliver Olson to use and wear the clothes formerly used and worn by her deceased husband." (l) At all times mentioned herein, Oliver showed a feeling of jealousy and hatred towards the children and grandchildren of Albertina, "and unduly persuaded" her to disinherit them; that she could not speak of them in his presence in terms of affection without incurring his displeasure; and she was in constant fear of him, lest she might say something to offend him; that he sought to make her believe that he owed no duty to them, and that they cared for her only for her property; that he objected to her corresponding with her said children, or to receive letters from them, and was angry "and berated her" when she did so; that he unduly persuaded her to remove from Humboldt county "to get away from her children, whose homes were in said county, in order that he might have a better opportunity to unduly influence the said Albertina Olson and get control of her said money and property, and to have the same put in his own name; that said Albertina Olson was continually under the influence and control of said Oliver Olson and subject to his will, and was compelled to put her money and property in his own name, and to make said alleged will, leaving everything to him." (m to r) The relations between Albertina and her children to the time of her death were of a friendly nature. Oliver sought to prejudice his wife against her said children, and often told her she must not let them visit her. That in September, 1908, Oliver, at the home of one of the contestants, "for the purpose of unduly influencing" her against her said children, declared to her that she "should cut out the kids with a dollar," meaning her children and grandchildren. That he, for like purpose and with like intent, told Albertina that he did not want Mrs. Hubbard to come near her, and that she must make a will and cut Mrs. Hubbard out with one dollar. That prior to making said will, for the purpose of unduly influencing her, he said to Albertina that she should cut Freda out with one dollar, meaning her daughter Mrs. Elfreda Hall. (s) At the time said alleged will was made, "said

Oliver Olson accompanied the said Albertina Olson to the office of the attorney in the city of Eureka, who prepared said alleged will, at the time said alleged will was prepared, and took an active part in the preparation of the same." (t) At this time they were visiting Amy James, one of the daughters and contestants, and during this time Oliver urged Albertina to make her will; and (u) when they went to the office of the attorney to have said will prepared, neither Oliver nor Albertina informed said Amy James of their said purpose, but concealed from her and from all said children and grandchildren the fact that a will had been made, and none of said children or grandchildren knew of said will until after her death. (v) That during said marriage of Oliver and Albertina, Oliver was acting as the confidential agent of Albertina, and during all said time she was subject to the undue influence and control of her said husband, who "took advantage of his said position and influence to obtain said alleged will and acquire said property." (w) "That by reason of said relations aforesaid, and the exercise of undue influence over her, as averred in the complaint and grounds of opposition herein, the said Oliver acquired over the mind of the said Albertina Olson an influence, whereby he was enabled to and did procure her to make the said alleged will, wherein and whereby all her property was to go to him to the exclusion of all the rest of her heirs at law."

Appellant relies upon the rule stated in Estate of Gharky, 57 Cal. 274, and Estate of Sheppard, 149 Cal. 219, 85 Pac. 312, that undue influence as ground of contest is but a conclusion of law to be drawn from facts (not evidence of the facts), which must be stated, "to the end that the court, either upon demurrer to the statement of the grounds of contest or the verdict, may determine whether, as a matter of law, such facts so pleaded or found constituted a valid reason why the purported paper should not be admitted to probate." Estate of Gharky.

[1] Attention is called to the absence of averment or finding that Mrs. Olson was weak in mind or body, or lacked testamentary capacity by reason of her age, or any infirmity, or that she acted under the exercise of menace, duress, or fraud. Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that the minds of strong men and women have often been overborne, and they have been by a master mind persuaded to consent to what, in their sober and normal moments, and free from undue influence, they would not have done.

[2, 3] "Undue influence is quite distinct from testamentary capacity. The former presupposes the existence of the latter." 27 Am. & Eng. Ency. of Law, 497. Nor are the elements of duress, menace, or fraud necessary to be shown to establish such undue influence. Such influence is, in a sense, a fraud, when exercised to the injury of the rightful heirs of a testator and to the advantage of the one exercising it; but it is not fraud in the sense used by appellant. Undue influence is "any improper or wrongful constraint, machination, urgency, or persuasion, whereby the will of the person is overborne, and he is induced to do, or forbear to do, an act which he would not do, or would do, if left to act freely." Id. 453. Or, as the Civil Code defines it: "Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, and who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him." Civ. Code, § 1575. A relation of confidence and trust is alleged to have existed between Oliver and Albertina, both during the several years of Mrs. Johnson's widowhood and during their marriage, arising from Oliver's acting in the capacity of confidential agent at all times and from the relation of husband and wife after he married Mrs. Johnson. It was said, in Welch's Will, 6 Cal. App. 47, 91 Pac. 337: "While such confidential relation [husband and wife] does not, of itself, in this state raise a presumption of undue influence in regard to making a will, yet it is important in weighing the evidence in all cases of this character; in fact, it has been held in some jurisdictions that there is a presumption of undue influence in such cases when such confidential relations exist."

[4] Appellant's attack upon the complaint or grounds of contest is made upon each paragraph separately, claiming, in effect, that the pleader has failed to allege that the particular act pleaded resulted in so far overcoming the will of the testatrix as to lead her to substitute his will for her own, and to destroy her free agency. But appellant overlooks the final averment, as well as some others that might be noted, where the pleader avers that by reason of Olson's "aforesaid relations," and by reason of the "undue influence over her, as averred in the complaint and grounds of opposition herein, the said Oliver Olson acquired over the mind of said Albertina Olson an influence, wherein and whereby he was enabled to and did procure her to make the said alleged will," by which all her property "was to go to him to the exclusion of all the rest of her heirs at law." The grounds of opposition in their entirety must be looked to, and not the disjointed parts, for a right conception of their sufficiency; and, thus considering them, we feel quite

certain that the facts alleged are sufficient to withstand a general demurrer.

[5] The story of the relations of these two persons, continuing unbroken from the death of her first husband until the death of the testatrix, as set forth in the contest, was, we must presume in the absence of evidence, fully confirmed at the trial and justified the findings of the court. Finding 9, set forth above, is a distinct finding by the court that the will in question was procured through the undue influence exerted over his wife by her husband, and "is the direct result of such undue influence exerted as aforesaid," and that the testatrix "was not, at the time of the making of the said alleged will, free from undue influence, but was then and there, and for a long time prior thereto had been, and continued to be, acting under and subject to the undue influence of said Oliver Olson," and that the will "was procured to be made by means of and through the undue influence of said Oliver Olson," and "was the direct result of the undue influence exerted by said Oliver Olson over and upon said Albertina Olson." Here is the ultimate fact clearly and distinctly found, and, we must presume, on sufficient evidence. If it be claimed that this finding can have no greater force than may be derived from the findings as specifically set forth, still we must hold that, as the findings of fact are substantially the same as alleged in the complaint, and as the latter sufficiently set forth grounds of contest, the findings are sufficient to support the judgment.

[6] The court did not find, as was alleged in the contest, that Olson took an active part in the execution of the will; but it did find that he accompanied the testatrix to the attorney's office at the time the will was prepared, "and remained in said office within the hearing of, and in a position so that he could see the parties in the execution of the said will, and departed from said office with said Albertina Olson." This circumstance was pertinent and of probative force, and was properly considered in connection with other circumstances. In the Estate of Snowball, 157 Cal. 307, 107 Pac. 601, a similar circumstance was given significance, where the favored daughter of the testatrix went to the office of the lawyer with the testatrix, who then made the will "while the daughter remained in another room."

[7] The statement in the will by the testatrix that she had advanced and paid to each of her children and grandchildren his or her full share of her property is urged as going far to rebut any inference of unfairness or undue influence. And it is claimed that because the statement was not denied in the grounds of contest it must be presumed to be true. Shell's Estate, 28 Colo. 167, 63 Pac. 413, 53 L. R. A. 387, 89 Am. St. Rep. 181, is cited. In that case the testator devised all his property to his second wife, making no provision for his children by a former marriage The probate of the will was opposed. The testator stated the reason for omitting his children to be that he had made ample provision for them. The ground of contest was undue influence. The cause was tried, and the evidence went up with the record on appeal, from which the reviewing court was able to say that there was no attempt made to controvert this fact; and hence the court presumed it to be true, and, thus assuming, found that there was nothing unnatural in not making provision for the children of the first wife. We do not think we can indulge a presumption that the statement referred to in the will now here was true. There is a finding (21) that the testatrix "was continually under the influence and control of Olson, and was subject to his will, and was compelled to put her money and property in his name and to make said alleged will leaving everything to him." Other findings show that the contest involved all the property ever owned by the testatrix, and rebut any inference that she had given her children and grandchildren their full share, or, indeed, any share, of her property.

We do not feel called upon to comment further upon the facts as alleged and found, or to controvert the inferences indulged by appellant, which, he insists, may be drawn in entire harmony with the assumption that the testatrix acted in accordance with her own free and untrammeled will. While such inferences might, under the compelling force of evidence, have justified the court in reaching a different conclusion, still we think the facts as found, supported, as they must have been, by the evidence, fully warranted the court in refusing the probate of the will.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

19 Cal. App. 374

STANTON v. WELDY et al. (Civ. 971.)

(District Court of Appeal, Third District, California. July 1, 1912.)

EVIDENCE (§ 432*)—WANT OF CONSIDERATION—CONCLUSIVENESS OF RECITAL.

Under Civ. Code, § 1615, which provides that the burden to show want of consideration to support an instrument is on one seeking to avoid the instrument, defendants in a suit on a note were entitled to show want of consideration, though the note recited that it was given for the price of one-seventh of a stallion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1981–1989; Dec. Dig. § 432.*]

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by C. O. Stanton against J. R. Weldy and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

W. H. Hatton, for appellants. L. L. Dennett and S. G. Tompkins, for respondent.

CHIPMAN, P. J. This is an action on two certain instruments, alleged to be promissory notes, each reading as follows: "$500.00. San Jose, Cal., Nov. 14, 1906. For value received, we promise to pay C. O. Stanton or bearer, five hundred dollars, gold coin of the United States, with interest thereon from day of date until paid at the rate of six per cent. per annum in the following manner, to wit: On or before one year. This note is given for the purchase price of one-seventh of Percheron stallion, name Decide, dark grey. Foaled April 20th, 1901, No. (52,180) 40,762, and the express condition of the sale of said property is such that the title, ownership and right of possession thereof does not pass from the said C. O. Stanton, or their assigns, until the principal and interest above specified, and all costs, are paid in full; and the holder of this note shall have the right and full power to take possession of said property at any time they may deem themselves unsafe or insecure, and all payments made thereon shall be retained by the holder thereof; and in case said property, together with all payments made thereon, shall not be equal in value to the sum of said note, together with accrued interest and costs, including a reasonable attorney fee in the premises, at the time it shall be taken by the holder hereof, then this obligation shall continue to be binding; and the purchaser hereby agrees to pay any deficiency on demand, and that the same may be collected by due process of law. J. A. Weldy. J. R. Weldy."

Alleging nonpayment, and that the sum of $150 is a reasonable attorney's fee to be allowed in the action, the prayer is for judgment for $1,177.50, principal and interest, and $150, attorney's fees.

General and special demurrers were overruled, and defendants filed a verified answer to the unverified complaint, denying, on information and belief, its averments alleging the execution and delivery of said promissory notes, denying directly that there is due and owing or unpaid the principal or interest, or any other amount, and, for further answer alleged that defendants "received no consideration for the so-called promissory note set forth in said first cause of action," and like averments as to the second alleged cause of action. The cause was tried by a jury, and, by the direction of the court, the jury rendered a verdict for plaintiff. Defendants appeal from the judgment on the verdict, and from the order denying their motion for a new trial.

Plaintiff raised the point on the answer that the denial on information and belief was not a sufficient denial of the execution of the promissory note. The point was not pressed nor ruled upon, and plaintiff proceeded to put in his evidence.

Plaintiff called J. A. Weldy, one of the defendants, who testified to the execution of the two notes by himself and his brother, the other defendant; that he (the witness) did not deliver them to Mr. Stanton, the payee, and did not know how he got them; that he had seen Mr. Stanton, but that he had had no business with him. Mr. Tompkins, attorney for plaintiff, over defendants' objection, testified that the plaintiff in the action delivered the said two documents, the subject of the action, to witness, and that the purpose of the evidence was to show plaintiff's possession. The instruments, subject to defendants' objection, were admitted in evidence and read to the jury; whereupon, without further evidence, plaintiff rested.

Defendants moved for a nonsuit on several grounds, which may be thus summarized: That the instruments introduced are not promissory notes, and are not such as import a consideration, or such as, under the Code, give rise to a presumption of a consideration; that the instruments purport to set forth one-seventh of a stallion as the consideration, and there is no evidence of delivery, and, furthermore, delivery of one-seventh of a stallion is impossible; that a promissory note for the payment of a certain sum of money carries with it the presumption of a consideration, but the consideration here is specifically mentioned to be one-seventh of a stallion, and "there must be some proof that that consideration has been given," which is wholly wanting, either in allegation or evidence; that there is no proof of anything done by plaintiff, and, besides, the contract is impossible of performance, and is not enforceable, lacking, as it does, mutuality, plaintiff having promised nothing, even after performance by defendants; that if the instrument be construed as a one-seventh *interest in* a stallion the same objection would lie, for, while there might be a bill of sale of an interest, there could be no delivery, except the delivery of the stallion; and, finally that there is no evidence of nonpayment, and if nonpayment is presumed from possession of a promissory note such presumption is not indulged by possession alone of a contract such as this. The court denied the motion for nonsuit.

Both of the defendants were called as witnesses on their own behalf, and counsel sought to show by their testimony that they had received no consideration whatever for the so-called promissory notes. To all questions intended to show that no consideration was given for these instruments, objection was made by plaintiff, on the ground that defendants cannot be heard to contradict their writing; "that the recitals contained in the written instrument are conclusive as between the parties to the instrument. The Court: Well, except consideration. Mr.

Tompkins (attorney for plaintiff): And as to the consideration, also, when that recital is contractual in its nature, and not a mere formal recital of consideration [citing cases]. The Court: These cases simply hold that where the consideration is contractual you cannot show any other consideration. Mr. Tompkins: The defense is not here that there has been a failure of consideration. The Court: What is the defense? Mr. Tompkins: The defense is that there was never any consideration. Mr. Hatton: Exactly. The Court: The only person who could object to a matter of this kind would be his creditors; an objection could not be made by either of the parties to the transaction. The court is not authorized to vary the terms of the contract, and cannot do so in this case. The objection will be sustained." Similar rulings were made by the court, and for like reasons, to questions as to whether defendants were ever given possession of the stallion. There was no objection to the form of defendants' questions, or the means by which they sought to show want of consideration. Defendants were refused the evidence on the ground stated in the objection and by the court.

The record thus presents a question which, it seems to us, was erroneously decided by the learned trial judge. We are unable to perceive the distinction upon which the ruling was made—that a failure of consideration may be shown, but not an entire want of consideration, where the latter issue is directly made by the pleadings. This question of consideration is the principal one referred to in respondent's brief. Cases are cited in support of the rule as given in Cyc. vol. 3, p. 377: "The rule permitting parol evidence of another consideration does not apply where the consideration as expressed is in fact a contract, and not a mere statement of fact." That is to say, where the instrument recites the consideration to be, as here, the purchase price of a stallion, a different or some other consideration cannot be shown to dispute or vary the terms of the contract. The cases cited simply hold, as was said by the trial judge, that, where the consideration is contractual, "some other consideration than that set forth in the instrument itself cannot be shown." But such was not the purpose of the evidence offered. There is a wide difference between showing an utter lack of consideration and some other consideration than that mentioned in the agreement. In the latter case a consideration is admitted, but a different one is sought to be shown. In the former the purpose is to show the nonexistence of any consideration. On principle, we can discover no reason for allowing proof of no consideration, where money is the consideration named, and where some article of personal property is named as the consideration. If the promisor received nothing in either case, he may show the fact in defense.

Plaintiff made no attempt to prove a consideration, relying wholly on a presumption. Can it be that a fact so essential to plaintiff's recovery and resting on a presumption cannot be disputed by the fact itself?

Section 1614 of the Civil Code provides that "a written instrument is presumptive evidence of a consideration." Section 1615 provides that "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to avoid it." How else could defendants successfully carry this burden than by proving "want of consideration"? The objection of plaintiff went to the right of defendants to prove the issue tendered, not to the manner of offering the evidence. Under the view taken by the trial court, no evidence which defendants could have offered would have been received to show want of consideration for the contract.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

19 Cal. App. 333

PEOPLE v. WATSON. (Cr. 246.)

(District Court of Appeal, Second District, California. June 26, 1912.)

Criminal Law (§ 1178*)—Appeal—Disposition of Cause.

Where appellant in a criminal case fails to support his appeal by oral argument or printed brief, the judgment of conviction appealed from must be affirmed, as provided by Pen. Code, § 1253.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. § 1178.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

John W. Watson was convicted of embezzlement, and he appeals from the judgment and from an order denying a new trial. Affirmed.

Davis, Rush & Robinson, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of the crime of embezzlement and sentenced to serve a term of two years' imprisonment in the state prison. He appealed to this court from that judgment, and from an order made denying his motion for a new trial.

The record on appeal, consisting of the reporter's and clerk's transcripts, was filed in this court on the 26th day of February, 1912, and thereafter upon stipulation of counsel time was twice extended within which defendant might file a brief in support of his appeal. No brief was filed within the time allowed, and on June 24th this cause was ordered to be submitted. Appellant having failed to support his appeal, either by oral argument or printed brief, the judgment and order must be affirmed. Pen. Code, § 1253; People v. Albitre, 153 Cal. 367, 95 Pac. 653.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 344

INTERLOCKING STONE CO. v. SCRIBNER et al.

ROLLINS v. SCRIBNER et al. (Civ. 938).

(District Court of Appeal, Third District, California. June 28, 1912.)

1. ATTACHMENT (§ 12*) — INTERPLEADER — CROSS-COMPLAINT.

A defendant in an action in interpleader, who files a cross-complaint setting up a cause of action on an express contract for the direct payment of money in the state, and making plaintiff a party defendant, may, on making the affidavit required by Code Civ. Proc. § 538, obtain an attachment against the fund held by plaintiff before its payment into court, and thereby forestall any possible adverse action on the part of any creditor of the codefendant, not made a party defendant in the complaint of interpleader.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 38, 39; Dec. Dig. § 12.*]

2. INTERPLEADER (§ 32*)—ISSUES.

The court in an action in interpleader, in which defendant files a cross-complaint making plaintiff a party and obtaining an attachment against the fund held by plaintiff before its payment into court, must determine whether the case is a proper one for interpleader; and when that question is determined in the affirmative, and the fund is paid into court, it may discharge plaintiff from liability to the conflicting claimants, who must, as required by Code Civ. Proc. § 386, litigate their claims among themselves.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 72, 73; Dec. Dig. § 32.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action in interpleader by the Interlocking Stone Company against M. G. Scribner and M. E. Rollins, in which the latter appeared and filed a cross-complaint on which an attachment was issued. From an order refusing to dissolve the attachment, plaintiff appeals. Affirmed.

F. A. Berlin, for appellant. M. C. Decarli, for respondent.

BURNETT, J. The action was brought in interpleader by plaintiff under section 386 of the Code of Civil Procedure, providing that, "whenever conflicting claims are, or may be, made upon a person for, or relating to, personal property, or the performance of an obligation, or any portion thereof, such person may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves."

It appears by the complaint that plaintiff is indebted on an open account to the defendant M. G. Scribner in the sum of $577, and on a promissory note, dated July 30, 1909, for the amount of $275.50 and interest, and on another note, of January 8, 1909, for the amount of $820.10 and interest. That there was, at the time of the commencement of the action, standing upon its books in the name of M. G. Scribner 6,101 shares, and in the name of defendants Neal and Scribner 6,201 shares, of the capital stock of plaintiff corporation. A detailed statement is set out of certain writs of execution and writs of attachment issued against said Scribner in various causes, and, by process of garnishment, levied upon all the property and debts in the hands of plaintiff and belonging or owing to said Scribner. That the defendant E. E. Rollins claims to be the owner by assignment, for value, and before maturity, and before the levy of said attachments and executions, of the two said promissory notes. That on May 26, 1910, the said defendant M. G. Scribner commenced an action in the superior court of Alameda county against plaintiff herein to recover the said sum of $577 due to said Scribner on said open account. The foregoing facts and others are alleged in a manner to make it plain that the defendants should be required to interplead concerning their claims to the moneys and property referred to in the complaint.

The defendant E. E. Rollins appeared and filed a cross-complaint and made plaintiff herein a party defendant thereto. In the cross-complaint the said two promissory notes were set out, and it was alleged that the same were, subsequent to their execution and prior to the filing of said cross-complaint, duly assigned, indorsed, and delivered to said cross-complainant. With said cross-complaint the said Rollins filed an affidavit and undertaking, and had a writ of attachment issued against the property of the said Interlocking Stone Company. Appellant states that this writ was levied upon the property of said company; but as to this the record is silent. The plaintiff herein moved the superior court to dissolve the said attachment; but the motion was denied, and from this order of denial the appeal has been taken. The motion was made upon the ground "that said attachment was improperly and irregularly issued," for the reason that the said affidavit and said undertaking were each "irregular, improper, defective, and void, and upon the further ground that, the above-entitled action being an action in interpleader, the said court has not, nor has the clerk of said court, any jurisdiction or authority to issue an attachment in said action upon the cross-complaint therein."

[1] The said affidavit and undertaking seem to be in proper form, and, indeed, no attack is made upon them in appellant's brief. The last ground mentioned is the only one that is urged for reversal of the order. The contention of appellant is that "the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff claims to be only a stakeholder, and prays that the defendants may be required to interplead among themselves to determine the relative priorities of their claims to the fund in the hands of the stakeholder. The plaintiff has no interest in the controversy among the defendants, and is not a proper party defendant to the cross-complaints of the defendants. It would be a hardship and an injustice to require the plaintiff in such an action of interpleader to plead to 16 or more cross-complaints, when it disclaims any interest in the property, and offers to deliver it to whomsoever the court may determine to be entitled to it. If a defendant does not care to interplead with his codefendants in reference to the subject-matter involved, he should go into another forum to assert his rights; and it may be that there he might proceed by attachment. But even there he must litigate with his codefendants here, or his object cannot be obtained." But it is submitted that appellant has mistaken the form of procedure for relief, and that the apprehension of hardship is more fanciful than real. There is nothing in the law to prevent Rollins from filing a cross-complaint, as he did. He stated a cause of action on an express contract for the direct payment of money in this state. His cause of action was against plaintiff herein, which was made defendant to the cross-complaint. Cross-complainant was thus in a position to make the affidavit required by section 538 of the Code of Civil Procedure. Unless the action is brought against the party who is the asserted debtor, it is apparent that he could not make the affidavit nor secure the writ of attachment. Nor is it perceived why he should go into any other forum and bring an independent action against plaintiff, when he had already been brought into court by the act of plaintiff itself to litigate this very matter.

The complaint of Rollins being for a cause of action that constitutes the foundation for the issuance of a writ of attachment, and the affidavit and undertaking being in proper form, and the court having undoubted jurisdiction of the subject-matter, it cannot be said that any irregularity or excess of authority can be affirmed of the proceedings in the court below. To protect Rollins' interest, it may have been entirely unnecessary to have the writ issued, but the money involved was still in the hands of plaintiff herein, and it would seem that Rollins had the legal right, by the process of garnishment before the money was paid into court, to forestall any possible adverse action on the part of some creditor of Scribner, not made a party defendant in the complaint of interpleader.

[2] As far as plaintiff is concerned, as soon as the parties defendant had appeared or defaulted, the court would determine whether it was a proper case for interpleader. The question being determined in the affirmative, upon the payment of the money into court, an order would be made discharging plaintiff from liability to all or any of the conflicting claimants, and the latter would be required to litigate their several claims among themselves. Section 386, Code Civ. Proc. This, of course, would relieve plaintiff of any liability or burden incident to said writ of attachment.

The course of procedure in such cases is discussed in S. F. Savings Union v. Long, 123 Cal. 109, 55 Pac. 709, wherein Judge Temple, speaking for the court, said: "In such cases there may always be a twofold contest: First, as to the right of the plaintiff to bring the suit and to force the defendants to interplead, and, if such right is maintained, the litigation among the defendants. There may be two sets of pleadings: First, those having reference only to the right of the plaintiff to compel the defendants to interplead, and the several complaints of the defendants, in which their respective rights to the subject in controversy are set up. These may be, and usually are, included in the answer to the bill of interpleader. Such answer is then in the nature of a cross-complaint, and should be served upon each defendant, who may answer the same. Whether the plaintiff shall be permitted to maintain such an action is first determined, and if his right is sustained an interlocutory decree is entered, requiring the defendants to litigate their claims inter sese."

Although not disclosed by the record, it is fair to assume that the course, as thus indicated, has long since been pursued, and that plaintiff is no longer a party to the litigation. At any rate, the showing made in the court below does not lead to the conclusion that the order refusing to dissolve the attachment was erroneous. It is therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

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19 Cal. App. 359

PEOPLE v. BREEDING et al. (Cr. 237.)

(District Court of Appeal, Second District, California. June 29, 1912.)

1. Lewdness (§§ 1, 5*)—Living in State of Cohabitation and Adultery—Elements of Offense.

The offense denounced by Pen. Code, § 269a, as amended by Act March 21, 1911 (Laws 1911, p. 426), punishing every person living in a state of cohabitation and adultery, can only be committed by one who is married; and an information charging that defendants willfully and unlawfully lived in a state of cohabitation and adultery with each other necessarily implies that they were married to others; and a failure to allege in direct terms that defendants were married to others does not render the information insufficient.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1–4, 5; Dec. Dig. §§ 1, 5.*]

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2. Lewdness (§ 1*)—Living in a State of Cohabitation and Adultery.

The state on a trial of defendants, charged with living in a state of cohabitation and adultery, in violation of Pen. Code, § 269a, as amended by Act March 21, 1911 (Laws 1911, p. 426), must show that each of the defendants was lawfully married to another; and where there was no evidence of the marriage of one of the defendants the prosecution must be dismissed as to him.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1–4; Dec. Dig. § 1.*]

3. Lewdness (§ 1*)—Living in a State of Cohabitation and Adultery.

Prior to the amendment of Pen. Code, § 269a, by Act March 21, 1911 (Laws 1911, p. 426), punishing persons living in a state of cohabitation and adultery, it was not a crime to live in a state of cohabitation and adultery, unless the same was open and notorious.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1–4; Dec. Dig. § 1.*]

4. Lewdness (§ 9*)—Living in State of Cohabitation and Adultery — Evidence — Admissibility.

Where the information charged a violation of Pen. Code, § 269a, as amended by Act March 21, 1911 (Laws 1911, p. 426), punishing every person living in a state of cohabitation and adultery, evidence of statements by one of the defendants as to the defendants living together, made prior to the adoption of the amendment, was inadmissible to establish the crime, or for any other purpose.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 14; Dec. Dig. § 9.*]

5. Lewdness (§ 1*)—"Living in a State of Cohabitation and Adultery."

The words "living in a state of cohabitation and adultery" in Pen. Code, § 269a, as amended by Act March 21, 1911 (Laws 1911, p. 426), punishing living in a state of cohabitation and adultery, mean the living together as husband and wife; and to justify a conviction it must appear that there existed between defendants an adulterous cohabitation.

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. §§ 1–4; Dec. Dig. § 1.*

For other definitions, see Words and Phrases, vol. 5, pp. 4191–4192.]

6. Lewdness (§ 10*) — Living in State of Cohabitation and Adultery—Evidence—Sufficiency.

Evidence *held* not to justify a conviction of living in a state of cohabitation and adultery, in violation of Pen. Code, § 269a, as amended by Act March 21, 1911 (Laws 1911, p. 426).

[Ed. Note.—For other cases, see Lewdness, Cent. Dig. § 15; Dec. Dig. § 10.*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

William Breeding and another were convicted of crime, and they appeal. Reversed.

Dick Foye Harding and George L. Hoodenpyl, for appellants. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendants were convicted upon an information charging them with the crime specified in section 269a of the Penal Code; it being alleged that on or about the 25th day of May, 1911, they did willfully and unlawfully live in a state of cohabitation and adultery with each other, etc.

[1] The charge of living in a state of cohabitation and adultery, an offense which can be committed by one only who is married, necessarily implies that the accused was a married person. Hence the failure to allege in direct terms that defendants were married did not render the information insufficient. People v. Silva, 8 Cal. App. 349, 97 Pac. 202.

[2] Since those only who occupy the status of married persons are capable of committing the crime with which defendants were charged (Ex parte Sullivan, 17 Cal. App. 278, 119 Pac. 526; In re Grace Cooper [Sup.] 121 Pac. 318), and since by implication the information alleged that each of the defendants was lawfully married to other than his or her codefendant, it was therefore necessary, in order to justify a conviction, to prove such implied allegation of marriage. As to defendant Breeding, no evidence was introduced which in the slightest degree tended to establish this essential element of the crime; indeed, no evidence at all was offered touching the question. For this reason the court should have granted the motion, made at the close of the evidence offered on behalf of the people, for the dismissal of the prosecution as to defendant Breeding.

[3] Section 269a of the Penal Code, prior to the amendment thereof in May, 1911, provided that every person who lived in a state of open and notorious cohabitation and adultery was guilty of a misdemeanor. By act of the Legislature, approved March 21, 1911, and which became effective on May 20, 1911, the section was amended by striking out the words "open and notorious." Prior to the time this amendment went into effect, the acts with which defendants were charged constituted no offense whatever under the laws of this state. People v. Salmon, 148 Cal. 303, 83 Pac. 42, 2 L. R. A. (N. S.) 1186, 113 Am. St. Rep. 268.

[4] One Culver was called as a witness, and, after testifying that he had a conversation with defendant Croft in August, 1910, was asked to relate what she said with reference to her and Breeding living together at that time. Defendants objected to the question, upon the ground that it was immaterial, since it had reference to the conduct and acts of the parties at a time when, conceding that they lived in a state of cohabitation and adultery, such conduct and acts constituted no offense. The court overruled the objection, stating that the evidence would be admitted "for the purpose of showing the relations that these parties had prior to that time and from that if the facts were sufficient to lead the jury to find at the time they occupied that relation they may take into account previous circumstances, but not for the purpose of establishing the crime." This statement of the court is somewhat involved, and its meaning not en-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tirely clear. Unless the evidence was admissible as tending to establish the crime, it was immaterial and should have been excluded. Assuming that the effect of the court's ruling was to admit the evidence for all purposes, we are of the opinion that it was incompetent. Conceding that the evidence tended to show that in August, 1910, when to do so constituted no offense, defendants lived in a state of cohabitation and adultery, it constituted no proof that they were living in such state after May 20, 1911, when to do so constituted a crime. It was not a status which, proven to have been created, will, in the absence of evidence to the contrary, be presumed to continue, but a relation or condition due to the acts of the parties, and which, in the absence of such acts, can have no existence. We agree with the learned trial judge that such evidence was inadmissible for the purpose of establishing the crime, and, being inadmissible for that purpose, it could not be admissible for any other purpose; hence it was error to admit it at all.

[5, 6] As used in the statute, the words "living in a state of cohabitation and adultery" means the living or dwelling together as husband and wife, and exercising the sexual rights and duties implied by such relation when legally created; in other words, a counterfeit of the marriage relation. Hence, to justify the conviction of defendants, it should appear from the evidence that there existed between them an adulterous cohabitation prior to May 25, 1911, and subsequent to the date on which said amendment went into effect, namely, May 20, 1911. The only evidence touching the question as to the conduct of defendants during this period was that they resided in the same house, which consisted of a room and a kitchen downstairs and a loft or room upstairs, each of which, other than the kitchen, was used as a bedroom; that on May 24, 1911, the constable, accompanied by two other persons, went to this house about 8:30 in the evening, and after spending a half or three-quarters of an hour in watching the house, during which time they saw some person come out and re-enter the same, and after the occupants had retired, they knocked upon the door and asked for admission, in response to which, after the lapse of some minutes, the door was opened by a son of Nina B. Croft, a young man about 20 years of age, at which time the witnesses testified that they saw defendant Breeding and another son of defendant Croft in bed in the lower room of the house; that Nina B. Croft was occupying the upper room of the building; that after knocking upon the door and demanding entrance, and before the door was opened, these witnesses heard a noise within which sounded like some one coming down the stairs, which stairway consisted of a ladder or cleats nailed upon the studding, and during this period of waiting they also heard voices engaged in conversation both upstairs and downstairs; one of the voices upstairs being that of a woman. At the time defendant Croft's sons, both of whom were upwards of 20 years of age, and one of whom was married, were occupying the house with defendants. This was substantially all of the evidence offered touching the period extending from May 20 to May 25, 1911. While this and other evidence tends to establish the fact that defendants resided in the same house, nevertheless it is insufficient to show that they lived in a state of cohabitation and adultery. Indeed, it is questionable whether the evidence, when applied to the period covered by the information, even "shows opportunity."

For the reasons given, the judgment as to both defendants is reversed.

We concur: ALLEN, P. J.; JAMES, J.

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19 Cal. App. 400

FLYNN v. MANSON et al. (Civ. 1,022.)

(District Court of Appeal, First District, California. July 10, 1912. Rehearing Denied by Supreme Court Sept. 7, 1912.)

1. Release (§ 29*)—Joint Tort-Feasors.
A release of one of several wrongdoers from liability releases his codefendants, though the release recites that it is not claimant's intention that it so operate.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.*]

2. Release (§ 29*)—Torts — Double Recovery.
There can be but one recovery for a single tort.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 69, 72, 74; Dec. Dig. § 29.*]

Appeal from Superior Court, City and County of San Francisco; John Hunt, Judge.

Action by Ann Flynn against Marsden Manson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles F. Hanlon, for appellant. Lloyd S. Ackerman, for respondent United States Fidelity & Guaranty Co. Stratton & Kaufman, for respondent Empire State Surety Co. John B. Gartland, for respondent Casey. Knight & Heggerty, for respondent Van der Naillen.

KERRIGAN, J. This is an appeal from the judgment. According to the allegations of the complaint the plaintiff was injured by the wrongful act of the defendants. In consideration of the sum of $250 the plaintiff released one of the defendants, reserving the right to proceed against the remaining defendants. A judgment of dismissal was entered in favor of the defendant thus released. When the cause came up for trial the court granted a motion to dismiss the action as to the remaining defendants, holding that the release of one of a number of joint tort-feasors was a discharge of all, notwithstanding the stipulation in the instrument of release to the contrary.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The facts of the case, and the decisions in this state applicable thereto, are set forth in an opinion prepared and filed by the learned judge of the trial court. As our consideration of the case leads us to the same conclusions as set forth very clearly in that opinion, we cannot do better than quote it in its entirety:

"This is an action ex delicto, brought by plaintiff against the defendants Marsden Manson, Michael Casey, and A. Van der Naillen, and other former members of the board of public works, to recover damages alleged to have been sustained by plaintiff in consequence of the neglect of the defendants to maintain a sufficient sidewalk, in consequence of which the plaintiff was injured, and to recover damages for which injury this action was brought. Issue was joined therein, and on the 27th day of September, 1909, the defendant Marsden Manson, in consideration of the payment of the sum of $250, secured from the plaintiff a release discharging him, said Marsden Manson, from any further liability in the premises. Thereafter, in accordance with the terms of said release, a dismissal of the action was duly made and filed by plaintiff's attorney, and a judgment dismissing said Manson and his cosureties was thereupon duly entered.

"The instrument of release recited that in consideration of the above amount the plaintiff forever released said Manson 'from all claims and causes of action' set forth in the complaint herein. It, however, contained a provision to the effect that, in executing said release, it was not the intention of plaintiff that it should operate as a release of the liability of Manson's codefendants, or either of them; but, on the contrary, 'it is the plaintiff's intention that the cause of action * * * against said defendants Casey and Van der Naillen * * * shall exist and continue with the same force and effect as if this release had never been made.' The release in question was set up by supplemental plea on behalf of the defendants Casey and Van der Naillen, and a motion was thereupon made by the last-named defendants for a dismissal of the action as to them, upon the ground that the release of either codefendant was a release of all the defendants herein.

[1] "It has long been a well-settled rule of law that in an action against several wrongdoers charged with the commission of a joint tort the release of one is the release of all; but whether the far-reaching effects of such release can be modified or overcome by any reservation in the release similar to the one mentioned herein is a question upon which the authorities are undoubtedly conflicting, and the point has never been directly decided in this state. In Urton v. Price, 57 Cal. 272, an action against two tort-feasors, the plaintiff executed a release to one of them 'from all demands arising from personal injuries to me for which I brought suit,' and the court found that the release evidenced an intention to constitute a satisfaction for the injuries complained of. In the Tompkins Case, 66 Cal. 166 [4 Pac. 1165], which was an action against two railroad companies to recover damages for injuries sustained by a passenger upon the car of one of said companies, it appeared that the plaintiff executed a release of one of the defendants, and the court held that thereby both of the defendants were released. In the course of its opinion the court says: 'Every party contributing to the injuries was liable to the full extent of the damages by her [the plaintiff] sustained. Her injuries gave her but a single cause of action. * * * Damages resulting from the same wrongful transaction are ordinarily inseparable. She could not recover part from one and part from the other defendant'—quoting with approval the following language of the court in an opinion in Urton v. Price: 'The bar accrues in favor of some of the wrongdoers by reason of what has been received from * * * one or more of the others. The bar arises from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent.'

"In the Chetwood Case, 113 Cal. 414 [45 Pac. 704], an action in its nature ex delicto was commenced against a number of defendants, three of whom constituted the executive committee of the corporation defendant. Subsequently the plaintiff released two of the defendants last named upon the payment by them to him of the sum of $27,500, and thereafter caused formal judgment of dismissal of the action as to them to be entered. Judgment had been rendered against three defendants last named for a sum of money in excess of $190,000, and it was held that the release of two of the defendants operated to release the third. 'While plaintiff may sue one or all of the joint tort-feasors, he can have but one satisfaction. Once paid for the injury he has suffered by any one of the joint tort-feasors, his right to proceed further is at an end. Where several joint tort-feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. By his withdrawal plaintiff announced that he has received satisfaction for the injury complained of. * * * It matters not, either, whether the payment made was in a large or in a small amount. If it be accepted in satisfaction of the cause of action against one, it is in law a satisfaction of the claim against them all. In the case at bar it is disclosed that, after the court had awarded a single judgment for a lump sum against the three defendants jointly, the plaintiff accepted from two of them a sum of money for and on account of the injury and loss sustained, and a judgment of dismissal was accordingly entered. This judgment, entered under the stipulation of the parties, was equivalent to a retraxit. * * * It undoubtedly is liable for all the damages which the plaintiff has sustained, without regard to their different degrees of culpability, and a release of one discharges all.'

[2] "It is claimed by plaintiff that these authorities are inapplicable because in none of those cases did the release contain the saving clause of the one herein. It is to be observed, however, that the release made to Manson discharged him 'from all claims and causes of action set forth in the complaint.' It furthermore provided that, in the event that such release should be held to operate as a discharge of Manson's codefendants, nevertheless it was to operate 'as a full and final release of said Manson.' However conflicting may be the current of authorities in respect to the proper construction of a release of the kind in question, it is a well-settled principle of law that in actions ex delicto plaintiff can recover compensation but once. Where the demand is unliquidated, as in the case here, the court cannot hold that the payment of any sum, however small, in consideration of a release does not or cannot operate as compensation for the alleged injuries.

"I think, in view of the broad and sweeping language of the Supreme Court in the case last quoted, it is clear that the release in question, notwithstanding its saving clauses, is a discharge, not only of Manson, but of his codefendants Casey and Van der Naillen."

In addition to the authorities referred to in the foregoing opinion, there are a number of cases in other jurisdictions, constituting the weight of authority, which hold that a reservation in a release to one of several tort-feasors does not operate to hold the others. Such a provision, says the court in Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504, "is simply void as being repugnant to the legal effect and operation of the release itself." So in Seither v. Philadelphia Traction Co., 125 Pa. 397, 17 Atl. 338, 4 L. R. A. 54, 11 Am. St. Rep. 905, where a reservation in a release similar to the one here was considered, the court said that the plaintiff having received one satisfaction was not entitled to a second. Each joint tort-feasor "being liable to the extent of the injury done by all, it follows as a necessary consequence that satisfaction made by one for his liability operates as a satisfaction for the whole wrong and as a discharge of all concerned. One defendant cannot make an agreement impairing the legal rights of his codefendants, nor cede to the plaintiff the privilege these defendants had of availing themselves of any matter forming a legal defense to the action." Ellis v. Bitzer, 2 Ohio, 89, 15 Am. Dec. 534, 537. In Sunlin v. Skutt, 133 Mich. 208, 94 N. W. 733, it is held, as stated in the syllabus: "The release of one joint trespasser is the release of all, irrespective of the intention of the parties."

In the case of Ruble v. Turner, 12 Va. 38, the same principle is given thus: "The law says that if one joint trespasser be released, or make accord and satisfaction, it shall be a bar against the recovery against all others. The plaintiff can no more change the law in this particular by any subsequent proviso or condition than he could after a grant in fee simple by deed restrain his grantee from selling the lands. * * * The proviso is merely void, and cannot prevent the legal effect of the accord and satisfaction made by one of the codefendants." See, also, Ewing v. Ford, 1 A. K. Marsh. (Ky.) 457, Brown v. Town of Louisburg, 126 N. C. 701, 36 S. E. 166, 78 Am. St. Rep. 677, El Paso & S. P. Co. v. Darr (Tex. Civ. App.) 93 S. W. 166, Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154, and the leading case of Abb v. N. P. Ry. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864, where the authorities on both sides of the question are carefully reviewed, and the conclusion is reached that, when an injured party receives a sum of money with an agreement that it shall fully release and discharge the one making the payment—as was the case here—it is a release of the cause of action as to all the defendants, although there was a stipulation to the contrary. "The absolute release of one," says the court, "operates to release all tort-feasors who participated in the same act."

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

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19 Cal. App. 451

PARKER v. HERNDON. (Civ. 945.)

(District Court of Appeal, Second District, California. July 12, 1912. Rehearing Denied Aug. 10, 1912.)

1. MASTER AND SERVANT (§ 80*)—ACTION FOR COMPENSATION—COMPLAINT — SUFFICIENCY.

A complaint stating that plaintiff, an experienced mining engineer, was employed by defendant, who owned an interest in mining claims, to report the condition of the property and assist in making sales, on an agreement for an undivided one-sixth interest in the property and the proceeds; that plaintiff performed his part of the agreement, but defendant did not convey any interest to him, and refused to pay him any part of the proceeds of sale, excepting plaintiff's expenses; that the exact amount received by defendant for property sold is unknown to plaintiff, but that on information and belief he states it to be in excess of $10,000; and that there is due and unpaid to him a sum in excess of $1,266, he being unable to state the exact amount—in the absence of demurrer, sufficiently states a cause of action for the recovery of money.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107–127; Dec. Dig. § 80.*]

2. APPEAL AND ERROR (§ 1039*) — HARMLESS ERROR—PLEADING.

Defendant cannot complain on appeal that the complaint did not state facts entitling plaintiff to relief prayed for, but not granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. § 1039.*]

3. LIMITATION OF ACTIONS (§ 195*) — ACTION TO RECOVER MONEY.

An action to recover under a contract to pay plaintiff part of the proceeds of mining claims for his services cannot be said to be barred by limitations, under Code Civ. Proc. §§ 337, 343, where it does not appear when the proceeds of a sale were received by defendant.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711–716; Dec. Dig. § 195.*]

4. APPEAL AND ERROR (§ 934*) — REVIEW — FINDINGS.

Findings should be liberally construed to support the judgment appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3782; Dec. Dig. § 934.*]

5. APPEAL AND ERROR (§ 1011*) — REVIEW — FINDINGS—CONCLUSIVENESS.

Findings on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Joseph H. Parker against James M. Herndon. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

H. C. Millsap and Millsap & Sparks, for appellant. Charles Lantz and W. J. Wood, for respondent.

SHAW, J. Action begun December 4, 1908. By the amended complaint, upon which the action was tried, it was alleged that plaintiff was an experienced mining engineer; that on January 1, 1904, defendant was the owner of a one-half interest in a number of mining claims in Riverside county; that he employed plaintiff to map, photograph, and make a technical report as to the quantity and value of ore therein, and assist defendant in making sales of the property, in consideration of the performance of which service defendant agreed to give to plaintiff an undivided one-sixth of his interest in said property, and in case of a sale of any of the property to pay to plaintiff one-sixth of the gross proceeds of such sale; that plaintiff performed his part of the contract; that defendant did not convey to plaintiff any interest in the property; that he sold a number of the claims, but refused to pay to plaintiff any part of the proceeds thereof, or to pay him any sum whatever, except plaintiff's expenses incurred in the performance of the work; that the exact amount received by defendant for the property sold is unknown to plaintiff, but on information and belief alleged to be in excess of $10,000, and that there is due and unpaid to him a sum in excess of $1,266, the exact amount of which sum so due and unpaid plaintiff is unable to state. The prayer was for judgment for such an amount as might be found due plaintiff from the proceeds of the sales made by defendant, and a decree adjudging plaintiff the owner of a one-sixth interest in the property which defendant retained. By answer defendant denied the material allegations of the complaint, and in addition thereto, pleaded the statute of limitations as a bar to any recovery upon the alleged agreement. The court found the issues, in so far as they affected plaintiff's right to one-sixth of the proceeds of the property sold, in his favor, and gave him judgment therefor, from which, and an order denying his motion for a new trial, defendant appeals.

[1] While the complaint is inartificially drawn, and contains much matter of surplusage, it must, in the absence of demurrer, be construed as a sufficient statement of a cause of action to recover money alleged to be due upon the contract whereby defendant agreed to pay plaintiff one-sixth of the proceeds of the sale of property alleged to have been sold. It also purports to state a cause of action for the specific performance of the contract as to the unsold mining claims, an interest in which defendant retained.

[2] Appellant attacks the complaint, claiming that, measured by the equitable rules applicable to cases involving specific performance, it is insufficient as a basis for the relief prayed for as to the unsold property, title to which was still vested in defendant. Conceding this to be true, a complete answer to the contention is that during the trial, in open court, plaintiff voluntarily abandoned all claim and right to the unsold portion of the property, and asked judgment only for one-sixth of the proceeds of the property sold. No demurrer being interposed, and no judgment rendered against defendant decreeing specific performance, appellant will not be heard in an attack upon the complaint based upon the ground that it did not state facts entitling plaintiff to relief prayed for, but not granted. Under such circumstances, he is in no position to complain. The case of Prince v. Lamb, 128 Cal. 120, 60 Pac. 689, cited by appellant, was one wherein an accounting was sought by plaintiff upon the theory that a copartnership existed between the parties. The court held the facts alleged insufficient to show a copartnership, or any right to the relief claimed, and hence no facts were alleged entitling

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

plaintiff to a decree for an accounting. The case at bar, as shown by the record, is not one for an accounting, but for simple breach of contract. Plaintiff, alleging his inability, for reasons alleged, to state the exact sum due by reason thereof, asks the court to determine the same and give judgment therefor.

[3] The cause of action was not barred by the statute of limitations (Code Civ. Proc. §§ 337, 343), affirmatively pleaded by defendant. He introduced no evidence in support of the allegation, but claims that plaintiff's evidence shows the services were completed prior to April 22, 1904, and the original complaint was filed December 4, 1908. The covenant of defendant, however, was not to pay plaintiff upon completion of performance of the services, but, as found by the court, "to pay to plaintiff one-sixth of the gross receipts which said defendant should receive from the sale of defendant's interest in the property." Nothing, therefore, was due from defendant to plaintiff until the sale was consummated and the purchase money paid. The record is silent as to the date when the sale was made and the purchase money in the sum of $6,499.98 paid. For aught that appears, this sum may have been paid the day before the suit was brought. Moreover, there is a conflict of testimony as to the time when plaintiff completed his contract.

It is further claimed that the finding, that defendant should pay plaintiff one-sixth of the gross proceeds of the sale of the property, is not supported by the evidence, for the reason that, in certain letters written plaintiff, who was then operating a mine in Kern county, defendant offered to give him a one-sixth interest in the property, and in response to these letters, and at the request of defendant, plaintiff came to Los Angeles, where, as he says: "We talked the proposition over, and I told him I wanted to have a thorough understanding of this thing. He said: 'Why, sure. Now I will give you just according to my letters that I have written you. I will give you all the expenses for the trip, allowing you $50 for the expenses of your family while you are gone up there, and I will give you a one-sixth interest of all that I receive on the property.' I said: 'Now, if there is any money to be paid on this, I do not care to go into it, because it is too large a deal for me to tackle. I have not got the money.' He said: 'There is no money coming from you whatever. The thing is big enough. I know what it is, and we can all clean up a fortune. I will give you one-sixth of the gross receipts if you will go down there and see that I do not get beat out of the property. I want you to go and make maps of the property, make photographs, and conscientiously sample the ore.'" Plaintiff further testified that "the major part of the work, with the exception of endeavoring to help sell the property, was all done within a few months, but I endeavored until the latter part of last year to help him sell the property."

Appellant insists that this oral agreement was void for want of other consideration than the promise on the part of plaintiff to perform a duty already imposed upon him by an acceptance of defendant's offer made by letter to give him a one-sixth interest in the property, which fact he claims was found by the court. Sullivan v. Sullivan, 99 Cal. 187, 33 Pac. 862.

[4] If possible, findings are to be liberally construed in support of the judgment. Ames v. City of San Diego, 101 Cal. 395, 35 Pac. 1005. The finding that, upon receipt of the letters, plaintiff accepted defendant's offer by letter, and left his work in Kern county, and came to Los Angeles, and there had a conversation with defendant, in which it was agreed that defendant should pay him one-sixth of the gross proceeds of the sale, rightly construed, means that in response to letters plaintiff came to Los Angeles, where an oral contract was made, as found by the court. The parol contract, not the offer made by letter, which brought the parties together, constitutes the basis for plaintiff's right to recover. This was the theory upon which the trial court gave judgment for plaintiff.

[5] Conceding a conflict in plaintiff's own testimony as to what he was to do, what he did, and when he completed his work, it was, nevertheless, for the trial court to reconcile his statements, and, unless manifestly without support, the findings made thereon should not be disturbed. Applying this rule, and recognizing the existence of such conflict, we are of the opinion that the attack upon the findings is without merit.

Judgment and order affirmed.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 457

GOODMAN v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et. al.

(Civ. 1,216.)

(District Court of Appeal, Second District, California. July 13, 1912.)

Justices of the Peace (§ 159*)—Appeal—Jurisdiction of Superior Court.

Where a justice's judgment was rendered on March 7th, and an undertaking staying execution and an undertaking on appeal were filed on March 14th, and notice of appeal was filed on April 3d, and thereafter the amount required by law to be paid for the filing of papers on appeal was paid, an order dismissing the appeal was proper.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 550–578; Dec. Dig. § 159.*]

Application for mandamus by S. B. Goodman against the Superior Court in and for the County of Los Angeles and N. P. Conrey, one of the judges thereof. Denied.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

H. C. Millsap, for petitioner.

PER CURIAM. The affidavit discloses that a certain judgment was rendered against petitioner, as defendant in a certain action brought in the justice's court, on the 7th day of March, 1912, for the sum of $234.60; that thereafter, on the 14th day of March, an undertaking was filed in the justice's court staying execution on said judgment, and also an undertaking on appeal; that on the 3d day of April following a notice of appeal was filed, and thereafter the amount required by law to be paid for the filing of papers on appeal was duly paid; that thereafter, on July 1st, the superior court dismissed the appeal. This application prays for a writ directing the respondents to vacate and set aside the order made and entered dismissing the appeal. We are of opinion that this writ should be denied, upon the authority of Rigby v. Superior Court, 122 Pac. 958, W. P. Jeffreys & Co. v. Superior Court, 13 Cal. App. 193, 109 Pac. 147, and Stimpson Scale Co. v. Superior Court, 12 Cal. App. 539, 107 Pac. 1013.

Application for writ denied.

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19 Cal. App. 396

WAGNER v. UNITED RAILROADS OF SAN FRANCISCO. (Civ. 1,003.)

(District Court of Appeal, First District, California. July 8, 1912. Rehearing Denied by Supreme Court Sept. 6, 1912.)

1. STREET RAILROADS (§ 117*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE.

Where, in an action for injuries in a collision with a street car, plaintiff testified that he looked for and saw the car approaching which subsequently collided with his wagon, and, believing that he had ample time to cross safely, attempted to do so, but in a moment saw that the car was approaching at a speed of 30 or 35 miles an hour, and that he then whipped up his horses, endeavoring to escape a collision, but without success, he was not guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. § 117.*]

2. APPEAL AND ERROR (§ 1058*)—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.

The error in rejecting evidence of a fact subsequently proved is not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

3. STREET RAILROADS (§ 113*)—ORDINANCES—ADMISSIBILITY.

An ordinance regulating the speed of street cars is admissible, in an action for injuries to a traveler in a collision with a car, on plaintiff proving that the ordinance was passed about two years before the accident, in the absence of any objection that it was not properly authenticated.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 229–238; Dec. Dig. § 113.*]

4. APPEAL AND ERROR (§§ 900, 901*)—BURDEN TO SHOW ERROR.

Appellant must affirmatively show the existence of error complained of, and the presumption is in favor of the correctness of the action of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667–3669, 3670; Dec. Dig. §§ 900, 901.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by William Wagner against the United Railroads of San Francisco. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

A. A. Moore, and Stanley Moore, for appellant. Frank H. Gould, for respondent.

KERRIGAN, J. This is an appeal by defendant from a judgment, and from an order denying its motion for a new trial. The action was brought to recover damages for personal injuries sustained by the plaintiff as the result of a collision between one of defendant's cars and a sand wagon driven by plaintiff. The defendant operates a street railway on Ellis street in San Francisco; and on the 26th day of January, 1907, at about 3 o'clock in the morning, as the plaintiff was driving a loaded sand wagon along Mason street in a southerly direction across Ellis street, the wagon was struck just back of the front wheels by a car operated by an employé of the defendant, which car was on the southerly track and proceeding in an easterly direction.

The theory of plaintiff's case was that the defendant ran its car at an excessive rate of speed, to wit, at the rate of 25 miles an hour, and in so careless and negligent a manner as to strike with great violence the wagon driven by plaintiff, thereby throwing him from the seat of the wagon and injuring him in the manner described in the complaint. Defendant claims that the judgment and order should be reversed on three grounds.

[1] 1. Defendant's first claim is that the evidence shows that the plaintiff was guilty of contributory negligence, and that therefore the court should have granted its motion for nonsuit. Plaintiff's evidence did not show that he drove upon the car tracks of the defendant without looking for approaching cars. On the contrary, he himself testified that he looked for and saw the car coming which subsequently collided with his wagon; that, where he first saw it, it was a block away, and, believing that he had ample time to cross in safety, attempted to do so, but a moment later he perceived that the car was advancing at a speed of 30 or 35 miles an hour; that he then whipped up his horses in an endeavor as best he could to escape a collision, but without success. The

reasonableness of the plaintiff's belief that he had time to cross its tracks in safety was, under the circumstances, a question to be considered by the jury; and, since there was evidence to sustain the material allegations of plaintiff's complaint, the motion for nonsuit was therefore properly denied.

[2] 2. It is next claimed by the defendant that the judgment and order should be reversed for the alleged error of the court in excluding testimony of the length of the run of the car, the mileage, and the schedule time allowed to make that run, as evidence showing the speed of the car. The defendant offered to prove by one of its witnesses that the mileage of the Ellis street run was 9⅓ miles, that the schedule time for making this distance was one hour, and that on this occasion the car was within two blocks of the terminus of the run, and was on time. This offer was rejected. The avowed purpose of the proffered evidence was to afford an inference that the car, at and just prior to the accident, was not being operated at an illegal and unreasonable rate of speed; but, as the witness on the stand at the time this offer was made had himself just testified directly to the same effect—as also did others—we do not think that it can be claimed that the court's action in rejecting this testimony caused the defendant any such substantial injury as to warrant the granting of a new trial.

[3] 3. The third ground urged for the reversal of the judgment is that the court erred in admitting in evidence an ordinance of the city and county of San Francisco regulating the operation of street railway cars, without proof of its authenticity, and without proof that it was in force at the time of the accident. In that connection the record shows the following to have occurred:

"Mr. Gould—I offer in evidence the ordinance of the city and county of San Francisco numbered 1674, approved November 29, 1905, entitled 'An ordinance regulating the operation of street railway cars, limiting their speed, and providing for the character of their brakes, and fixing penalties for the violation thereof.'

"Mr. Moore—That is objected to as being incomplete and unintelligible, as not being within the pleadings or the amendment, and as no proper foundation has been laid for the same, and it is incompetent, irrelevant, and immaterial."

By said ordinance it was declared unlawful for any person or corporation to operate street railway cars at a greater speed than 10 miles per hour within a portion of the city and county of San Francisco, including the scene of the accident.

[4] If the ordinance was not properly authenticated, and the defendant cared to take advantage of such omission, it was incumbent on it to make the record disclose that circumstance. The presumption is in favor of the action of the court; and where, as here, "the record does not show upon what it is based and all the circumstances in regard to it, it will be presumed to have been regular and correct." 2 Haynes on New Trial and Appeal (Revised Edition) 285. The burden is upon appellant to affirmatively show the existence of error. Niles v. Gonzalez, 155 Cal. 359, 100 Pac. 1080; Escondido H. S. Dist., etc., v. Escondido, etc., 130 Cal. 128, 62 Pac. 401; O'Callaghan v. Bode, 84 Cal. 489, 497, 24 Pac. 269; Clark v. Sawyer, 48 Cal. 133; Nims v. Johnson, 7 Cal. 110; 3 Cyc. 300, 301; Blethen v. Bonner (Tex. Civ. App.) 52 S. W. 571; Thorn v. Kemp, 98 Ala. 417, 13 South. 749. The plaintiff proved that the ordinance was passed in the year 1905, and the presumption is that it is in force until the contrary is shown. St. Louis, A. & T. H. Ry. Co. v. Eggman, 161 Ill. 155, 43 N. E. 620; People v. Addison, 10 Cal. 1; White v. White, 82 Cal. 438, 23 Pac. 276, 7 L. R. A. 799; Bush v. Garner, 73 Ala. 162; Graham v. Williams, 21 La. Ann. 594.

The judgment and order are affirmed.

We concur: LENNON, P. J.; BURNETT, J.

19 Cal. App. 423

L. SCATENA & CO. v. VAN LOBEN SELS.

(Civ. 985.)

(District Court of Appeal, First District, California. July 12, 1912.)

1. CORPORATIONS (§ 425*) — OFFICERS — CONTRACTS.

Where the president and manager of a corporation, with authority to contract for the consignment of produce, contracted for the allowance of a rebate on commissions charged by the corporation for the selling of produce consigned to it by the other party to the contract, and the corporation for several years paid the rebate, the corporation was estopped from asserting that its officer had no authority to make the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697–1701, 1705; Dec. Dig. § 425.*]

2. CONTRACTS (§ 28*) — EVIDENCE — SUFFICIENCY.

Evidence *held* to justify a finding that a contract binding a corporation to pay a rebate on commissions charged for the selling of produce consigned to it was not made on the condition that the rebate should be allowed only in case the adverse party should consign all his produce to the corporation.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133–140, 1755, 1782–1784; Dec. Dig. § 28.*]

3. SET-OFF AND COUNTERCLAIM (§ 36*)—UNMATURED CLAIMS.

Under Code Civ. Proc. §§ 437, 438, authorizing a defendant in an action on a contract to plead by way of counterclaim any other cause of action arising on contract and existing at the commencement of the action, rebates on commissions charged for the sale of produce not due are not available as a counterclaim in an action on contract.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 65–69; Dec. Dig. § 36.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. Pleading (§§ 167, 384*) — Issues — Evidence.

The allegations of an answer setting up a counterclaim are deemed denied, and plaintiff may not only introduce evidence in denial of its allegations, but may also prove affirmative matter as a defense to the counterclaim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 329, 1296–1298; Dec. Dig. §§ 167, 384.*]

5. Trial (§ 397*) — Findings—Affirmative Matter—Evidence.

The court need not make any finding on any affirmative matter as a defense to a counterclaim, unless it is a defense and is supported by evidence; and evidence not proving an affirmative defense does not call for a special finding as to the matter proved by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 940–945; Dec. Dig. § 397.*]

6. Contracts (§ 28*) — Evidence—Admissibility.

Where defendant in an action on a contract set up a counterclaim for rebates on commissions charged for the sale of produce, letters written by him after the rebates had been earned, which concerned only demands of plaintiff against defendant, and which did not mention any claim of defendant for rebates, were admissible to show that a contract for rebates did not exist, but did not prove any affirmative defense to the counterclaim.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133–140, 1755, 1782–1784; Dec. Dig. § 28.*]

Appeal from Superior Court, Alameda County; Wm. S. Wells, Judge.

Action by L. Scatena & Co., a corporation, against P. J. Van Loben Sels. From an order denying a new trial, and from the part of the judgment allowing a counterclaim of defendant, plaintiff appeals. Modified and affirmed.

Fred L. Dreher, for appellant. McKee & Tasheira, for respondent.

HALL, J. This is an appeal by plaintiff from an order denying its motion for a new trial and from such portion of the judgment as allows the counterclaim of defendant. Plaintiff filed its complaint against defendant upon two causes of action, one upon a promissory note for $1,000, interest, and attorney's fees, and the other for $542.09 for goods sold and delivered. Defendant, by way of counterclaim, set up a claim to recover of plaintiff one-half of certain commissions charged and retained by plaintiff for the selling of certain farm produce consigned to plaintiff by defendant during the years 1906, 1907, and 1908, under an agreement, as it is alleged, whereby plaintiff promised to repay to defendant at the end of each year one-half the commissions charged by it for the selling of such produce as should be consigned to it for sale by defendant during the year. The court found in favor of defendant upon his counterclaim, and allowed the amount thereof as a credit or offset against the claim of plaintiff against the defendant. It is this action of the court that is complained of in this appeal.

[1] I. The first ground urged for a reversal is that the evidence does not show that the agreement for a rebate of commission was the contract of plaintiff. Whatever agreement defendant had with plaintiff for the allowance of a rebate on commission was made by him with L. Scatena, the president, manager, and agent of plaintiff. The evidence shows that plaintiff had an agreement with the other firms engaged in handling farm produce on commission that all the commission firms should charge a uniform rate of commission. Plaintiff, in its brief, does not challenge the sufficiency of the evidence to show that L. Scatena had either actual or ostensible authority to make contracts for the consignment of produce to plaintiff, but claims that, because this particular contract allowed to defendant a rebate on such commissions, such contract was not within the scope of the agency of its manager, and therefore did not bind the plaintiff. This contention, we think, puts too narrow a limitation upon the authority of the agent. He had authority to contract for the consignment of produce, and necessarily to agree to the terms upon which consignments would be received. The subject-matter of the contract was clearly within the scope of his agency, and it does not lie in the mouth of the plaintiff, who has received and accepted the benefit of such contract, to say that its general manager and agent had no authority to agree to the terms of the contract. Besides, the contract for a rebate was first entered into in 1902, or before such date, and it is perfectly established by the evidence that the agreed rebates were allowed and paid to defendant each year thereafter until 1906. The court was justified in holding that the contract proved was the contract of plaintiff.

[2] II. It is next urged that the contract proved was to the effect that the rebate should be allowed only in case defendant should consign all his produce to plaintiff, or at least that he should consign more than he had previously consigned, and that there is no evidence that he had complied with such condition. As before stated, the contract for the allowance of a rebate on commissions was first entered into in 1902, or before such date. In the conversation at that time between Mr. L. Scatena and defendant, language was used that justified the contention of plaintiff that the agreement was for a rebate if defendant would consign all or more of his produce to plaintiff. But in practice the rebate was paid at the end of each year thereafter until 1906, without question as to whether more or all of defendant's produce had been consigned to plaintiff. Such had been the practical construction put upon the agreement by the parties in interest. In a general way an agreement for a rebate was entered into at the beginning of each year.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The evidence particularly shows the entering into the agreement at the beginning of 1906. The language testified to is somewhat vague, and while it shows an agreement for a rebate of one-half the commission, to be paid at the end of the year, there was no reference to the quantity of produce that should be shipped.

The whole evidence shows that there was a keen competition among commission men to obtain consignments, that defendant was a large grower of such produce, and that plaintiff was anxious each year to obtain his consignments. The circumstances, as disclosed by the evidence, were such as to justify the court in believing that, when the parties in 1906 agreed to the payment of a rebate on commissions for consignments, they had in mind the practice that had been in fact followed for the preceding years rather than the language that had been used when the agreement for a rebate was first made. The payment of a rebate was agreed to by plaintiff as an inducement to defendant, a large grower of produce, to consign to plaintiff, and it was not a condition precedent to the payment of such rebate that defendant should consign all or any particular proportion of such produce to plaintiff. Such, at least, is the conclusion justified by the circumstances in evidence concerning the making of the agreement. It is the interpretation put upon the agreement by the trial court; and, as it is fairly supported by the evidence, we cannot disturb either the findings or the judgment for this reason.

[3] III. It is next urged that the matter set forth in the defendant's answer does not constitute a counterclaim, because it was not a "cause of action arising upon a contract and existing at the time of the commencement of the action." In part this contention must be sustained. A defendant, "in an action upon a contract," may plead, by way of counterclaim, "any other cause of action arising also upon contract and existing at the commencement of the action." Sections 437 and 438, Code Civ. Proc. This action was commenced on the 13th day of August, 1908. The rebate for commissions on consignments for the year 1908 was not payable to defendant until the end of said year. This appears both by the allegations of defendant's counterclaim and the findings of the court. No cause of action existed for the recovery by defendant of any rebate on commissions on consignments for the year 1908 when the action was commenced. The amount the court found and allowed as a rebate on commissions for 1908 is the sum of $44.18, and the judgment should be modified by adding such amount to the judgment as of the date of the entry thereof.

[4] IV. It is next urged that the court failed to find upon a material issue raised by the evidence to the counterclaim. Under our practice, no replication is required to an answer or to a counterclaim set up in the answer. Its allegations are deemed denied, and the plaintiff may not only introduce evidence in denial of its allegations, but may also prove affirmative matter as a defense to such counterclaim. In the case at bar the court found in favor of defendant upon the allegations of his counterclaim.

[5] Appellant claims that evidence was introduced tending to show that defendant waived or abandoned his counterclaim before this action was brought, and that the failure of the court to find upon the issue thus raised is an error of law requiring a reversal of the judgment and a new trial. If we concede, for the purposes of this decision that it is necessary for the court to find upon an issue thus raised, we still do not think the court erred in failing to make the finding contended for. It certainly is not required of the court to make any finding upon any affirmative matter, unless it constitutes a defense to the counterclaim and is supported by some evidence.

[6] In this case the appellant points to four certain letters written by defendant to plaintiff, which he claims show a waiver or abandonment of any claim for the rebate set up in the counterclaim. These letters were written after the rebate had been earned that we have in this opinion allowed. When they were written the obligation to pay such rebates had been fully incurred. There is nothing in them that can possibly be construed as amounting to a release or discharge of the obligation to pay such rebates. There is nothing in them that tends to show an accord and satisfaction, nor an estoppel against defendant. They are simply letters written to plaintiff by defendant concerning the demands of plaintiff against defendant, in which no mention is made of any claim of defendant against plaintiff for the rebate set up in his counterclaim. They resulted in no settlement of the matter in controversy between plaintiff and defendant, nor in any action to the prejudice of plaintiff. They were admissible as evidentiary matter tending to show that no contract for rebates had ever existed, and as such were doubtless considered by the court; but they do not tend to prove any affirmative defense to the counterclaim. No finding was required upon any matter raised by the evidence presented by these letters other than such as was made upon the affirmative issues presented by defendant's counterclaim. Evidence that does not tend to prove an affirmative defense to a counterclaim does not call for a special finding as to the matter proved by such evidence.

Complaint is also made by appellant as to the admission of certain evidence over appellant's objection. The evidence admitted over appellant's objection was unimportant and, if the court committed a technical error in its ruling, it was of too trifling a character to require a new trial.

The order denying a new trial is affirmed. The judgment is modified, by substituting the sum of $1,128.19 for the sum of $1,084.01, thus increasing the amount awarded to plaintiff by the sum of $44.18 as of the date of the entry of the judgment, and, as so modified, the judgment is affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

163 Cal. 587

CITY PROPERTIES CO. et al. v. JORDAN, Secretary of State. (S. F. 6,306.)

(Supreme Court of California. Aug. 23, 1912.)

COMMERCE (§ 69*)—CONSTITUTIONAL LAW (§ 230*)—FILING OF ARTICLES OF INCORPORATION—FILING FEE—LICENSE TAX—CONSTITUTIONAL PROVISIONS.

The refusal of the Secretary of State to accept for filing articles of incorporation of a domestic corporation, organized to guarantee mortgages on real estate in various states, without payment of the filing fee and license tax contemplated by Pol. Code, § 416, and Civ. Code, § 409, is not violative of the federal Constitution, as interfering with interstate commerce, and as denying to the corporation the equal protection of the laws, since the corporation may not become a legal entity without the filing of the articles, and since the state may grant a franchise to be a corporation on such terms as it sees fit.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 113-118; Dec. Dig. § 69;* Constitutional Law, Cent. Dig. § 687; Dec. Dig. § 230.*]

In Bank. Petition for a writ of mandamus by the City Properties Company, a de facto corporation, and others, as incorporators and directors thereof, against F. C. Jordan, Secretary of State, to compel the acceptance for filing of articles of incorporation. Denied.

Arthur Crane, of San Francisco, for petitioners.

PER CURIAM. This original petition for writ of mandate, directed to F. C. Jordan, as Secretary of State of California, sets forth that the petitioners, as incorporators, had filed articles of incorporation of the City Properties Company with the county clerk of the city and county of San Francisco, that the amount of the capital stock of the corporation was $4,000,000, divided into 40,000 shares, of $100 each, and that the amount subscribed was 3 shares, of $100 each—1 share each by the three incorporators, petitioners herein. The purposes for which the corporation was to be organized are multifarious. Its capital was to be divided and placed in different cities of the United States for the purpose of guaranteeing mortgages on real property in such states. It was to own and hold real estate in such cities, to own and hold stock of other corporations, to issue bonds and deal in stocks and bonds, to invest in lands in the states of the United States, and it was to buy and sell and otherwise deal with and in all forms of personal property. These articles of incorporation were presented for filing to the Secretary of State, who refused to accept them for this purpose without the payment of the filing fee and license tax contemplated by law. Pol. Code, § 416; Civ. Code, § 409.

Petitioners conceive and allege "that the said taxes so sought to be imposed as a condition precedent to the filing of said articles of incorporation would constitute a burden upon interstate commerce, a tax upon property situated outside of the state of California, a discrimination against your petitioning corporation, and a refusal to allow your said petitioner equal protection of the laws; and said taxes, and both items thereof, as your petitioners are advised and believe, are sought to be imposed by the respondent in violation of the fourteenth amendment to the Constitution of the United States." They, however, fail to perceive that their embryonic corporation, until it has acquired vitality and has become a legal entity, by obtaining from the sovereign power a right to exist as a corporation, is not only without substance, but without shadow. They fail further to perceive that the sovereign power may grant or refuse to grant a franchise to be a corporation upon such terms as it sees fit. If those proposing to incorporate do not like the terms, they need not incorporate. Nothing in the law prevents these petitioners as individuals from engaging in interstate or any other kind of commerce; but if they seek to create a new legal entity—a person and a citizen within the meaning of the Constitution—for the purpose of engaging in business, and ask the state of California to give life to this creation, it will be done, and done only, upon such terms as the state may prescribe. The pretension that the exaction of the filing fee "would constitute a burden upon interstate commerce" upon the part of a corporation which has no existence, which cannot exist until the state of California permits it, and which, if it existed, might never engage in interstate commerce, cannot be said to present any legal question.

The application for mandate is therefore denied.

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163 Cal. 561

EDWARD BARRON ESTATE CO. v. WOODRUFF CO. et al. (S. F. 5,528.)

(Supreme Court of California. Aug. 20, 1912. Rehearing Denied Sept. 19, 1912.)

1. FRAUD (§ 25*)—CONTINUING DECEIT—EXECUTORY AND EXECUTED CONTRACTS.

While deceit, merely inducing one to make an executory contract, may not be complained of, if nothing is done under the contract, so that there is no damage, yet if the deceit does not end in the making of the contract but further influences a party to the contract in his conduct under it, it is a continuing deceit, of which such party, injured by the execution or partial execution of the contract, may complain.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. § 25.*]

2. FRAUD (§ 25*)—CONTINUING DECEIT.

The effect of defendant's misrepresentations, inducing plaintiff to make a contract employing defendant to make plans and specifications for a building, buy the materials, employ the help, and supervise the construction, that he had great architectural and structural knowledge and skill, when he had none, and that the maximum cost of the building such as plaintiff desired to erect would not exceed $300,000, did not cease on the making of the contract, but continued during the execution thereof, as regards the right to recover for the deceit.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. § 25.*]

3. Fraud (§ 11*)—Statement of Opinion.

An action for deceit can be founded on a mere expression of opinion, where it is made, not as an honest expression of opinion, but dishonestly, with knowledge on the part of the one making it of its falsity.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

4. Fraud (§ 11*)—Representation of Fact.

The statement of one, representing himself as an architect of great skill and knowledge, that the maximum cost of the building such as plaintiff desired to erect would not exceed $300,000, is a representation of a fact, and not a mere expression of opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.*]

5. Fraud (§ 22*)—Right to Rely on Representations.

Plaintiff, having employed defendant as architect and supervisor of construction of a building on his fraudulent representations that he had great knowledge and skill in such matters, and that the maximum cost of the building such as plaintiff desired to erect would not exceed a certain sum, had thereafter a right to rely on such representations, oft repeated after the making of the contract, and so was not guilty of such carelessness as to bar his right to recover for the deceit, because not exercising means of ascertaining that the representations were untrue and insisting on defendant presenting complete plans, specifications, and detailed estimates, as he had represented he would.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 19–23; Dec. Dig. § 22.*]

6. Fraud (§ 32*)—Right of Action.

Plaintiff, having employed defendant as architect and superintendent of construction of a building on his false and fraudulent representations, repeated after the employment, that the cost of the building would not exceed a certain amount, could, on discovering the fraud when the building was partly completed, repudiate defendant, complete the building itself, and sue for the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 28; Dec. Dig. § 32.*]

7. Fraud (§ 59*)—Measure of Damages.

Plaintiff, having employed defendant as architect and superintendent of construction of a building on his fraudulent representation that its cost would not exceed a certain amount, on which sum alone a fair return by way of rental can be obtained, can recover as damages the commissions paid and the excess of cost.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60–62, 64; Dec. Dig. § 59.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the Edward Barron Estate Company against the Woodruff Company and another. Judgment for defendants. Plaintiff appeals. Reversed, with directions.

Charles S. Wheeler, J. C. McKinstry, and Lilienthal, McKinstry & Raymond, all of San Francisco, for appellant. Walter H. Linforth, of San Francisco, for respondents.

HENSHAW, J. This is an action to recover damages for fraud and deceit. To the complaint a demurrer, general and special, was interposed. The demurrer was sustained. Plaintiff declined to amend, and from the judgment which followed prosecutes this appeal.

The sufficiency of the complaint to pass a general demurrer is the matter to which the chief arguments upon either side have been addressed. The allegations and charges in the complaint may be thus epitomized:

Plaintiff is a family corporation, organized to manage the properties of Edward Barron, deceased. Its stockholders are the heirs of the deceased, and none of its officers or stockholders has had any business experience or skill, and, in particular, are they without knowledge or skill in the profession of architecture and in the art of constructing buildings. Plaintiff owned a piece of land on Geary and Taylor streets in San Francisco. The improvements on this land were destroyed by the fire of April, 1906. Thereafter plaintiff desired to erect upon its land a building of a character that would return by way of rental a fair interest upon the value of the land and the building to be constructed thereon. The value of the land was $300,000. Plaintiff was advised that if a reinforced concrete and tile hotel building of six stories, or six stories with a mezzanine floor, could be erected on the land, at a cost not to exceed $300,000, the premises could be rented and a fair return received therefrom. In particular, one De Wolfe, a man of good financial standing, would accept a lease of the land with such a building thereon at a rental sum equal to 8 per cent. per annum upon the value of the land and the total cost of the building. These facts became known to S. H. Woodruff (defendant herein), who is the sole owner of the stock of the Woodruff Company (defendant herein), a corporation; Woodruff's business operations being conducted under the designation of the Woodruff Company. S. H. Woodruff, it is charged, made all the representations on behalf of the Woodruff Company, so that hereafter in this statement and in the discussion upon it S. H. Woodruff's name may alone be used. S. H. Woodruff represented that he was an architect and designer of great skill and experience; that he had designed and constructed many buildings in Eastern cities. Pictures and plans of certain buildings were exhibited to plaintiff by Woodruff, and it was stated as a fact that Woodruff had as architect designed the buildings shown in the pictures and detailed on the plans.

It is charged that, in truth, Woodruff was not an architect of skill or ability, was not qualified to act as an architect, and had never designed or planned the buildings of which the plans, diagrams, and representations had been shown to plaintiff. All these and other representations hereinafter to be referred to it is charged were falsely made by defendant, with the purpose and object of inducing plaintiff to employ the defendants to erect its hotel building for a commission of 15 per cent. of the moneys to be expended by plaintiff in its construction. And to like effect it is charged that certain promises, hereinafter to be adverted to, were made by defendants without any intention of performance upon their part, and as a part of the same scheme to induce plaintiff to entrust the construction of its hotel building to defendants. Further, in this connection, it is charged that the defendants positively asserted, stated, and represented to the plaintiff as a fact that the maximum cost of constructing such a building as the plaintiff then desired to erect, including all commissions to the defendant the Woodruff Company, would not exceed the sum of $300,000; that the building would be complete and suitable and strictly first-class in every particular; that in all probability the actual cost of the building would be much less than the sum of $300,000; that the defendants would be safe in saying it would only cost $285,000, but to allow for all contingencies they would fix the outside cost at $300,000; that the defendants could not state how much less the cost would be until plans and specifications were prepared, but in no event would the cost exceed the sum of $300,000; that this fact could be definitely stated by the defendants without first obtaining plans and specifications and they did definitely state it, and so assured plaintiff. Further, the defendants stated that if the plaintiff would sign a written contract, which was afterwards signed, the defendants would without delay prepare full and complete plans and specifications of the kind provided for in the contract, and would thereupon forthwith make an actual detailed estimate of the cost of the proposed building, if constructed as planned, "the estimate to be accurate to the last nail thereof"; that plaintiff could then see for itself that defendants' statements were true as to the maximum cost of the building. Defendants further represented that, if the actual cost of the building should by any chance exceed the estimate of $300,000, the defendants could and would, and their experience would enable them to, so change or modify the plans and specifications as to construct the building of the character which plaintiff desired, and that such building could surely and certainly be constructed for a sum not to exceed $300,000.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

It is charged that these statements and representations, in so far as they were statements and representations of fact, were false and untrue, and in so far as they were statements of defendants' opinion they were not statements of a true opinion held by defendants or either of them, but were designedly false and misleading statements and representations and opinions not actually held by defendants, or either of them, but were falsely asserted to be held by them for the purpose of inducing plaintiff to enter into the contract and to expend moneys for the construction of the building, from which expenditure the defendants would derive the named commission; that so far from believing that such a building could be constructed for the sum of $300,000, the defendants were of a contrary opinion at the time of making such statements, representations, and expressions of opinion, and believed and knew that the cost of a building of the kind and character referred to would be far in excess of $300,000. Plaintiff, relying upon the statements of fact, expressions of opinion, and false promises so made by defendants, on the 22d day of September, 1906, entered into a written agreement with the defendant the Woodruff Company, whereby in effect the Woodruff Company was employed as architect, engineer, and contractor to erect the hotel building for a 15 per cent. commission on the moneys which plaintiff might expend in its construction; but prior to the date when plaintiff was thus induced to enter into this contract, defendants had employed skilled experts to estimate the cost of constructing the building and had been informed by them that the cost would far exceed the sum of $300,000. The defendants believed the truth of these statements and the correctness of the opinion so given to them by their own experts, but, nevertheless, they willfully and falsely and fraudulently, and with the intent and design of involving plaintiff in the expenditure of moneys as aforesaid, concealed this knowledge and made the false representations, expressions, and promises above set forth.

The only provisions of the written contract, which was thus entered into, necessary here to mention, are the following: The Woodruff Company agreed to furnish plans and specifications for a six-story (or six-story and mezzanine story, as required by the owner) reinforced concrete and tile hotel building, such plans to be made under the direction and according to the requirements of the Barron Estate Company. It further agreed to supervise the work of construction, to purchase all necessary material, employ all necessary labor, and incur all other cost necessary, to complete the work according to the plans and specifications and any changes therein, and to furnish to the Barron Estate Company a weekly statement of all material ordered and delivered upon the work, of all labor employed, and every other reasonable statement in connection with the work. The Barron Estate Company agreed to pay the Woodruff Company an amount equal to 15 per cent. of the total cost of the work, together with any changes therein, this commission to be computed on the total of each weekly statement of cost, and also to pay weekly the money to carry on the work. The plans and specifications in the contract referred to were to be identified by the signatures of both parties thereto. It is to be noted that this written contract contains no word to indicate the maximum cost of the building.

After the contract was made, the defendants, again representing that the hotel building could be constructed within the limit of $300,000, further represented that it was advisable and necessary to allow defendants to proceed under the building contract with the clearing of the land and the ordering of such material as was essential for the construction of the building thereon, without waiting for the preparation of detailed plans and specifications; and, inasmuch as the plans and specifications, when prepared, would merely show how much less than $300,000 the building would cost, it would be safe in permitting the defendants to proceed immediately under the contract before preparing the plans and specifications; that defendants would in no event incur any expense or do any work in advance of the detailed plans and specifications and accurate estimate, other than such as would be absolutely required, whatever plans and specifications were finally adopted. Upon these and other representations of defendants plaintiff relied, and so allowed and sanctioned the defendants to proceed under the contract, and gave its consent to the commencement of the building. It is charged that in October, 1906, plaintiff exercised its option to have a mezzanine floor, and so informed defendant. Defendants thereupon stated that the mezzanine floor would increase the cost of the building, but that the added cost could not by any possibility exceed the sum of $50,000, so that the total cost of the building could not by any possibility exceed $350,000. De Wolfe, the prospective tenant, agreeing to pay a rental, including interest, upon this increased cost, the mezzanine floor was ordered under these representations of defendant. Defendants then prepared working plans and drawings of the exterior of the building, including the mezzanine floor, and again represented that the building, if constructed and completed in accordance with the plans and drawings, would not exceed the sum of $350,000, and further said that the defendants were preparing detailed plans and specifications, from which a most accurate estimate of the cost could be made, but that in no event would the cost exceed $350,000. Again, later, on February 4, 1907, while the building was in process of construction, the defendants stated and represented to plaintiff and to De Wolfe that, owing to certain changes and alterations requested by De Wolfe, it would cost $400,000 to build the hotel, unless De Wolfe would modify his request for the changes; that as a matter of fact the changes requested were unnecessary for the proper construction of the building, but that with such changes and alterations requested the building could and would be constructed at an outside cost of $400,000. Plaintiff and De Wolfe, in reliance upon these representations, amended their agreement, and De Wolfe agreed with plaintiff to eliminate from his contract with it the limit cost therein specified, or, in other words, to pay a rental upon an estimated cost of $400,000.

It is charged that all these statements were untrue, were at the time they were made by defendants known by them and by each of them to be untrue, and that they knew the fact to be that, irrespective of the changes requested by De Wolfe, the actual cost of the building would exceed $600,000. Plaintiff, however, was entirely ignorant of these facts, and believed in and relied upon the statements and representations of the defendants; that all these representations and statements were so made to induce plaintiff to continue to expend money upon the building far in excess of the sum of $300,000, and subsequently $400,000, which they were willing and expected to pay, and so to enable the Woodruff Company to receive its commissions of 15 per cent. upon this enhanced and excessive cost. The Woodruff Company proceeded with the construction of the building and plaintiff continued to make weekly payments until September, 1907. Prior to this date the Woodruff Company had received from plaintiff weekly payments aggregating over $350,000. When the payments had reached this sum, plaintiff expressed to the defendants the fear that the building would cost more than $400,000, to complete; whereupon defendants, to allay plaintiff's fears and to lull them into false security, stated that plaintiff would be entitled to receive large credit on account of moneys already expended in extra material ordered by the Woodruff Company, which extra material would not be required in the building. These statements and representations were false, and were known to defendants to be false at the time of their making. About the middle of October, 1907, in response to repeated demands of plaintiff for an estimate of how much less than $400,000 the building would cost, defendants for the first time informed plaintiff that the cost of the building would exceed $400,000, and that the building when completed would cost $510,000. Thereupon plaintiff stopped work on the building, employed competent and honest experts to make an estimate of the cost of finishing the building, and was by these experts informed that the building completed in a reasonable and proper manner would cost a total sum of not less than $700,000.

Plaintiff did not discover the falsity of any of the various statements, representations, promises, and expressions of opinion made by defendants until after the defendants had made an oral statement that the total cost of the building when completed would be $510,000, and at which time plaintiff had already expended $460,000 in the construction of the building, and to complete the building would be compelled to expend $230,000 additional. When completed, the total value of the land and building would not exceed $700,000, while the total cost of the improvements alone would equal, if it did not exceed, $700,000. Of the $460,000 so paid out by plaintiff, by reason of the deceit practiced by defendants upon plaintiff, $70,000 was received by the defendants as commissions. The services of the defendants, for which plaintiff was induced to pay $70,000, were of no value to plaintiff whatsoever. De Wolfe refused to accept a lease of the land and to pay interest on the actual cost of the building, and no other person will take a lease of the land and pay the plaintiff as rental a sum which will give a reasonable interest upon the value of the land and reasonable interest upon the actual cost of the improvements which, by reason of defendants' deceit, plaintiff was induced and forced to make. Plaintiff has, by reason of its reliance upon the deliberate false representations, promises and statements, and opinions made by defendants, suffered detriment and damage in the sum of $300,000, for which it asks judgment.

[1] Logically, the consideration of the case thus presented divides itself into two separate, but intimately related, phases—the first, the deceit practiced in inducing plaintiff to enter into the contract; the second, the continuing influence and effect of that deceit, taken with the subsequent false representations, and the legal consequences which flow therefrom in the performance of the contract. It is fundamental, of course, that, no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action. Therefore it is but a truism to say that if one party by fraud has been induced to enter into a contract executory as to both parties, and nothing whatsoever is done under that contract, he has ordinarily suffered no injury therefrom. This contract was, of course, wholly executory. But, upon the other hand, in a contract such as this, it may not be said that the deceit which has induced the making of an executory contract is merged and ends in the contract itself. If the deceit does not end in the making of the contract, but still further influences a party to the contract in his conduct under it, it is obviously a deceit of a continuous nature, of which the injured party may justly complain.

To use a simple illustration: If A. has in contemplation the purchase of property which he is told is valuable for mining purposes, and will buy or refuse to buy upon the opinion and report of a mining expert in whom he has confidence, and B. represents to A. and prevails upon A. to believe that he has rare skill and experience as such mining expert, when in fact he has none, and their negotiations end in a written contract wherein B. is to inspect and investigate the property and report his opinion as to its value for mining purposes, and the transaction there ends, A. has sustained no substantial injury. The deceit of B. has but induced the making of an executory contract never executed. But if B., in pursuance of this contract, does make a favorable report upon the property, upon the assurance of which A. purchases it, and it proves to be worthless, no one, we think, will question but that B.'s deceit in securing the employment is a continuous deceit, operating to render him liable for the loss which A. has sustained. And this, regardless of the fact whether the opinion upon the value of the property which he gives to A. is honest or not. His deceit lies back of the report, and is based upon his false representation of the possession of special skill and knowledge qualifying him to make such a report.

So in this consideration the contract, though executory, having been in part at least executed, the deceit of defendants in procuring the making of the contract and the placing of themselves in a position to reap advantage therefrom is a deceit which runs concurrently with the execution, and contaminates from beginning to end their dealings with plaintiff. It will not do, therefore, to say that up to the time the contract was entered into plaintiff and defendants were dealing at arm's length. True, they were; but it is equally true that but for the representations made, opinions expressed, and promises given the contract would not have been entered into, and, having been entered into, plaintiff was absolutely justified in a continued reliance upon them until charged in some manner with knowledge of the falsity of one or another of them.

[2] The four alleged misrepresentations and falsifications leading up to and inducing the making of the contract are: (1) The representation of S. H. Woodruff's great architectural and structural knowledge and skill, when in truth and in fact he possessed none; (2) the positive assertion as a fact, or as an expression of opinion, that the maximum cost of the building such as plaintiff desired to erect would not exceed $300,000; (3) the representation that, if plaintiff would sign the contract, the defendants would without delay prepare full and complete plans and specifications of the kind provided for in the contract, and would forthwith make an actual detailed estimate of the cost, such estimate "to be accurate to the last nail thereof"; (4) the representation that if such estimate exceeded $300,000, by the exercise of their knowledge and skill, defendants could and would change and modify the plans and spec-

ifications, so as to reduce the cost of the building to a sum not to exceed $300,000.

Manifestly the effect of the first of these declarations did not and could not die with the execution of the written contract. Plaintiff employed defendants because of the false representations of the special skill and knowledge of S. H. Woodruff, and not only executed the contract because of its belief in his possession of such special skill and knowledge, but, beyond peradventure, it was, during the period of the execution of the contract, justified in relying upon this representation touching Woodruff's special skill and ability.

[3] The second representation, whether regarded as a representation of fact or as an expression of opinion, was also and obviously of continuous influence and effect. It is, of course, generally speaking, true that an action for deceit cannot be founded upon the mere expression of an opinion. But the qualifications and modifications of this general rule are as important as the rule itself. Those qualifications and modifications are numerous. It is unnecessary to attempt to illustrate them all. But, bearing in mind that an expression of an opinion, if honestly made, is an expression of what the speaker believes to be a fact, it becomes apparent that, by the expression of a dishonest opinion to one entitled to rely upon it, deceit is practiced, injury may be worked, and an action will lie. Thus the opinion of an expert employed to report upon a mine would be but the expression of his judgment, and if honestly, though mistakenly, made, of course, no injury cognizable in law, equity, or good morals could result. But instantly that the expert expresses a dishonest opinion, though it still be but an opinion, he has made himself liable in an action for deceit. Again, as pointed out by Pomeroy (2 Pom. Eq. [3d Ed.] § 878): "Wherever a party states a matter which might otherwise be only an opinion, and does not state it as the mere expression of his own opinion, but affirms it as an existing fact material to the transaction, so that the other party may reasonably treat it as a fact, and rely and act upon it as such, then the statement clearly becomes an affirmation of fact within the meaning of the general rule, and may be a fraudulent misrepresentation."

These two illustrations of instances in which expressions of opinion may be made the basis of an action for deceit are sufficient for the purposes of this consideration. If for them support by authority be considered necessary, it will be found in our own state in such cases as Crandall v. Parks, 152 Cal. 776, 93 Pac. 1018, where Prof. Pomeroy's language is quoted with approval, and in such other cases as Hedin v. M. M. & S. Institute, 62 Minn. 146, 64 N. W. 158, 35 L. R. A. 417, 54 Am. St. Rep. 628, People v. Peckens, 153 N. Y. 576, 47 N. E. 887, Watson v. People, 87 N. Y. 561, 41 Am. Rep. 397, Simar v. Canady, 53 N. Y. 298, 13 Am. Rep. 523, Hickey v. Morrell, 102 N. Y. 454, 7 N. E. 321, 55 Am. Rep. 824, and Schumaker v. Mather, 133 N. Y. 590, 30 N. E. 755. Therefore, touching the second of these alleged false misrepresentations, it is legally a matter of indifference under the pleading whether it be considered the expression of an opinion or the representation of a fact. If the former, then the complaint shows that it was not the expression of an honest opinion, but was dishonestly made with knowledge upon the part of the defendants of its falsity. If the latter, then it was a declaration of a fact which not only was not true, but which defendants, it is charged, knew to be untrue. Treated, then, either as an expression of opinion or as a representation of fact, its influence in inducing plaintiff to employ defendants cannot be denied.

[4] It is, perhaps, however, proper to add for the guidance of the trial court that we think the language thus charged to have been uttered by defendants imports the declaration of a fact, rather than the expression of an opinion. For, while it is true, as is argued on behalf of respondents, that, because of the fact that the plans and specifications had not been settled upon and agreed to, it was an impossibility for any human being to state in terms of dollars and cents what the exact cost of the building would be, and that therefore the language at the most could be but an expression of defendants' opinion, the answer is that, in this day of architectural skill and business knowledge of construction in connection therewith, any competent architect, while not able to give in advance of accepted bids a dollar and cent estimate of the cost of a building, can name as matter of fact a figure beyond which the cost will not go. Such a statement is a statement of fact, and it is such a statement that defendants are charged with having made.

The third representation requires here no consideration. It is sufficient to say that it is charged that the complete plans and specifications were never presented to plaintiff. Whether defendants were justified in their failure so to do is a subject of later consideration. The fourth representation is manifestly connected with and dependent upon the third, and for the reasons given requires no detailed discussion.

[5] Thus we are brought to the transactions between the parties occurring after the execution of the contract, the history of which transactions has been set forth in the foregoing statement of facts. Respondents' position in this regard is twofold: First, that plaintiff had the means of ascertaining before any damage was sustained that the representations complained of were untrue, that it was guilty of laches in not employing those means, and therefore cannot be heard to complain. Second, that having

knowledge that one representation was false, since the plans and specifications were not forthwith furnished and the detailed estimate was not forthwith given, the plaintiff was put upon inquiry whether all representations might not be false, and from that moment was charged with full notice; that having continued with the contract after such knowledge and means of knowledge, it waived all right it might otherwise have had to charge defendants in an action for deceit. As part of their argument herein respondents urge that by its own showing plaintiff did not exercise ordinary care and prudence, and for its failure so to do has barred itself of any right to relief. Oppenheimer v. Clunie, 142 Cal. 313, 75 Pac. 899.

The propositions thus set forth are the most serious and debatable ones in the case. By the complaint it is shown and admitted: (1) That plaintiff paid in excess of $350,000 before its fears were excited that the contract would not be completed within the stated figure of $400,000. (2) It is argued that insistence by plaintiff on the presentation of the plans and specifications, with a detailed estimate of the cost, all as contemplated by the written contract, would have served either to bind defendants or to have established that their statements could not be substantiated. If, therefore, in point of law, it was the duty of plaintiff to have exacted the presentation of these plans, specifications, and estimates, its failure so to do would be a display of a lack of ordinary care and prudence, while, upon the other hand, if these plans and specifications and estimates had been demanded and were not forthcoming, there would be notice of trickery upon the part of the defendants and of a failure to live up to their written agreement. Unquestionably, then, if plaintiff was derelict and culpable in these matters, the inevitable results would be either a waiver of the fraud or estoppel by conduct from charging upon it.

But we think the complete answer to all this is found in the fact that the situation of the parties was changed immediately and in most essential particulars from the moment their contract was entered into. From that instant they ceased to be dealing at arm's length, and from that moment the defendants became, as architects, contractors, and superintendents of construction under the pay of plaintiff, its trusted agents. Needham v. Chandler, 8 Cal. App. 126, 96 Pac. 325. Dealing with such trusted agents, plaintiff, as we have said, had the right to rely upon the representations antecedently made and, subsequent to the contract, oft repeated. It had, therefore, the right to rely upon the professed ability and skill of defendants, and upon their statement of fact that, whatever should be finally agreed upon as the plans and specifications, the upset cost of the building would not exceed $300,000, or, with the accepted modifications, $400,000. Still further, by virtue of this agency and relationship of trust and confidence it became the high duty of defendants to make full disclosure of all the knowledge which they possessed and which it was desirable or important that their principal should have. Thus, as charged, defendants knew that S. H. Woodruff was not a skilled architect, contractor, and constructor. Yet they concealed this knowledge from the principal, to whom it was of great moment. They knew, as charged, that the building could not be constructed for $300,000, and that it would cost a vastly greater sum. This knowledge, likewise, was of the utmost value to plaintiff, and it was knowledge which it was the duty of defendants to disclose to it. Clark on Contracts, p. 320; 14 Am. & Eng. Ency. of Law, pp. 69 and 70; 2 Kent's Comm. p. 582.

The test, then, of plaintiff's conduct—the determination of the question as to whether or not it acted with ordinary prudence—is not the test which would be applied between two parties acting at arm's length, each for his own interest. The real test will be found in the answer to the question whether or not plaintiff was guilty of a carelessness such as to bar its right of action for deceit against its trusted agent, dealing with matters peculiarly within the knowledge of the agent and under false representations directly made by that agent, because it did not employ every avenue and means of knowledge open to it to discover that agent's perfidy. Upon reason and authority this question must be answered in favor of plaintiff. Indeed, so plain is the proposition, so strongly must it commend itself to every mind, that we need do no more than cite Marston v. Simpson, 54 Cal. 190, and to quote briefly the principle as enunciated in 14 Am. & Eng. Ency. of Law, page 123, where it is said: "When one of the parties to a contract places a known trust and confidence in the other, any misrepresentation by the party confided in with respect to a material fact and constituting an inducement to the other party, by which an undue advantage is taken of him, is regarded as a fraud. The same is true where the circumstances are such that one of the parties must necessarily trust in the representations of the other."

So, even if plaintiff could have discovered the falsity of the representations as to upset cost by exacting a delivery of plans and specifications and estimates, since it reposed and had a right to repose a special confidence in the integrity and ability of defendants, a confidence induced by the false representations of the defendants themselves, and since under these inducements it entered into a contract involving relationships of trust, it was not guilty of any lack of prudence of which defendants can be heard to complain in not exacting the presentation of these estimates; nor, upon the other hand, did it waive its right of action for the subsequently discovered deceit by having failed to do so. And, finally, in connection with this matter, the payment by plaintiff of an excess over $350,000 before its fears were excited is explained by the further false representations of defendants that there would be coming to plaintiff large sums by way of rebate upon materials ordered and paid for, but not used.

[6] The last proposition which invites attention is that of damages; respondents contending that plaintiff has shown no detriment which at law or in equity could afford a foundation for damages. What has already been said disposes of the contention that any such damages were waived by the conduct of plaintiff. Finding itself with an unfinished building upon its hands, but one of two courses was open to it—to abandon the unfinished building to the elements, or to complete it at reasonable cost. Either course would have been justifiable. The latter unquestionably was the more prudent. In so doing, under the facts and circumstances here set out, it is idle to contend that plaintiff did, or permitted, procured, connived at, or consented to, anything in the nature of a waiver of its right of action. Schmidt v. Mesmer, 116 Cal. 267, 48 Pac. 54. Its procedure under the contract with defendants to its partial performance was, as has been said, justifiable. Its repudiation of defendants and its completion of the building after such repudiation was wholly within its right. Cooley on Torts, § 505; St. John v. Hendrickson, 81 Ind. 350; 14 Am. & Eng. Ency. of Law, pp. 171, 172; 20 Cyc. p. 92.

[7] Coming thus specifically to the question of damages, it is at once apparent that the allegation that defendants received $70,000, by way of commissions for services procured through fraud and of no value to plaintiff would, upon adequate proof, entitle it to a recovery in this amount. Still further, upon what may be termed general damages, the averments of the complaint amount to a charge that plaintiff was fraudulently induced and compelled to expend in the construction of a building $300,000 in excess of the $400,000 which alone it contemplated expending, and upon which latter sum alone it can receive any fair or adequate return by way of rental. If, in truth, plaintiff has been so damaged, we think it clear that the law affords it redress. To use an extreme case to illustrate the principle: If a man by fraud were induced to erect a $700,000 building in the heart of the Sahara Desert, for the use of which building there was absolutely no demand, it would not be an answer to say that the building was economically and honestly constructed and represented a legitimate expenditure of $700,000. So here we conceive that if plaintiff can establish that, under the circumstances charged, it suffered a loss of $300,000, or any part thereof, it is justly entitled to recover it, if it further establishes that the loss was occasioned in the manner charged.

Respondent's objection, therefore, we think, goes rather to evidentiary matters than to the rule of damage. A large and growing city is not the Sahara Desert, and the burden of proof cast upon plaintiff will necessarily be a heavier one than that which a plaintiff would have to carry in the illustration given. Nevertheless, as we have said, in so far as it can be established that plaintiff was fraudulently induced to expend its moneys for a structure not, as to cost, in accordance with representations, and not capable of returning a fair interest upon the invested capital, respondents have made themselves liable. Spreckels v. Gorrill, 152 Cal. 389, 92 Pac. 1011; Stratton's Independence v. Dines, 135 Fed. 449, 68 C. C. A. 161. For, as Chief Justice Marshall well said, in Russell v. Clark's Executors, 7 Cranch, 69, 3 L. Ed. 271: "If an act in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed."

The special demurrer does not call for particular consideration. But for the reasons heretofore given the judgment is reversed, with directions to the trial court to overrule the general demurrer to the complaint.

We concur: SLOSS, J.; LORIGAN, J.; MELVIN, J.

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163 Cal. 552

CALLAHAN v. MARSHALL et al. (S. F. 5,479.)

(Supreme Court of California. Aug. 20, 1912.)

1. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Warehousemen (§ 15*) — Receipts — Assignments—Title of Assignee.

Where the purpose of an assignment of warehouse receipts was not only to confer a right to the possession of the receipts, but to the possession of the property represented by them, the assignee was entitled to the possession of the property, as against the objection that the indorsements on the receipts, which were nonnegotiable, were invalid, under Civ. Code, §§ 1858b, 1858d.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 31–34, 37; Dec. Dig. § 15.*]

3. Appeal and Error (§ 173*)—Questions Reviewable — Questions Not Raised in Trial Court.

Where, in an action by an assignee of warehouse receipts for the goods represented by them, or their value, defendants treated all the receipts as indorsed to plaintiff, and admitted delivery to him, and the cause was tried on the theory that the indorsements on the receipts were in plaintiff's name as assignee, and the evidence showed that it was the indorser's intention to indorse all the receipts to plaintiff, the judgment for plaintiff would not be disturbed, on the ground that one of the warehouse receipts showed an indorsement to "T. E. C.," instead of "R. E. C.," the name of plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079–1120; Dec. Dig. § 173.*]

4. Appeal and Error (§ 1058*)—Exclusion of Evidence—Harmless Error.

Where a defendant, testifying, introduced a receipt signed by plaintiff, and an objection to explanation by defendant as to the circumstances under which it was given was sustained, but the witness subsequently testified thereto, any error therein was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200–4206; Dec. Dig. § 1058.*]

5. Evidence (§ 471*) — Conclusion of Witness.

Where the question at issue depended on what occurred between the parties, and the facts were brought out fully by the witness, a question as to whether a negotiation was ever concluded by an agreement was properly excluded, as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*]

6. Warehousemen (§ 34*)—Assignments of Receipts — Actions by Assignee — Evidence.

Where, in an action by an assignee of warehouse receipts for the goods represented by them or their value, every fact relating to a chattel mortgage, its execution and acknowledgment, but not its delivery, was shown, together with why it was not delivered, and it was not suggested that any provision of the mortgage could throw additional light on the issues, and it did not appear that plaintiff ever saw it, or knew its contents, the exclusion of the mortgage was not erroneous.

[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 71–85; Dec. Dig. § 34.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by R. E. Callahan against Betty Marshall and others. From a judgment for plaintiff, certain defendants appeal. Affirmed.

S. C. Denson, of San Francisco, for appellants. James M. Oliver, of San Francisco, for respondent.

PER CURIAM. The District Court of Appeal of the Third Appellate District, when this appeal was before it for determination, rendered the following decision, written by Presiding Justice Chipman, and concurred in by Associate Justices Hart and Burnett:

"It is alleged in the third amended complaint: That, on April 28, 1909, plaintiff was and ever since has been entitled to the possession of certain liquors, as evidenced by certain warehouse receipts of the Peninsula Warehouse Company, of the value of $2,000; that, prior to the commencement of the action, plaintiff made demand of defendants for the possession of said personal property which was refused. Plaintiff demands judgment for the possession of said goods or the value thereof.

"Defendants, in their answer, admit that the property mentioned in the complaint is stored in the said Peninsula warehouse, which latter is conducted by defendant Heise, who 'is responsible for the same and for the business thereof'; deny that plaintiff is entitled to the possession of said property, and admit its value to be over $2,000, but aver that defendant Marshall claims to be the owner thereof; admit the alleged demand for possession and refusal to deliver possession to plaintiff, but deny the alleged unlawful withholding of possession; aver that plaintiff never at any time owned the said goods, and aver that plaintiff 'obtained from J. M. Wilkins the possession of certain warehouse receipts, hereinafter mentioned, on or about April 19, 1909, by fraud and deceit hereinafter stated, and without paying any consideration therefor.'

"As a second defense, and by way of cross-complaint, defendants Marshall and Wilkins aver: That in February and March, 1909, defendant Callaghan Company, a copartnership, was operating said Peninsula warehouse; that defendant Heise has succeeded to the business, and is now sole proprietor of said warehouse, and in possession of said goods; that at four different dates in February and March, 1909, defendant Marshall, 'through her agent, defendant J. M. Wilkins, stored and deposited' in the said warehouse the property in question, and that said Callaghan Company issued its nonnegotiable warehouse receipts for the goods at said times so as aforesaid stored in said warehouse; that the said receipts and the goods represented thereby 'were, and ever since have been, and now are owned by and the property of the defendant Betty Marshall'; that about April 1, 1909, plaintiff was, and ever since has been, the agent and broker of Jerome Bassity Mercantile Company; that between said Callahan, said company, and said Wilkins negotiations were pending for the purchase by said Wilkins of the property here involved and certain other saloon property; that on April 15, 1909, plaintiff demanded of said Wilkins that he deposit the said four nonnegotiable receipts 'to show his good faith in the carrying out of the said proposed sale and purchase, and the said Wilkins, as the agent of this defendant Betty Marshall, on said 15th day of April, 1909, made the following indorsement upon each of said certificates, to wit: "To the order of R. E. Callahan. Betty Marshall, J. M. Wilkins, Agent," and then and there delivered the said four warehouse receipts to him, the said R. E. Callahan,' who receipted for the same to said Wilkins as follows: '4/15/09. In addition to the above, the following warehouse receipts have been assigned to R. E. Callahan as a deposit to show good faith in the said J. M. Wilkins carrying out the above agreement.' (Then follow the number and date of each receipt and a general description of the goods.) Signed: 'R. E. Callahan.' It is then averred in effect that said Callahan made false and fraudulent representations as to the value and earnings of the property, the subject of the negotiations, namely, the Mohawk saloon at 128 and 130 East street, San Francisco, its contents, fixtures, etc.; that, before the said negotiations were concluded, defendants discovered that they were being defrauded, and said 'negotiations were broken off and ended, and said proposed sale and purchase was never concluded or made'; that it was never intended by the parties that said Callahan should have possession of said goods, and that said receipts were delivered to him 'as the evidence of good faith and ability on the part of the said Wilkins to comply with the terms and consummate the said proposed sale and purchase,' and that plaintiff has now no right to the possession of said receipts or said goods; that plaintiff is financially irresponsible, and, should he retain possession of said goods, he will immediately sell the same, and thus deprive defendant Marshall of her property.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Plaintiff, in his answer to the cross-complaint, denies the facts alleged as constituting the alleged fraud; avers that about April 1, 1909, said Wilkins, in connection with said negotiations, delivered to plaintiff his check for $250, 'as a deposit and part payment for the purchase of the aforesaid described property from the Jerome A. Bassity Company, being the property the subject of said sale and purchase, and that on April 15, 1909, the said Wilkins, 'agreeable to the demands of the said R. E. Callahan, as an additional deposit and further payment upon the aforesaid property, * * * delivered to the said R. E. Callahan the four nonnegotiable warehouse receipts hereinbefore referred to, and having indorsed upon the said warehouse receipts, the following indorsement, to wit.' Then follow the indorsements, showing that one was indorsed by Betty Marshall and the other by Wilkins as her agent, and all reading: 'To the order of R. E. Callahan.'

"The findings were against defendants as to the averments of fraud; that the averments of the complaint were true, except the averment 'that the claims of said defendant Betty Marshall are without right,' and as to her rights, 'if any,' that 'they are inferior and subject to the right to the possession of the plaintiff to said property and the whole thereof'; that the negotiations for the purchase of the properties mentioned in defendants' cross-complaint 'were concluded and the said purchase was consummated prior to April 25, 1909'; that it is not true that it never was intended by the parties that plaintiff should have possession of said receipts and said property represented thereby, or that said receipts 'were merely delivered to the said Callahan as evidence of good faith, or as evidence of the ability on the part of said defendant J. M. Wilkins, or on the part of any other person, to comply with the terms or to consummate the said, or any, proposed or other sale or purchase, * * * and it is untrue that defendants, or any of them, are entitled to the possession of said warehouse receipts, or any of them.'

"As conclusion of law the court found that plaintiff was 'entitled to judgment against the defendants A. P. Heise and Betty Marshall, and each of them, for the possession of the property described in plaintiff's third amended complaint, or for the value thereof, to wit, $2,000, and costs of suit.

"Judgment of dismissal was entered as to all defendants save defendants Betty Marshall and A. P. Heise, and as to them judgment was given for the possession of the property, or its value, and for costs of suit. The appeal is from this judgment on statement of the case.

"Plaintiff introduced evidence tending to show the following facts: That plaintiff, as the agent of Jerome A. Bassity Mercantile Company, the owner of a certain saloon and its equipment, and also the holder of a lease of the premises in which the saloon business and a lodging house were being carried on, entered upon negotiations with defendant J. M. Wilkins for the sale to him of the saloon property and leasehold. Wilkins was admittedly the agent of defendant Marshall, but whether or not she was interested in the proposed sale and purchase does not appear. She was the owner of certain liquors on store in the Peninsula warehouse, under the control and management of defendant Heise. The purchase price of the Bassity property was $11,000, of which Wilkins was to pay $3,000 cash and give a chattel mortgage to secure the payment of the balance, $8,000. Plaintiff's evidence was that, in the course of the negotiations, Wilkins agreed to assign and did assign to plaintiff the warehouse receipts referred to in the pleadings as part payment on the purchase price, the goods to be appraised at their value and credited on the $8,000 mortgage. That the deal was closed on April 15, 1909. The cash register was locked and the bartenders informed that Wilkins was in charge from that date. That the cash register was locked pending the payment of the $3,000, which was to be made in a few days, and at the same time the chattel mortgage to be delivered to secure the balance. That, on the 23d of April the parties met at the saloon, at which time Wilkins had a check for $3,000, but did not deliver it, because requested to split the amount into certain parts, which were to go to different persons. That the cash register was unlocked, and the money counted, and found to fall short of the daily receipts which defendants claimed had been represented by the plaintiff and guaranteed to be the average daily receipts, and, after some parleying defendants declared the trade off. As to the alleged false representations of the average daily receipts of the saloon, plaintiff's evidence was that the representations had reference to a definite period prior to the negotiations, and there was evidence that the representations were true, and that plaintiff made no other representations in relation to the earnings of the saloon. There was evidence, also, sufficient to justify the finding as to the other representations with regard to the property, made by plaintiff, which were alleged by defendants to have been false.

[1] "The principal issue of fact tendered by the pleadings was whether the warehouse receipts were assigned to plaintiff for the purpose as alleged by defendants, i. e., merely as evidence of Wilkins' good faith in the negotiations, but to be returned if the trade fell through, or, as alleged by plaintiff, as a payment on account of the purchase of the property by Wilkins. The evidence was sharply conflicting on this issue; but the conflict was resolved by the trial court in favor of plaintiff, and with its conclusions, under well-settled rules, we cannot interfere.

[2] "Appellants contend with much force that the warehouse receipts were nonnegotiable—on their face so declared—and the form of indorsement upon them carried neither right to the property nor to its possession. Reliance is placed upon the statute (Civil Code, §§ 1858b, 1858d) and upon the rule as stated in Gill v. Frank, 12 Or. 507, 8 Pac. 764, 53 Am. Rep. 378. If it were necessary to distinguish that case from the present one, it might be pointed out that in the case cited the evidence was that the warehouse receipt in question was not returned to the warehouseman, either by the person to whom it was issued or by his purported assignee. The court seemed to be of the opinion, upon the facts shown, that it was never intended by the assignment that there should be any change of possession of the property, and hence the garnishment was ineffectual. But in the present case there was evidence that the purpose of the assignment was, not only to confer a right to the possession of the receipts, but to the possession of the property represented by them. Indeed, the evidence went further, and would have justified a finding that the assignment was intended to pass title to the property, had the pleadings warranted it. The court, however, adjudged only the right to the possession of the property and in this it was justified by the evidence. The discussion upon the effect of the assignment as a question of technical law is inapt, for the reason that there was evidence showing what effect it was the intention of the parties should be given the indorsements.

[3] "2. One of the warehouse receipts shows an indorsement 'to the order of T. E. Callahan,' and it is claimed that the judgment as to this receipt has no evidence to support it, and, as it is impossible to say how much of the gross value of the goods was represented by this receipt, the judgment must be reversed. A sufficient answer is found in the fact that in their pleadings defendants treated all the receipts as indorsed to plaintiff. They admitted delivery to plaintiff, and the cause was tried on the assumption that the indorsements were in plaintiff's name as assignee. The evidence showed that it was Wilkins' intention to indorse all the receipts to plaintiff. Obviously, the error in the indorsement was clerical. The mistake seems not to have been discovered until after the trial.

[4] "3. Defendant Wilkins testified in his own behalf. In his testimony he introduced a receipt, dated April 7, 1909, signed by plaintiff, which, among other things, acknowledges the receipt of the 'sum of $250 by check on Merchants' National Bank as a deposit and part payment of the purchase price of that certain saloon * * * and the leasehold interests' (describing the property the subject of the negotiations); also stating the purchase price 'as per letter submitted by J. M. Wilkins, a copy of which is herewith handed Mr. Wilkins; subject, also, to said Wilkins arranging definitely * * * for a lease on certain property he is the owner of.' To this receipt is attached another receipt, of date 4/15/09, already referred to, being the receipt for said warehouse receipts. Counsel for defendants then asked the witness: 'What was said and agreed upon between you and Mr. Callahan at that time in regard to that $250 check?' An objection that 'the paper speaks for itself and is the best evidence, that there is nothing ambiguous or unintelligible' about it, was sustained. Error is claimed of this ruling. The witness was permitted to answer what understanding or agreement was had between him and Mr. Callahan 'at that time in addition to this receipt.' He then proceeded at much length to state what was said and done between them at that time, which apparently embraced all that counsel desired to know. We discover nothing prejudicial in the ruling.

[5] "4. In the course of this witness' testimony he was asked: 'Was this negotiation ever concluded by an agreement to make the purchase? A. No, sir.' A motion to strike out the answer was granted. The question seems to have called for a conclusion, rather than for a fact. The question at issue depended upon what occurred between the parties, and as to this the facts were brought out very fully by witnesses on both sides, and from these facts the court was to judge whether an agreement to purchase was concluded.

[6] "5. Defendants, at a late stage in the trial, offered to read into the record the chattel mortgage, which was never delivered. An objection was sustained as immaterial and incompetent. Defendants claim that it was material 'to show that the pretended sale had not been completed.' Every fact relating to the mortgage, its execution and acknowledgment, but not its delivery, was shown, and why it was not delivered. It is not suggested that any provision of the mortgage could have thrown additional light on the issues. We cannot see that its inclusion in the record could have availed defendants anything. It did not appear that plaintiff ever saw it, or knew its contents.

"6. It is claimed that the motion for a nonsuit, made at the close of plaintiff's evidence, should have been granted, and that nothing occurred in the further proceedings 'to strengthen or enlarge plaintiff's right to the possession of the goods sued for.' In this defendants are in error. In support of the cross-complaint defendants introduced much evidence relating to the issues there presented. This was met by plaintiff with evidence which very materially strengthened the case as it appeared when the motion was made. It was in this evidence we find that the warehouse receipts were delivered, and that the delivery was for the purpose and with the intention as hereinbefore pointed out, and in this evidence is to be found support of the findings negativing defendants' averments of fraud. It may be conceded that, had the court taken defendants' view of the evidence, it would have supported different findings and a different judgment. But inasmuch as the view in fact taken by the court finds support in the evidence, we can discover no just ground for a reversal."

A further hearing on said appeal was granted by this court, and the argument of counsel thereon was directed exclusively to the contention of appellants that, in point of law, the indorsements in favor of plaintiff, made on the nonnegotiable warehouse receipts involved here, were invalid under sections 1858b, 1858d, of the Civil Code, and that the delivery of said receipts to plaintiff so indorsed was ineffectual to transfer the right to possession of said property to him. Further consideration of this point satisfies us that the conclusion of the District Court, as declared above, respecting it, was correct. As to the issues of fact in the case, it was conceded by appellants on the argument here that there was a conflict in the evidence upon which the findings respecting them are based, and no attack was made on such findings. As to the rulings of the trial court complained of by appellants, they are fully considered and correctly disposed of in the opinion of the District Court. With that opinion as a whole we agree, and adopt it as the view of this court on the further consideration of this appeal.

The judgment is affirmed.

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163 Cal. 538

CITY OF SANTA CRUZ v. SOUTHERN PAC. R. CO. et al. (S. F. 5,667.)

(Supreme Court of California. Aug. 19, 1912. Rehearing Denied Sept. 19, 1912.)

1. Public Lands (§ 45*) — Grants — Lands Granted—Statutes.

Act Cong. July 23, 1866, c. 211, 14 Stat. 209, in terms granting all the right and title of the United States to "the land within the corporate limits" of Santa Cruz, is not limited to lands at the time in the bona fide occupancy of persons by the subsequent clause, "in trust for and with authority to convey so much of said lands as are in the bona fide occupancy of parties * * * to such parties."

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 120–127; Dec. Dig. § 45.*]

2. Public Lands (§ 45*)—Grants—Grantees —"Corporate Authorities."

The grant by Act Cong. July 23, 1866, c. 211, 14 Stat. 209, of land within the corporate limits of the town of Santa Cruz, to "the 'corporate authorities' of said town," is to the incorporated body, and not to the individuals then holding office as such authorities.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 120–127; Dec. Dig. § 45.*

For other definitions, see Words and Phrases, vol. 2, pp. 1602, 1603.]

3. Public Lands (§ 36*) — Grant of Tidelands—Rights of Navigation and Fishery.

The title of Santa Cruz under Act March 21, 1872 (St. 1871–72, p. 472) § 2, declaring all tidelands within the limits of the town dedicated as public grounds and the title thereto granted to it in trust for the use of the public, and without power to sell or dispose of it, with proviso that the act shall not be construed to prevent construction and maintenance of wharves thereon by authority of the laws of the state, or its free use for fishing purposes, is subject to the paramount public rights of navigation and fishery, which to a large extent are paramount to the rights of the state itself.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 78–80; Dec. Dig. § 36.*]

4. Municipal Corporations (§ 122*)—Ordinances — Passage — Admissions — Construction.

Admission that an ordinance granting a franchise to construct and maintain a railroad along an avenue to and on the wharf of the grantee, to be constructed at or near the foot of the avenue, was duly and regularly adopted, implies that all the necessary jurisdictional steps had been taken before its passage, and that it received the required vote.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281–289; Dec. Dig. § 122.*]

5. Wharves (§ 7*) — Grant — Construction and Operation—Statutes.

The requirement of Pol. Code, § 2911, that the grant of authority to construct a wharf over tidelands shall specify the quantity of the land that may be used, is directory only, at least to the extent that failure to observe it in the ordinance making the grant will not, on collateral attack, make the grant void.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 3, 6; Dec. Dig. § 7.*]

6. WHARVES (§ 7*)—ORDINANCES—LIBERAL CONSTRUCTION.

An ordinance granting a franchise to construct and maintain a railroad along an avenue to and on the wharf of the grantee, to be constructed at or near the foot of the avenue, having obviously been understood by all the parties as granting the right to build and maintain such wharf, having been so acted on without opposition, and being in furtherance of the paramount public use of navigation, will be given a liberal interpretation to that effect, including the making of connection between the avenue as then existing and the proposed wharf.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 3, 6; Dec. Dig. § 7.*]

7. WHARVES (§ 7*)—GRANTS OF FRANCHISE—CONSTRUCTION.

The City of Santa Cruz having, under Civ. Code, § 475, granted a railroad a franchise to construct and maintain for 50 years a railroad on a wharf to be constructed by the grantee in a bay, right to maintain so much of the wharf as is necessary for the railroad continues for 50 years, though under Pol. Code, § 2911, the grant would endure as a purely wharf franchise for only 20 years.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 3, 6; Dec. Dig. § 7.*]

8. MUNICIPAL CORPORATIONS (§ 719*)—TIDELANDS—WHARVES—OWNERSHIP BY STATE.

Counties, cities, and towns being merely made agents of the state, and not being given any right or title to tidelands or wharves erected thereon by Pol. Code, §§ 2906, 2920, authorizing the granting of authority to construct and maintain for 20 years wharves on lands bordering on navigable waters, such right to be granted by cities and towns as to lands therein, and by counties as to lands outside cities and towns, and the grant by Act March 21, 1872 (St. 1871–72, p. 472) § 2, to the city of Santa Cruz of all tidelands within its limits being with provision that it shall not prevent construction and maintenance thereon of wharves by authority of the laws of the state, the state, and not the city, becomes the owner and entitled to possession of a wharf on such lands within the city, on termination of the franchise therefor granted by the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1425, 1529–1535; Dec. Dig. § 719.*]

9. MUNICIPAL CORPORATIONS (§ 719*)—RELATION TO STATE—WHARVES—TENANT BY SUFFERANCE.

The state having the right to maintain and operate, or permit to remain for purpose of navigation, a wharf on tidelands within the city of Santa Cruz, notwithstanding the grant by Act March 21, 1872 (St. 1871–72, p. 472) § 2, of such lands to such city subject to the right of navigation, the city has no right of possession against a tenant by sufferance, under the state, of a wharf thereon, at least as long as it is used for the paramount purpose of navigation.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1425, 1529–1535; Dec. Dig. § 719.*]

10. MUNICIPAL CORPORATIONS (§ 719*)—FILLING IN TIDELANDS—PLEASURE GROUNDS.

It not being shown that the filling in of earth under a wharf on the tidelands at Santa Cruz is not an appropriate method of strengthening the structure, or that it prevents the use of the beach for other purposes more than is necessary for the purposes of navigation, the city of Santa Cruz, the extent of the right and power of which, under Act March 21, 1872 (St. 1871–72, p. 472) § 2, granting such lands to it subject to the right of navigation, is to prevent an unnecessary purpresture on public use of the beach for pleasure grounds, may not interfere with such improvement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1425, 1529–1535; Dec. Dig. § 719.*]

11. ADVERSE POSSESSION (§ 7*)—LAND OF CITY.

Land of a city between a street and tide line, being proprietary land not dedicated to public use, is subject to the ordinary rules concerning title by prescription.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 24–42; Dec. Dig. § 7.*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by the City of Santa Cruz against the Southern Pacific Railroad Company and another. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed.

Rehearing denied; Beatty, C. J., and Angellotti and Sloss, JJ., dissenting.

Cassin & Lucas, of Santa Cruz, for appellants. Hugh R. Osburn, City Atty., of Santa Cruz, for respondent.

SHAW, J. This is an appeal by the Southern Pacific Railroad Company and the Southern Pacific Company, defendants herein, from the judgment for plaintiff and from an order refusing a new trial. The complaint on its face states a cause of action to quiet title to a tract of land in the city of Santa Cruz, 40 feet wide and 390 feet long, comprising all of the wharf, known as the railroad wharf, at Santa Cruz, except the part which extends into Monterey Bay beyond the line of ordinary low tide. About one-half of the tract in length is known as upland and lies above ordinary high tide. The remainder, the southern part, is tideland, lying between the lines of the ordinary high and low tides.

[1] 1. The town of Santa Cruz was incorporated by an act of the Legislature approved March 31, 1866. Stats. 1865–66, p. 547. It has since been changed by appropriate legislation to the present city of Santa Cruz. The plaintiff claims title to the upland solely by virtue of the act of Congress of July 23, 1866, which reads as follows: "That all the right and title of the United States to the land within the corporate limits of the town of Santa Cruz in the state of California, as defined in the act of the Legislature of that state incorporating said town be and the same are hereby relinquished and granted to the corporate authorities of said town and their successors, in trust for and with authority to convey so much of said lands as are in the bona fide occupancy of parties upon the passage of this act by themselves or tenants, to such parties. Provided

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that this grant shall not extend to any reservation of the United States, nor prejudice any valid adverse right or claim, if such exist, to said land or any part thereof, nor preclude a judicial examination and adjustment thereof." Act July 23, 1866, c. 211, 14 Stat. 209.

The appellants contend that this act should be construed to grant title only to lands that were at that time in the bona fide occupation of some person or persons, and that, as there is no evidence of such occupancy of the land in question here, no title thereto is shown. We do not think it can be so construed. In plain language it grants all the right and title of the United States to "the land within the corporate limits" of Santa Cruz. This describes all of the land within those limits which then belonged to the United States. The subsequent clause no doubt made the corporate authorities of the town trustees of all of such land then in the bona fide occupancy of any person, with power to convey the same to such person; but it does not purport to qualify the description of the area or to confine the operation of the grant to the occupied lands alone. The effect is that it granted all the right and title of the United States to all lands within the town limits, whether occupied or not, but charged the corporate authorities with the duty and trust to convey to every bona fide occupant the land he occupied.

[2] It is next argued that the act granted title to "the corporate authorities" of the town, and not to the town itself, and hence that the city, as successor of the town, has no title thereunder, and that the title rests either in the former corporate authorities of the town or in the present corporate authorities of the city. We cannot agree to this proposition. The evident purpose of the act was to grant the title to the incorporated body, and the term "corporate authorities of said town" was used to describe that entity, and not the individuals who then held office as such authorities. This was, in substance, held with respect to an act to grant lands to the "corporate authorities" of Petaluma, upon a like trust. Jones v. Petaluma, 36 Cal. 238. See, also, Davoust v. Alameda, 149 Cal. 74, 84 Pac. 760, 5 L. R. A. (N. S.) 536, 9 Ann. Cas. 847; Arnold v. San Jose, 81 Cal. 618, 22 Pac. 877.

[3] 2. The city claims title to the tideland by virtue of section 2 of the act of March 21, 1872. Stats. 1871–72, p. 472. It is as follows: "All of the tidelands within the corporate limits of said town, between the line of high and low tide, are hereby dedicated as public grounds, and the title thereto is granted to the town of Santa Cruz in trust for the use of the public, and without power to sell or in any manner to dispose of the same or any part thereof, but nothing herein contained shall in any manner be construed so as to prevent the construction and maintenance of wharves over, in, and through said lands by authority of the laws of the state of California, or the free use thereof for fishing purposes." Tideland situated on a navigable bay, as this land is, "is held in trust for the benefit of the people. The right of the state is subject to the public rights of navigation and fishery, and, theoretically, at least, the state can make no disposition of them prejudicial to the right of the public to use them for the purpose of navigation and fishery, and, whatever disposition she does make of them, the grantee takes them upon the same terms upon which she holds them and, of course, subject to the public rights above mentioned." Ward v. Mulford, 32 Cal. 372; Oakland v. Oakland W. F. Co., 118 Cal. 182, 50 Pac. 277; People v. Kerber, 152 Cal. 733, 93 Pac. 878, 125 Am. St. Rep. 93. This broad statement is somewhat qualified, as shown in the opinions in the cases cited; the qualification being that when, in preparing such tideland for the purpose of navigation, the state finds it necessary to make a sea wall and fill in the land between it and the open water, and thereby, or in some other way for the same purposes, excludes some part of such land from use for purposes of navigation, the public use for navigation as to that part becomes divested or abandoned, and it becomes proprietary land, which the state can dispose of to private use.

This qualification, however, is of no importance here, for no such exclusion or abandonment has taken place with respect to these lands. The above statute was enacted in 1872, and hence it is not affected by the limitation prohibiting the grant or sale of such land within two miles of a city or town, found in article 15, § 3, of the present Constitution. But in view of the public trust upon which the state itself holds these lands, a statute is not to be construed to devote such land to any other use, unless it clearly purports to do so. It is not necessary to determine, for the present, whether or not it could under any circumstances do this, for we do not think the act so intends. Santa Cruz has always been known as a summer resort, especially adapted to sea bathing and other sports and diversions of similar character. The act was evidently passed in recognition of this fact, and the intention was to dedicate the tideland to that use, subject, however, to the use for navigation and fishery, and to transfer the title to the town for that purpose as custodian or administrator of that public use. The purpose was simply to give Santa Cruz control of the beach when it was not in use for navigation or fishery. There was no intention to abandon or impair these primary and paramount public rights and uses, rights which, as above stated, are to a large extent paramount to the title of the state itself. That this was not intended is shown by the reservation of the right to construct and maintain wharves over the land and the free right of fishery.

The city's title is therefore subject to these paramount rights.

The Codes were enacted in 1872 by the same Legislature that passed the above special grant to Santa Cruz. They took effect as of the first day of the session. Pol. Code, § 4478. The authority to build wharves and railroads over tidelands is found in the Political Code and in the Civil Code. Section 465 of the Civil Code gives power to any railroad corporation to construct its road across, along, or upon any roadstead, bay, street, or highway. Section 470 provides that no railroad corporation must use any street, alley, or highway, or any of the land or water within any incorporated city or town, unless the right to such use is granted by a two-thirds vote of the city or town council. Sections 2906 to 2920 of the Political Code provide for the granting of authority to construct, maintain, and operate wharves, and take tolls for the use thereof, on any lands bordering on navigable waters. On lands in cities and towns, such right is to be granted by the municipal authorities: on lands outside of such cities and towns, by the county board of supervisors. Sections 2920, 2906. In either case the license is limited to 20 years. Sections 2906, 2911. Such grant gives the right of way over all tidelands of the state necessary for the particular wharf. Section 2911.

[4] The wharf of the defendants was built in 1876 by the Santa Cruz & Felton Railroad Company. It was built in connection with its railroad, and under a franchise granted to it by the town of Santa Cruz in 1875. The railroad company was incorporated in 1874 for the purpose of building and operating a railroad from the town of Felton to the tide line of Monterey Bay in Santa Cruz, and of operating and maintaining such wharves as should be necessary to the convenient operation of the railroad from Felton to said tide line. The corporate limits of Santa Cruz extended three miles into Monterey Bay. On January 9, 1875, the town of Santa Cruz, by ordinance, granted to that company a franchise, purporting to extend 50 years from that date, to construct and maintain a railroad along Pacific avenue, "to and upon the wharf of said grantee to be constructed at or near the foot of Pacific avenue." Under this franchise that company, in 1876, built the railroad and wharf in question, placing its railroad track upon the wharf and extending it thereon to the end of the wharf at deep water in the bay. That company operated the said railroad and wharf thereafter until 1887, when the appellants succeeded to its rights under the franchise, and they have ever since continued to maintain and operate the wharf and a railroad thereon. Appellants now claim that they are entitled to operate said wharf for the remainder of the life of the franchise.

Respondent asserts that, as a wharf franchise, this grant is void, because it does not appear that any notice of the application therefor was given, or that any hearing was had thereon, as required by sections 2907 and 2910 of the Political Code. On the trial the plaintiff admitted that the ordinance granting the franchise was duly and regularly adopted. This necessarily implies that all the necessary jurisdictional steps had been taken before its passage, and that it received the two-thirds vote required for a railroad franchise by section 470 of the Civil Code.

[5] Objection is also made that it is invalid, because it does not particularly describe the quantity of the tideland over which the right of way was given for wharf purposes, as required by section 2911 aforesaid. It may be that the state could prosecute an inquiry on that question, and could possibly avoid the grant on that ground. But section 2914 provides that a wharf may be 75 feet wide and may extend to navigable water. It is not contended that this wharf is wider than the statute allows. We are of the opinion that the requirement of section 2911, relating to wharves, that the grant shall specify the quantity of tideland that may be used, is directory only, at least to the extent that, upon a collateral attack such as is here made, a failure to observe this requirement will not, of itself, be sufficient to make the grant wholly void.

[6] It is obvious from the conduct of all the parties concerned that they all understood that the effect of the railroad franchise was to give or grant the right to build and maintain this wharf. It was accepted by the grantee, the wharf built, evidently at great expense, and it has been ever since maintained and operated, without objection by the town or city authorities, so far as appears, until this action was begun. The amended complaint was filed January 26, 1909. The date of beginning the action does not appear in the record, but it was not long before. The inciting cause of the suit seems to have been the announced intention of the appellants to fill in the space under the wharf with rocks and masonry in such a manner as to prevent free passage under it. Under these circumstances, and in view of the fact that the grant was in furtherance of the paramount public use of navigation for which the state holds such lands in trust, we think it should have a liberal interpretation in favor of the grantee, in so far as it purports to grant such right. The town had the power to lay out, extend, alter, and improve public streets. A public way or approach to a public wharf is a highway, in the general sense of that term. The power to improve a street would include power to improve that part of a public street leading to a public wharf, so as to give access to the wharf from the street and facilitate passage to and from the wharf by the public. The railway is as much a part of the wharf,

when constructed, as the planks of the ordinary roadway thereof. One allows footmen and ordinary vehicles to pass to the ships; the other allows the railroad cars to do so. The granting of the right to build a railroad along a street leading to the ocean front, "to and upon the wharf" to be constructed by the grantee at the foot of the street, by which would be understood the water front, where, as was the case here, the grantor also had power and authority over the water front and bay, would imply and carry with it the authority to the grantee to build the wharf at the foot of the street and extend it into the water for such distance as should be necessary to connect it with deep water and make it convenient for the commerce to be carried on over the railroad. The parties could have contemplated nothing less than this. Anything less would have made the whole structure useless. We think, therefore, that, so far as plaintiff is concerned, this grant must be held to give the right to make the connection between the street, as it then existed, and the proposed wharf, and to construct the wharf over the intervening tideland to deep water, and to maintain and use the wharf, when built, so long as the franchise continued.

[7, 8] Sectins 465 and 475 of the Civil Code, in effect, give the privilege of constructing and operating a railroad over any public bay or roadstead in the state, not within a city or town, to any railroad corporation that accepts the privilege and uses it. As to the waters of such bay or roadstead which are within a city or town, a grant from the council is necessary. The council of Santa Cruz having made the grant for 50 years, and the appellants having built the railroad over the bay to deep water, and being now in the use of it, there can be little doubt that, with regard to the railroad and so much of the wharf structure as may be necessary or convenient for its maintenance and operation, the 50-year grant is still in force, and the right of possession by the appellants under it still continues. It is a wharf built "by authority of the laws of the state of California," within the meaning of the exception in the grant of 1872 to Santa Cruz.

The grant being made in 1875, it would endure as a purely wharf franchise, under section 2911 aforesaid, only 20 years from that date. Conceding that the wharf is larger than is necessary for railroad purposes, although it is not alleged or shown, and that the excess could be obtained and held only as a wharf franchise under the Political Code, we are of the opinion that upon the expiration of that franchise it would be the state, and not the city, that would succeed to the right of possession of such excess. The sections of the Political Code referred to, giving power to boards of supervisors and cities and towns to authorize the construction of wharves over lands bordering on navigable waters for purposes of navigation, do not purport to transfer to the county, city, or town, or to the governing authorities thereof, any right or title to the tidelands, or to the wharves erected under the authority given by those bodies. The Code merely constitutes these subordinate political bodies the agents of the state, and empowers them, as such, to grant the franchises mentioned on behalf of and for the state. It merely provides a means or agency whereby the right is transferred from the state to the party who builds the wharf. The title to the tidelands for that purpose, therefore, remains in the state. From this it necessarily follows that when, by efflux of time, the right thus granted by the local authority has terminated, the wharf, being suitable for the paramount public use of navigation, and also a structure of a permanent nature affixed to the realty by the grantee during the term of the license or tenancy, is a part of the realty and becomes the property of the state. Civ. Code, § 477. We think it is clear that, aside from the effect of the special act aforesaid, at the expiration of this license the city of Santa Cruz did not succeed to the wharf right or franchise, or to the possession and use of the wharf for the purposes of navigation. It was erected under the authority of the state. Hence it was within the reservation in the special act, and it is the property of the state, and the state alone has the right of possession and use, and the right to maintain an action to recover possession.

[9] It remains to consider, in this connection, whether the special act of March 21, 1872, gives the city of Santa Cruz the right to interfere with the wharf, or cause it to be abated as a nuisance or removed as a purpresture, or a right to enjoin the filling in of the space under it with rocks or other material which would obstruct the convenient use of the tideland as pleasure grounds. The complaint asks for such injunction and that the city's title be quieted, but does not ask to recover possession. The judgment does not grant the injunction, nor quiet the title, but it declares that the plaintiff shall recover possession of the land.

There can be no question but that the state, notwithstanding the grant to Santa Cruz, still retains and holds the right to erect a wharf extending over this tideland, and to operate the same, if it sees fit to do so, for the benefit of the public. Such wharf would be in furtherance of the paramount trust upon which the state holds such land. If the state did this, the city of Santa Cruz would have no right, under its grant, to interfere in the matter. The wharf in question, assuming that the interest of the appellants therein has ceased, now belongs to the state as fully as if the state itself had built it. The state has the right to maintain it or to permit it to remain for that public use. It is being operated by the appellants for the benefit of the public and with the acquiescence of the state, for the purposes of navigation. The appellants are, at least, tenants by sufferance, under the state, a title which third persons, having no interest or privity with the real owner with respect to this use, cannot question. The city has no right of possession, at least so long as it is used for the paramount purpose. The city has no interest in that use, and it cannot prevail against one who is in possession for the purpose of administering the use and is doing so. It is obvious that the judgment in favor of the city for the possession of the part of the wharf situated between the line of high and low tide, is erroneous.

[10] The principal thing complained of is the threatened act of the appellants in filling in the space under the wharf, so as to prevent the use of that part of the beach for pleasure grounds. It may be conceded that, if the appellants should place any obstruction upon the beach that was not appropriate for wharf purposes and was not useful in aid of navigation, the city, having charge of the subordinate trust relating to that land, would have the right to remove it, or cause its removal, or to prevent its erection, on the ground that it was an unnecessary purpresture upon that particular public use. This is the extent of the right and power of the city. It is not claimed or asserted that the filling in of this space is unnecessary to the use or preservation of the wharf, or that it obstructs or prevents the use of the beach for other purposes more than is necessary for the purposes of navigation. It appears to be an appropriate method of strengthening the structure. Hence it follows that the city has shown no right to interfere with such improvement of the wharf.

[11] 3. In February, 1875, another franchise was granted by the town of Santa Cruz to a company known as the Santa Cruz Railroad Company, to build a railroad into Santa Cruz over a route described therein, "with such switches and turnouts as may be deemed necessary by the grantee for the convenient use and operation of said railroad." Under this franchise that company built a railroad from Watsonville to Santa Cruz over the designated route, crossing Pacific avenue at a point a few feet northerly of the northerly or inner end of the wharf. From this road a turnout or spur track was made to connect that road with the Santa Cruz & Felton Railroad upon the wharf aforesaid. This spur track enters upon the wharf near the northerly end, and there connects with the track of said Felton Railroad, thus affording access to the wharf from the Watsonville Railroad. This connecting spur was made within three years next before the action was begun. The track of the Felton Railroad, except the portion thereof on the wharf extending from its connection with this spur track to the outer end of the wharf in the bay, has been removed, and the use of that part of that road was abandoned before this action was begun. The date of such removal and abandonment does not appear, but ever since that time the only access by rail to the wharf has been from the present Southern Pacific main track, being a part of the said Watsonville Railroad, over the spur aforesaid. So far as the part of this spur track which is laid upon the wharf is concerned, the right to maintain it is covered by and included in the right to maintain and operate the wharf. This necessarily follows from the fact that such a spur track would be a reasonable convenience for the operation of such a wharf. With respect to that portion of the spur track situated outside of the wharf, and consequently outside of the lands involved in this action, we need not concern ourselves. It is not a question in issue.

The portion of the land occupied by the wharf and situated above the line of high tide appears to be necessary for the wharf. The appellants have the same right to occupy it as a part of the wharf as they had to occupy the part between the high and low tide lines. The railroad franchise has not expired, and under that they have the right to use and operate the railroad tracks upon the wharf. The power given to the town to improve streets would include power to authorize such improvement. Under this general power the town has authority to have the small triangular part of Pacific avenue lying within the wharf lines so improved by making it a part of the wharf as to give access for footmen and vehicles to the wharf. It does not appear that this part of the wharf impairs the use of the street for ordinary purposes. It may be further said that the land of the city between the street and tide line is proprietary land not dedicated to public use. It is subject to the ordinary rules concerning title by prescription. The appellants have been in possession, under claim of right by virtue of the grant contained in the ordinance, for over 30 years. With respect to this part of the land they have title by prescription, for the term of the grant, even if it were conceded that the ordinance is invalid.

For the reasons here given, we are of the opinion that the judgment is erroneous, and that the city has established no right of possession, nor any cause for issuing the injunction prayed for.

The judgment and order are reversed.

We concur: HENSHAW, J.; MELVIN, J.; LORIGAN, J.

19 Cal. App. 481

Ex parte McMULLIN. (Cr. 189.)

(District Court of Appeal, Third District, California. July 16, 1912.)

1. DIVORCE (§ 331*)—JURISDICTION OF PERSON.

In a divorce suit in a Nevada court against a resident of California over whom the court acquired no jurisdiction of his person, a decree is unenforceable in California so far as it awards alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 841, 842; Dec. Dig. § 331.*]

2. PARENT AND CHILD (§ 17*) — OFFENSE AGAINST CHILD—OMISSION TO SUPPORT—EFFECT OF DIVORCE DECREE.

Civ. Code, § 196, which requires a parent who is entitled to the custody of a child to support him, does not relieve a father from criminal responsibility under Pen. Code, § 270, for omitting to furnish necessary food, etc., though the custody of the neglected child was awarded the wife in a divorce suit.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176–181; Dec. Dig. § 17.*]

3. PARENT AND CHILD (§ 17*) — OFFENSE AGAINST CHILD—OMISSION TO SUPPORT — EFFECT OF DIVORCE DECREE—"LAWFUL EXCUSE."

That provision for alimony made by a Nevada court is not enforceable against the husband, a resident of California, because no jurisdiction of his person was acquired, does not constitute a lawful excuse within Pen. Code, § 270, which makes it an offense for a parent to willfully omit without lawful excuse to furnish necessary food, etc., for his child.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176–181; Dec. Dig. § 17.*]

Application by Smith McMullin for a writ of habeas corpus. Writ discharged, and petitioner remanded.

C. D. Dorn, Phil. Ware, and G. P. Hall, for petitioner. Lea, Hoyle & Ford, for respondent.

HART, J. The petitioner is held in custody by the sheriff of Sonoma county upon the authority of an order of commitment, made and issued by the police court of the city of Petaluma, holding him to trial in the superior court of said county for the alleged violation of section 270 of the Penal Code, which provides as follows: "A parent who wilfully omits, without lawful excuse, to furnish necessary food, clothing, shelter or medical attendance for his child, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both." Complaining that the commitment upon the authority of which he is restrained of his liberty is void, the petitioner seeks his release therefrom through the writ of habeas corpus.

The salient facts, as to which there is no controversy, may be stated as follows: Margaret J. McMullin and Harry Smith McMullin are the minor children of the petitioner and his former wife, Emma Harris McMullin; that, while still the wife of the petitioner, said Emma H. McMullin, went to the state of Nevada, taking with her said minor children; that, after her arrival in the state of Nevada, said Emma instituted an action for divorce against the petitioner and in said action asked for the custody of said minor children; that, after the filing of the complaint in said action for divorce, the petitioner was served with summons therein in the county of Sonoma, this state, but the petitioner did not answer the complaint in said action or otherwise make an appearance therein; that thereafter, and on the 21st day of March, 1910, "a decree was duly made and given in the district court of the First judicial district of the state of Nevada, in and for the county of Ormsby, awarding said Emma Harris McMullin a divorce from petitioner, and further awarding the custody to her of said minor children. The said decree further ordered that petitioner pay to her the sum of $100 per month as her permanent alimony." It is further made to appear that in the fall of the year 1911 said Emma Harris McMullin returned to the city of Petaluma, in the county of Sonoma, this state, where she again took up her residence and now resides, and that Margaret J. McMullin, one of the minor children referred to, soon followed her mother to Petaluma and there took up her residence and still resides with her mother, the other of said minor children remaining in the state of Nevada with relatives of said Emma Harris McMullin.

It is further admitted that since the said decree of divorce was given the petitioner has not provided said minor children "with support, maintenance, or education, except that the petitioner did pay the tuition at school, and for a few other things, for said Margaret Juanita McMullin"; that the mother of said Margaret has been supporting said minor child since said divorce, and that she "has been sending money to the state of Nevada for the support of the other minor child"; that said Emma, "at all times herein mentioned, has had and still has the custody of said minors," and that the petitioner has not, at any of the times mentioned in the petition, "had any share in the custody of said minors."

On the 29th day of April, 1912, so the petition further alleges, the former wife of the petitioner qualified as guardian of the persons and estates of said minors, having previously been appointed to that office by the superior court in and for the county of Sonoma in a proceeding instituted in said court by her for that purpose. The charge in the petition that the wife of the petitioner "deserted him, and, taking with her the said minor children, went to the state of Nevada," etc., is denied by the answer; but we think that, under the circumstances as disclosed here, the issue of fact thus sought to be raised may be disregarded as unnecessary to the decision of the principal point of controversy submitted in this proceeding.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] It is conceded that, the petitioner not having been served within the state of Nevada with the summons in the suit by his wife for a divorce, the Nevada court by which the decree in said action was granted never acquired or at any time had jurisdiction of his person. It follows, therefore, that the portion of the decree allowing alimony to petitioner's wife is not enforceable in this state. Section 413, Code Civ. Proc.; First National Bank v. Eastman, 144 Cal. 491, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; De la Montanya v. De la Montanya, 112 Cal. 109, 44 Pac. 345, 32 L. R. A. 82, 53 Am. St. Rep. 165.

[2] The contention of the petitioner is that, the custody of his minor children having been awarded to their mother by the decree in the action dissolving the bonds of matrimony between him and his wife, he is, under the terms of section 196 of the Civil Code, absolved from any and all legal liability for the support and education of such children. In other words, it is the contention that, by the provisions of said section of the Civil Code, where, upon the granting of a divorce, the court awards the custody of the minor children to one of the parents, the sole responsibility of supporting and educating such children is thus cast upon the parent to whom such custody is awarded. The section of the Code referred to reads in part, as follows: "The parent entitled to the custody of a child must give him support and education suitable to his circumstances."

The contention as thus explained involves the only question presented by this proceeding. The position of the petitioner, as above defined, is too broadly stated to be tenable either upon principle or precedent. It involves the statement only of a trite proposition to say that it is, in the absence of all positive law upon the subject, an imperative natural duty of parents to support and nurture their minor offspring, and it can never be assumed, where legislative regulation of that duty has been resorted to, that the Legislature intended thus to relieve parents of that first and most important of all responsibilities resting upon them, except in those cases in which circumstances absolutely compel the shifting of such responsibility to the shoulders of others. On the contrary, the specific purpose of all legislation upon the subject of the duty due from parents to their minor children is to secure the religious execution of that natural duty. The proposition that parents have no right to so neglect their minor children as to make them a charge upon other persons or upon the public is too obvious to be referred to, but the policy of the government, in the enactment of laws regulating the duty, imposed by natural laws, owing to minor children from their parents, is to not only prevent this very result but to compel the performance of that duty in such manner, consistent with the circumstances of the parents, as that their offspring may be started out in the battle for existence with some degree of preliminary equipment. Of course, section 196 of the Civil Code should be enforced according to its plain intent and purpose in all proper cases, but it cannot justly be given a construction that would have the effect of circumventing rather than promoting the very ends which it and our whole system of laws upon the subject to which it relates were designed to bring about.

The main reliance of counsel for petitioner, for the support of the exceedingly broad construction to which they have been led to subject section 196, is upon the decision in the case of Selfridge v. Paxton, 145 Cal. 713, 79 Pac. 425. But that case although some language is used in the opinion which might give some color to the construction given by the petitioner of the intent and scope of section 196, is not in point here. The important line of distinction between that case and the one at bar in our opinion lies in the fact that in the cited case it appeared that, contemporaneously with the granting of the divorce, the husband and wife entered into a contract by the terms of which the former agreed, among other things, to pay to the latter, to whose custody the minor children were awarded by the decree, for the support and maintenance of said children, the sum of $13,200, payable in monthly installments of $100, until the whole amount should be paid. It was therefore held that the husband could not be bound for the expense incident to medical attention given one of said minor children by the plaintiff, a physician, who brought his action to recover for professional services so performed against the husband. In the case here it appears, and it is admitted, that the court by which the decree of divorce was granted made provision in said decree for the payment by the husband to the wife of the sum of $100 per month as permanent alimony, and while it does not appear that the court made specific provision for the support and education of the children at the hands of the petitioner, or otherwise provided for their support by the husband than through the alimony so allowed, the presumption is that such alimony included an allowance sufficient for the support of both the mother and the children, and that such was the purpose of the order. And the very fact, admitted by the petitioner, that the alimony thus allowed cannot be enforced in this state brings this case within the rule as laid down in the very recent case of the

People v. Schlott, 122 Pac. 846, in which the chief justice, who wrote the opinion, takes occasion to limit and qualify the effect of the decision in the case of Selfridge v. Paxton, supra. In the Schlott Case, by the decree granting the divorce, the defendant was ordered to pay his wife the sum of $50 per month for the support of herself and their child. He willfully and without lawful excuse failed and omitted to pay the required sum per month, and it was held that he was, therefore, amenable to prosecution under section 270 of the Penal Code.

[3] But counsel for the petitioner seem to be of the opinion that the fact that the provision for alimony made by the Nevada court is not enforceable in this state constitutes within the meaning of that phrase as used in section 270 of the Penal Code, a "lawful excuse" for the omission to support his minor children. This opinion appears to have been inspired by that portion of the opinion in the Schlott Case wherein the provision contained in the decree for alimony is referred to as a "valid" one, from which language counsel seem to infer that the court intended to say that, in order to render the party sought to be required to pay alimony amenable to prosecution under section 270 of the Penal Code, the provision for alimony must be valid in all respects. We do not think the court intended to go that far, or to lay down any such rule as counsel seem to have worked out from the decision in that case.

We do not understand that the efficacy of section 270 of the Penal Code or its potency to accomplish the purpose of its enactment is made to depend upon the proposition whether or not a court, having, upon the granting of a decree of divorce, undertaken to make provision for the support by one of the parents of the minor children, has succeeded, in a legal aspect, in making a valid order providing for such support. The simple issue to be tried and determined under said section is whether a parent, without lawful excuse, willfully omits to furnish his minor children with necessary food, clothing, etc., and, in so far as it may constitute proof of the charge is concerned, we are unable to perceive any less force in the fact that the court attempted but for some legal reason failed to make a valid provision in the decree of divorce for the support of the child than in the fact, where it is a fact, that the court had succeeded in its attempt to make such a valid provision. In the one case no less than in the other it must appear or be assumed that the court found that it was proper and necessary that the parent to whom the provision was intended to apply should continue to contribute to the support of the minor.

Speaking concretely, the provision in the decree awarding the custody of the minor children to their mother—the plaintiff in the divorce action—and that requiring the petitioner to pay the mother permanent alimony in an amount sufficient for the support of both herself and said children, presuppose findings that the petitioner was not a proper person to have the custody and control of said children and that their mother was financially unable to bear the sole burden of their proper support under the circumstances as disclosed to the court, or, at any rate, that the petitioner, for sufficient reasons, should not be altogether relieved of the assumption of that natural burden. Thus it unmistakably appears that the necessity of the petitioner's assistance in the proper support of the children is shown and his duty in that respect plainly defined in the decree; yet, if petitioner's position here be sound, he may rest immune from prosecution under section 270 of the Penal Code merely because the enforcement of the order requiring him to support or contribute to the support of his minor children may be obstructed for a purely legal reason, not based upon the merits of the provision. We do not think that any court can be found that will construe the circumstances of this case as the petitioner views them.

Our conclusion is, as stated, that the provision in the decree divorcing the petitioner and his wife for permanent alimony constitutes proof that the court found that it was necessary that the petitioner should continue to contribute to the support of his minor children and that, therefore, it cannot be held that his divorced wife must provide said children with support by reason of the provision contained in section 196 of the Civil Code.

The writ is, accordingly, discharged and the petitioner remanded.

We concur: CHIPMAN, P. J.; BURNETT, J.

HAYT v. BENTEL. (Civ. 1,064.)

(District Court of Appeal, Second District, California. June 15, 1912. On Petition for Rehearing, July 15, 1912.)

1. VENDOR AND PURCHASER (§ 98*)—RESCISSION OF CONTRACT BY PURCHASER—CONDITIONS PRECEDENT.

Under Civ. Code, §§ 1688, 1691, providing that a contract is extinguished by rescission, that a rescission not affected by consent can be enforced only by the party seeking to rescind restoring or offering to restore to the adverse party everything of value received under the contract, a purchaser given possession at the time of the execution of the contract, stipulating for payment of the price in installments, and for a deed conveying the property free from all incumbrances, could not rescind for the vendor's inability to convey a good title without restoring, or offering to restore, the possession.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 163–165; Dec. Dig. § 98.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. CONTRACTS (§ 274*)—RESCISSION—EFFECT.

A rescission of a contract extinguishes it, and places the parties in the position they would occupy if the contract had never been made, and all rights transferred, released, or created by the contract are revested, restored, or discharged.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1202–1206; Dec. Dig. § 274.*]

3. CANCELLATION OF INSTRUMENTS (§ 45*)—RESCISSION—CONDITIONS.

Under Civ. Code, § 1691, providing that a rescission not affected by consent can be enforced only by the party seeking a rescission restoring or offering to restore the property received under the contract, one who seeks to rescind a contract without the assent of the other, and who sues for the money paid under the contract, must allege in his complaint that he has restored or tendered restoration of the property received by him, or allege facts excusing him from so doing.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 100, 101; Dec. Dig. § 45.*]

On Petition for Rehearing.

4. APPEAL AND ERROR (§ 934*) — PRESUMPTIONS—RECORD.

Though on appeal on the judgment roll alone in an action under Civ. Code, § 3406, by a purchaser in possession to rescind the contract and recover the money paid, the court will assume in support of a judgment for the purchaser that the trial court imposed the proper conditions authorized by section 3408, yet, where the appeal is on a bill of exceptions purporting to disclose the matters and proceedings affecting the case, a judgment for the purchaser who was in actual possession at the time of the execution of the contract cannot be sustained in the absence of an order making the relief granted subject to the condition that the purchaser restore possession.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777–3781; Dec. Dig. § 934.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Action by Mrs. S. M. Hayt against George R. Bentel. From a judgment for plaintiff, defendant appeals. Reversed.

H. C. Millsap and Millsap & Sparks, for appellant. Smith, Miller & Phelps, for respondent.

SHAW, J. This action was brought to recover from defendant certain installments of money, with interest thereon, paid by plaintiff pursuant to the terms of a contract for the purchase and sale of certain real estate. Judgment went for plaintiff. Defendant appeals from the judgment upon a bill of exceptions.

Among other things, the contract provided that upon plaintiff paying $275 cash upon the making of the agreement, $275 on June 29, 1906, and a like payment of $275 on June 29, 1907, together with interest on deferred payments, it being provided that time should be made the essence of the contract, defendant would by good and sufficient deed convey the property free and clear of incumbrance to plaintiff, who, as provided by the terms of the contract, was given immediate possession of the premises. The contract further provided that, in case plaintiff made default in the payments, defendant at his option might declare the whole sum remaining unpaid due and payable, or cancel the contract, re-enter and take possession of the land, and retain all moneys paid by plaintiff as rent for the use and occupation thereof. The complaint alleges that plaintiff made default in the last payment due June 29, 1907, but that on October 29, 1908, plaintiff made a payment of $50 on account of the principal sum of $275, and paid the interest on the balance of the principal up to December 29, 1908, at which time it was agreed by the parties "that as soon as the deed was executed and delivered to plaintiff she would pay him the balance due under the contract"; that in October, 1909, plaintiff offered to pay defendant the balance of the purchase money and demanded a deed for the property, which defendant refused to execute, alleging as a reason therefor that he could not deliver a conveyance of title in accordance with the said contract owing to the fact that the same was clouded by an incumbrance. Thereafter, on January 14, 1910, plaintiff again made tender of the full amount due and demanded a deed in accordance with the terms of the contract, but defendant refused to comply with the demand. On February 4, 1910, plaintiff declared the contract rescinded, notified defendant of such rescission, and demanded repayment of all moneys which she had theretofore paid pursuant to the terms of the contract, together with interest thereon, which defendant refused to pay. It was further alleged that at the time of the execution of the contract, and from thence up to the commencement of the action, the property was incumbered and the title thereto clouded so that it was impossible at any time for defendant on his part to comply with the terms of the contract by conveying to plaintiff title to the property free and clear of incumbrance.

[1] A general demurrer interposed by defendant to the complaint was overruled. In thus ruling we think the court erred. It appears from the contract, made a part of the complaint, that plaintiff was at the time of the execution thereof given immediate possession of the premises. She could not, upon the ground of the vendor's inability to convey a title free and clear of incumbrance, rescind the contract and insist upon the return of her money, with interest thereon from the date of payment, while retaining that which she had received under the terms of the contract, viz., the possession of the premises. "Where the contract provides for the vendee taking possession, the remedy of the purchaser, where the * * * vendor * * * is unable to make conveyance as stipulated in the contract, is to rescind the

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

contract, or offer to, and to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth. If, on the other hand, the purchaser chooses not to rescind, but to retain possession under the contract, he can do so only on the condition that he pays the purchase money and interest according to the contract." Gates v. McLean, 70 Cal. 50, 11 Pac. 492. This language was quoted with approval and applied in the case of Worley v. Nethercott, 91 Cal. 512, 27 Pac. 767, 25 Am. St. Rep. 209, where it was held that the purchaser of land in possession thereof under a contract of sale providing for the conveyance of a good and perfect title thereto could not, upon the vendor's inability to convey such title, retain both the land and the purchase money, but, if he chooses to retain the possession of the land, he must pay the price according to the contract, and receive such title as the vendor is able to give. Otherwise, if he elects to recover the purchase money paid, he must restore the possession of the property to the vendor and rescind the contract. In Rhorer v. Bila, 83 Cal. 54, 23 Pac. 275, it is said: "A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. If the title fails, or the vendor refuses to convey, an action on the covenants of his deed or contract will give him all the relief to which he is entitled." For the purpose of our decision, it may be conceded that the complaint shows facts sufficient to excuse plaintiff's default in making the payments, and that by reason thereof and the tender made by plaintiff she might, without surrendering possession of the property, have maintained an action on the contract for specific performance thereof. Such, however, is not the character of this case. She declared the contract rescinded.

[2] The effect of a valid rescission is to extinguish the contract. Civ. Code, § 1688. "The effect of the rescission of a contract is to place the parties in the same position as if it had never been made; and all rights which are transferred, released or created by the agreement are revested, restored or discharged by the avoidance." 24 Am. & Eng. Ency. of Law, p. 626.

[3] Hence, where one party without the assent of the other rescinds and sues to recover that which he has paid under the terms of the contract, his complaint, unless facts are stated excusing him from so doing, must show that he has restored or tendered restoration, upon condition that the other shall do likewise, of that which he is shown to have received pursuant to the terms thereof. Section 1691, Civ. Code. Plaintiff was in no position to insist upon the return of the amount paid and interest thereon from date of payment, and continue in the use, occupation, and enjoyment of the property, thus compelling defendant to resort to an action of eviction.

The judgment is reversed.

We concur: ALLEN, P. J; JAMES, J.

On Petition for Rehearing.

PER CURIAM. [4] The action herein may be assumed as under section 3406, Civil Code; that the court under section 3408, Civil Code, possessed the power to impose all proper conditions. Had this appeal been upon the judgment roll, the assumption necessary in support of the judgment would follow. Chicago Clock Co. v. Tobin, 123 Cal. 378, 55 Pac. 1007. The appeal, however, is upon a bill of exceptions purporting to disclose all matters and proceedings affecting the case, and it does not appear therefrom that any showing was made with reference to possession, the right to which is admitted by the pleadings to be in plaintiff. Willis v. Wozencraft, 22 Cal. 608. The fact that plaintiff was in default destroys any effect which would otherwise be considered in connection with the terms of the contract, as fixing the rights of the parties upon the happening of such event. We are prepared to concede that the judgment would destroy the bare right of possession, disassociated from actual possession, but we are still of opinion that, under the authorities cited in the original opinion, actual possession is presumed from the terms of a contract conferring such right. Hence, in the absence of an order making the relief granted subject to the condition that plaintiff restore possession, our conclusion must have been the same as that reached by considering the appeal upon the sufficiency of the complaint under the general demurrer interposed thereto. This being true, plaintiff could derive no benefit from a rehearing.

Rehearing denied.

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19 Cal. App. 458

TITLE INS. & TRUST CO. v. KING LAND & IMPROVEMENT CO. et al.

(Civ. 1,085.)

(District Court of Appeal, Second District, California. July 15, 1912. Rehearing Denied by Supreme Court Sept. 13, 1912.)

VENDOR AND PURCHASER (§ 102*)—CONTRACTS—EFFECT.

A contract reciting that, on payment of two notes at maturity, the maker should have an exclusive option to purchase land at a fixed price, was rescinded by the payee notifying the maker that his right to an option was terminated for failure to pay the second note, discharging the maker's and his guarantors' liability on that note, the first having been paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 175–177; Dec. Dig. § 102.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by the Title Insurance & Trust Company against the King Land & Improvement Company and others. From a judgment for defendants, and from an order denying a new trial, plaintiff appeals. Affirmed.

Stephens & Stephens, for appellant. Scarborough & Forgy and Willis I. Morrison, for respondents.

JAMES, J. This action was brought by the plaintiff on a promissory note made for the principal sum of $10,000 executed by the King Land & Improvement Company and W. J. King, and guaranteed by respondents G. W. Burleigh, C. R. Ward, and Robert McFadden. Judgment was in favor of the respondents mentioned. The appeal is on the part of plaintiff, and is taken from the judgment, and also from an order denying a motion for a new trial.

In October, 1907, plaintiff, acting as trustee for the owners of a considerable acreage in the Rancho Sausal Redondo, in Los Angeles county, made an agreement with W. J. King, whereby it was provided that the said King should be given an option to purchase the real estate so held in trust for the total amount of $130,000. A similar agreement had previously been made between the same parties; but, King having failed to fulfill the obligations thereof on his part to be performed, a new arrangement was consummated, and a second writing executed. In this writing it was first recited that it was the desire to give a further extension of the option to King and that the original agreement was abrogated and annulled, and it was then recited: "2. That in consideration of the nine thousand ($9,000) dollars heretofore paid as herein recited, and in further consideration of the execution of two promissory notes to the party of the first part by the party of the second part and the King Land & Improvement Company, a corporation, said notes dated October 1, 1907, drawing interest from date at the rate of 6 per cent. per annum, the first of said notes for $6,000, payable on or before November 5, 1907, the second of said notes for $10,000, payable on or before March 1, 1908, and both of said notes indorsed and guaranteed by W. J. King, Chas. Kern, Dr. Geo. Burleigh, A. C. Black, H. E. Smith, C. R. Ward, Robt. McFadden, H. C. Cartmell, Wm. I. Innes, and Albert Fuller, and in consideration of the prompt payment of said two promissory notes at the maturity thereof, time being of the essence of the contract with respect to the payment thereof, the party of the first part gives and extends to the party of the second part the exclusive option right and privilege of purchasing the said real property from the party of the first part at the price of one hundred and thirty thousand ($130,000) dollars, gold coin of the United States. If the party of the second part shall promptly pay both of said notes on or before the maturity thereof, and shall on or before the 1st of April, 1908, pay to the party of the first part the further sum of $18,334, time being of the essence of said payments, together with interest on both of said promissory notes, as herein provided, and with interest upon the said $18,334 at 6 per cent. per annum from the 1st of April, 1907, and if the party of the second part shall then pay to the party of the first part interest upon the sum of $16,000 from April 1, 1907, to October 1, 1907, at the rate of 6 per cent. per annum, then the party of the first part will convey to the party of the second part, or his assigns, the said property, by deed in form of grant, bargain, and sale, said deed to provide however, that the taxes of the year 1907–8 and the year 1908–9 shall be paid by the party of the second part or his assigns, and thereupon and contemporaneously therewith the party of the second part and his assigns in the said property will execute to the party of the first part two promissory notes each for the sum of $43,333.33, both bearing interest from the 1st day of April, 1907 at the net rate of 6 per cent. per annum, payable semiannually, and if not so paid to be compounded, and the party of the second part and his assigns will execute to the party of the first part a purchase-money mortgage upon the said property (or a trust deed, at the election of the party of the first part) in the form used by the party of the first part, providing, among other things, that the interest secured thereby shall be net at the rate of 6 per cent. per annum, and making such provision in the said mortgage or trust deed, at the option of the party of the first part, as shall secure that end."

The promissory notes were duly executed as in the agreement provided, and the first note of $6,000 was paid. Default was made in the payment of the $10,000 note, and on April 1st the plaintiff caused to be served upon King the following notice: "Dear Sir: Under an agreement entered into between you and this corporation on the 1st day of October, 1907, it was, among other things, provided that if you should promptly pay a note of $10,000 in said contract referred to, on or before March 1, 1908, time being of the essence of the contract with respect to the payment thereof, the undersigned would give and extend to you the exclusive option and privilege of purchasing certain real property described in said agreement. You, having failed to pay the said $10,000 promissory note in full, have, of course, failed to secure the option of purchasing said property, and you are hereby notified that all your rights under the said option agreement have been, by your failure to promptly pay said note, terminated, and you are hereby given formal notice to that effect."

Subsequently this action was brought for the purpose of securing a judgment against the defendants on the $10,000 note. The trial court made its findings in favor of the respondents first mentioned herein. It is argued on behalf of appellant that the trial court erred in concluding that upon the giving of the above notice, which plaintiff caused to be served upon King on April 1st, plaintiff rescinded the contract and thereby relieved respondents from any liability accruing on account of the $10,000 note. This contention is made upon the argument that the agreement contemplated that the payments evidenced by the $6,000 and $10,000 promissory notes were payments to be made to plaintiff in consideration of an option to purchase being extended to King, and that, the consideration having been executed by the plaintiff, liability accrued upon the promissory notes at the dates of their maturity. It is evident that the trial court, in interpreting the contract of the parties, concluded that the agreement constituted an agreement of sale which, upon rescission thereof exercised by the plaintiff, worked a waiver of the right to collect any of the payments of money provided therein to be made. Viewing the contract in this light, appellant concedes that the judgment would be right. The contract, however, does not appear to impose an obligation on the part of King to purchase at all events; in other words, no terms appear under which it would seem that the plaintiff would have the right to tender full performance, including an offer to transfer title, and enforce a demand against King that he make all of the payments therein specified and execute the two final promissory notes for $43,333.33 each. The contract, therefore, is incomplete as a contract to sell and to purchase, and must be considered as one by which King was to be allowed an optional right to make the purchase upon the terms agreed.

The question then presents itself as to whether these payments, evidenced by the promissory notes for $6,000 and $10,000, respectively, were payments to be made for an executed consideration, to wit, an optional right extending from the time of the making of the agreement up to the date of the maturity of said notes. We are of the opinion that it was not contemplated that King should have any option at all until he made payment of the promissory notes according to their terms, and that the condition imposed upon him was that he should become possessed of this option right when, and when only, both promissory notes had been paid according to their terms; that is, if he paid the notes in full and promptly, then the option to purchase would be extended to him. On the contrary, if he failed to pay the notes promptly, the option right which was to accrue upon these payments being made would not accrue, and plaintiff might decline to allow him to purchase the property for the price agreed upon, and rescind the agreement, which in fact it did do. In aid of this conclusion is the language used by plaintiff itself in the notice which it gave to King on April 1, 1908. In that notice it is recited that the agreement provided that, if the $10,000 note was paid promptly, "the undersigned would give and extend to you the exclusive option and privilege of purchasing certain real property described in said agreement. You, having failed to pay the said $10,000 promissory note in full, have, of course, failed to secure the option of purchasing said property." The agreement, then, as we interpret it, so far as it affected the giving of an option, was executory on both sides. It was rescinded on the part of the plaintiff because of the failure of defendant to satisfy conditions imposed upon him, and, having been rescinded, the makers and guarantors of the promissory note for $10,000 were thereby relieved of any liability on that account. Certainly plaintiff could not be permitted to collect the full consideration agreed to be paid as the price of an optional right, and at the same time decline to permit the exercise of such right. King could not, under his agreement, have claimed the privilege of purchasing the real property at the agreed price of $130,000 until he had satisfied the indebtedness evidenced by the promissory notes which constituted the consideration to be paid by him for that privilege. The effect of the notice of rescission given to King by plaintiff was to inform him that the optional privilege to purchase would not be extended to him, because he had failed to pay the consideration therefor; and, if the right of plaintiff to collect upon the $10,000 note is sustained, the result would be that full payment would be exacted for a right which plaintiff declined and refused to give in return therefor.

The contract under consideration is difficult of construction, and it is not easy to perceive just what was in the minds of the parties as to their intent at the time they made it. If there had been incorporated in it sufficient to show an obligation on the part of King to purchase at all events, then there would be sufficient substance to make a very complete contract of sale and purchase. Being lacking in such provisions as we have mentioned, however, we think it should be construed as a contract to give an option, and one subject to the construction which we have given it. We conclude that the judgment of the trial court was right, nevertheless, because plaintiff, having rescinded the agreement to give an option, waived its right to exact payment on the $10,000 note, and that all of the makers and guarantors thereof were consequently relieved from liability.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

19 Cal. App. 469

PEOPLE v. ROSS. (Cr. 244.)

(District Court of Appeal, Second District, California. July 16, 1912.)

1. Assault and Battery (§ 69*)—Defenses—Resisting Illegal Search.

Neither possession by a city recorder of a search warrant, prepared by him, but not issued to any one, nor suspension, during good behavior, of a sentence imposed by him on defendant for violating a liquor ordinance, constituted any authority for his invading defendant's premises in a search of his house for liquor; but such conduct constituted a trespass, and an invasion of, and injury to, defendant's rights, entitling him, under Pen. Code, §§ 692, 694, to employ sufficient resistance to prevent the trespass.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 99–101; Dec. Dig. § 69.*]

2. Criminal Law (§ 810*) — Trial — Inconsistent Instruction.

Giving an instruction inconsistent with a proper one is calculated to prevent the jury giving due consideration to the evidence in the light of the correct instruction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1968; Dec. Dig. § 810.*]

3. Assault and Battery (§ 56*) — Assault with Deadly Weapon.

Defendant was not guilty of the felony of assault with a deadly weapon, for pointing a pistol at one who was a trespasser on his premises and making an unauthorized search, telling him to go, and keeping it so pointed till he left.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 80, 81; Dec. Dig. § 56.*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Charlie Ross appeals from a judgment of conviction and from an order denying a new trial. Reversed.

Earl Rogers, W. H. Dehm, and H. L. Giesler, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted upon an information charging him with the crime of assault with a deadly weapon. The judgment of the court was that he be imprisoned for a term of one year in the state prison at Folsom and pay a fine of $2,000. From this judgment, and an order denying his motion for a new trial, defendant appeals.

At the time in question defendant was conducting a public feed yard in the city of Imperial, within which inclosure was located a shack or house wherein he lived. Victor Sterling, upon whom the alleged assault was committed, was city recorder of Imperial. Some time prior to the alleged assault, defendant had, in the recorder's court presided over by Sterling, pleaded guilty to the charge of violating a liquor ordinance of the city of Imperial; whereupon it was adjudged that he should pay a fine of $300 and serve 90 days in jail, the execution of which sentence, however, was "suspended during defendant's good behavior." On November 20, 1911, the day upon which the assault is alleged to have been committed, Sterling, having been informed that defendant was in possession of a quantity of liquor with the intent to use the same in violation of law, wrote out a search warrant, directed to any sheriff, marshal, constable, or policeman in Imperial county, commanding such officer to search the house, buildings, and rooms of defendant for beer in bottles and whisky in bottles, jugs, or kegs. He never issued or delivered this warrant to any officer empowered to execute the same; but, retaining it in his possession, he called to his aid three persons, two of whom were city marshals of Imperial, and all of whom were in fact armed, and these four went in an automobile to defendant's feed yard for the dual purpose, as stated by Sterling, "to investigate if he [defendant] was keeping good faith with the court," and to see if he had any liquor on the premises. Upon driving inside the inclosure, his armed escort, making no display of their arms, however, remained in the automobile, and Sterling got out and proceeded toward the house of defendant, about 150 feet from the point where they had stopped. He inquired for Ross, who, when Sterling was about 20 feet from the house, came out, whereupon Sterling said to him: "We have the necessary papers, and we want to see what you have here." Ross drew a pistol from his pocket, and, saying, "I have had enough of you sons of bitches," pointed it at Sterling, and told him, in effect to leave the premises, threatening to shoot him. Sterling, while parleying with defendant, walked towards the automobile, and defendant, with a rifle, which during the parley, he had secured from his house, and still pointing the pistol at Sterling, followed him 30 or 40 feet, until Sterling got into the machine and with his companions drove away. The uncontradicted evidence further shows that defendant "had every chance to fire the gun if he wanted to," that "nothing prevented him from doing it," that he did not do so, and "made no effort on his part to discharge the firearm."

[1] The record bristles with error. Neither the alleged search warrant prepared by the city recorder, but never issued to any officer authorized to execute the same, nor the suspension of the sentence imposed upon defendant upon his plea of guilty to the charge of violating the liquor ordinance of the city of Imperial, constituted any authority on the part of Sterling for invading defendant's premises and engaging in a search of his home to see what he had there. Hence all evidence admitted over defendant's objections touching these matters should have been excluded. Not only were these errors highly prejudicial to defendant's rights, but the effect thereof was greatly accentuated by

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

an instruction given by the court in response to a request of the jury for further information as to certain matters as follows: After the lapse of some 20 hours, during which the jury had failed to reach a verdict, it was brought into court, when the foreman said: "We want to ask if Mr. Sterling visited that place as an officer or as a private citizen? Did he have the right officially to visit that place? The Court: The court might answer that question by giving you some further instructions. Foreman: There is another question almost the same. We want to know if Victor Sterling, as recorder, if he releases a man on probation, if he then is probation officer so far as that man is concerned." In reply to these questions the court said: "There is no other provision, I believe, in the inferior courts, for the supervision of those placed on probation on their good behavior, than that the judge of the court has the entire supervision of the case. The superior court has a probation officer, an assistant officer to the court, to attend to those matters; but the inferior courts have no assistant and no officer to assist them in matters of that kind. If there is a criminal matter, they have the right to call upon the peace officers to serve papers or to do anything to carry out the orders of the court; but as to probation or parole, the transactions are entirely between the highest officer of the court, the judge, and the person placed on parole." It thus appears that, in effect, the court instructed the jury that Sterling, as city recorder, by reason of the suspension of sentence during defendant's good behavior, was empowered to enter his premises and search the same and supervise his conduct, and that as to defendant he (Sterling) was for the time vested with all the rights and powers of a probation officer appointed by the superior court. We know of no law conferring such authority upon a city recorder.

Other questions asked by the jury were the following: "We want to know if Victor Sterling, as probation officer, had a right to serve a search warrant?" "Some of the jurors want to know if he had a right to go there and serve a search warrant?" "Has a judicial officer, or Victor Sterling, a right, as a judicial officer, to visit that man's place any more than any other private citizen?" It is plainly apparent from the questions asked by the jury that they were impressed with the evidence, erroneously admitted, showing not only that Sterling had a search warrant in his pocket when he visited defendant's place, but also showing that defendant at the time was under a suspended sentence imposed by Sterling as city recorder, which fact, they were instructed by the court, gave Sterling as such officer "the entire supervision of the case." Moreover, by instruction No. 16 the jury were told that "presenting a loaded gun at a person who is within range is an assault, * * * if accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence or inflicting violent personal injury upon another; and if under such circumstances a defendant exacts a condition to be at once performed, which he has no legal right to impose, and his intent is immediately to enforce performance of that condition by violence, and he places himself in readiness and in position so to do, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is in law as much an assault as if he had actually shot at the other party and missed him." The evidence erroneously admitted, showing that defendant was at liberty under a suspended sentence imposed by the city recorder, who, as erroneously stated by the court, possessed the right to supervise his conduct, etc., was clearly calculated to impress the jury with the fact that Sterling had a legal right to invade defendant's premises in a search for liquor, and therefore, since Sterling was acting under power legally vested in him, defendant, as stated in the instruction last quoted, exacted a condition to be at once performed *which he had no right to impose.*

[2, 3] By instruction No. 14 the jury were told an attempt can be manifested only by an act which will end in the consummation of the offense, but for the intervention of circumstances independent of the will of the accused. The uncontradicted evidence of Sterling that defendant had "every chance to fire the gun if he wanted to," that "nothing prevented him from doing it," that he did not do so, and "made no effort on his part to discharge the firearm," makes it apparent that no circumstances independent of the will of the accused intervened to prevent the consummation of the assault. Moreover, instruction No. 15, clearly in conflict with instruction No. 14, was well calculated to, and no doubt did, prevent the jury from giving due or any consideration to the evidence in the light of instruction No. 14. By instruction No. 15 the jury were told that the voluntary abandonment of the alleged attempt by defendant constituted no defense. As applied to the facts of this case, this latter instruction is not only inapplicable, but irreconcilable with the statement as to the law made in the instruction immediately preceding it. The position of Sterling was that of a trespasser upon defendant's premises. He was there with the avowed intention of unlawfully entering and searching his home for whisky. Such acts constituted an invasion and injury to the rights of defendant, and under sections 692 and 694, Penal Code, he was entitled to employ sufficient resistance to prevent the commission of the offense —not to the extent, however, of committing a homicide (section 197, Pen. Code)—about to be committed by the trespasser. Conceding

that the acts of defendant might constitute a misdemeanor, as defined by section 417, Penal Code, nevertheless, under the circumstances here shown, they were insufficient to constitute the felony charged. The circumstances clearly distinguish this case from the facts disclosed in People v. Montgomery, 15 Cal. App. 315, 114 Pac. 792, and People v. Wells, 145 Cal. 138, 78 Pac. 470, where the assault was made by the trespasser, and the consummation thereof was prevented by acts of others and independent of the will of the accused.

An examination of the entire record convinces us that the verdict of the jury was reached by a consideration of incompetent evidence, considered in the light of erroneous instructions, from which they concluded that, in the invasion of defendant's home for the avowed purpose of searching his effects, Sterling was acting within his power as city recorder, and that defendant was not warranted in offering any resistance to prevent the same, and, further, that, notwithstanding the voluntary abandonment of the alleged attempt by defendant before the consummation of the offense, which the evidence tended to prove, he was, nevertheless, guilty as charged.

It is unnecessary to discuss other alleged errors as to instructions both given and refused. We are satisfied that the judgment and order should be reversed; and it is so ordered.

We concur: ALLEN, P. J.; JAMES, J.

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19 Cal. App. 464

STANTON et al. v. FREEMAN et al.

(Civ. 1,112.)

(District Court of Appeal, Second District, California. July 15, 1912.)

1. Appeal and Error (§ 1011*)—Review—Findings—Conclusiveness.

A finding on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

2. Quieting Title (§ 44*)—Evidence—Admissibility.

In an action to quiet title under a deed of which the grantor obtained possession and which he refused to return, evidence that one of the plaintiffs testified in a former action that the deed was executed on condition that it should pass only on plaintiffs effecting certain sales for the grantor, which they did not do, was properly admitted to show the consideration for the deed, and to corroborate the grantor's statement as to the nature of the consideration.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 89–92; Dec. Dig. § 44.*]

3. Quieting Title (§ 39*)—Defenses.

In a suit to quiet title under a deed, which was to pass to plaintiffs only in the event that they effected sales of other property for the grantor, which they did not do, it was not necessary that defendants demand by a cross-complaint that the deed be delivered up and canceled before they could defend against plaintiffs' claim on the ground of failure of consideration.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 80; Dec. Dig. § 39.*]

4. Adverse Possession (§ 42*) — Hostile Character of Possession.

Defendants' possession of land could not be adverse to the claim of plaintiffs under a particular deed prior to the time that the deed was executed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 207–212; Dec. Dig. § 42.*]

5. Deeds (§ 200*) — Delivery — Evidence — Admissibility.

In an action to quiet title under a deed from one of the defendants, evidence that for nearly four years plaintiffs did not attempt to take possession of the property was pertinent as a circumstance at least tending to corroborate defendant's claim that the deed was not to pass unless plaintiffs effected sales of other property for him, which they did not do.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 601; Dec. Dig. § 200.*]

Appeal from Superior Court, Los Angeles County; Frank F. Oster, Judge.

Action by P. A. Stanton and another against Archibald C. Freeman and others. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Bourdette & Bacon, Smith & Smith, and Frank James, for appellants. Willoughby Rodman and Willis I. Morrison, for respondents.

JAMES, J. Action brought by plaintiffs to quiet title to certain lots of land in the townsite of Inglewood in Los Angeles county. Judgment was in favor of defendants, and plaintiffs have appealed from an order denying a motion made by them for a new trial.

[1, 2] Prior to November, 1902, plaintiffs, as real estate agents and brokers, had been employed by defendant Freeman and his wife to negotiate the sale of property owned by said defendants at Inglewood. Some property had been sold under that agency, and in November, 1902, there was pending a sale of a large amount of said property under negotiations made by plaintiffs with parties representing the Inglewood Water Company. Defendant Archibald C. Freeman visited the office of plaintiffs one day while such negotiations were under way, and there, at the suggestion of plaintiff Van Alstyne, made a deed, which was signed and duly acknowledged by himself and wife, and purported to convey to plaintiffs title to the property in question in this action. This deed was placed among the papers of plaintiffs at their office, and two weeks later Freeman called and asked to examine it. It had never been recorded, and Van Alstyne procured it from his files and handed it to Freeman. Freeman made some statement to the general effect that he wanted to check up the lines,

and took the deed away and refused to return it. There were some negotiations between counsel for Freeman and plaintiffs following, in which Freeman's attorney endeavored to secure the consent of plaintiffs to have the deed placed in escrow along with other papers pertaining to the transfer of the property about which negotiations had been had, as before mentioned; but to this course plaintiffs refused to assent and the deed was left in the possession of Freeman's attorney. A controversy had arisen between plaintiffs and Freeman because it was claimed by Freeman that he had not been dealt fairly with by plaintiffs, his agents, in connection with the proposed pending sale of real estate, in that the agents, without his knowledge, proposed to secure for their own benefit a price in excess of that which they represented to Freeman as being the consideration for the proposed sale. Freeman took up the negotiations from this point on his own behalf, and refused to recognize plaintiffs further in the matter, and completed the sale to the same parties, but upon different terms and conditions. Plaintiffs subsequently brought an action against Freeman to recover for alleged commissions earned on account of the sale of the latter's property, and in that action they were defeated; the court finding that they did not complete the sale of the property and were not entitled to any commission. Subsequently Freeman transferred the property described in plaintiffs' complaint by deed to the Inglewood Water Company, and they in turn sold some of it to defendant Lloyd. Plaintiffs never obtained possession of any of the lots described in their deed, and rents were collected and taxes paid by Freeman and his subsequent grantees continuously down to the time that this action was commenced, which was on September 21, 1906. In the answers of defendants it was denied that plaintiffs had any title to or interest in the lots, and it was further set up that there was a failure of consideration for the transfer of title, in that the property was intended to be given in payment of commissions to become due to plaintiffs and which in fact they did not earn. The defense of nondelivery of the deed was made also as an issue under the pleadings. The court found all of the facts in favor of defendants.

The finding of the court that the lots in question were to be deeded to plaintiffs as payment of commissions, which the court also found they did not earn, cannot be disturbed, for the reason that it is based upon conflicting testimony. Van Alstyne testified that the deed was by him requested to be given as a sort of additional compensation for services already rendered. Freeman testified that it was understood that the lots were to be given as compensation for services rendered for the consummation of the deal then pending, which contemplated the sale of his property to persons representing the Inglewood Water Company. It appeared also in testimony that plaintiff Stanton had testified at the trial had regarding commissions claimed to be due from Freeman, and while referring to the same deed, as follows: "If the deal went through, it [the deed] was coming to us; if the deal did not go through, it was to be delivered to Mr. Freeman. We had no desire to retain the deed." Proof of this statement was proper evidence of the understanding had regarding the consideration for the deed between the parties, and was corroborative of Freeman's statement that that consideration was payment of compensation for services rendered in completing the sale of his property. In Kenney v. Parks, 137 Cal. 531, 70 Pac. 557, it is said: "To constitute delivery of a deed, it is not sufficient that there be a mere delivery of its possession; but this act must be accompanied with the intent that the deed shall become operative as such [citing authorities]. Here both parties understood that the deed could have no effect until recorded; and there was therefore no intent that it should become immediately operative, or that it should ever become operative during the life of the grantor, or afterwards, unless the grantee should survive her." See, also, Black v. Sharkey, 104 Cal. 281, 37 Pac. 939; Whitney v. American Insurance Co., 127 Cal. 467, 59 Pac. 897.

[3] In this case, the court having adopted the contention of defendant Freeman that the lots were to be transferred to plaintiffs in payment of commissions not then earned, and which were not thereafter earned, the inferential fact to be drawn therefrom, that the transfer of title, and consequently delivery of the deed, was not to be completed until such consideration had been fully executed, is sufficiently supported by the evidence. But, if we assume that there was a complete delivery at the time the deed was made and given to Van Alstyne, we think, under the issues made by the pleadings and the conclusion of the trial court thereon, that there was no consideration rendered by plaintiffs to defendant for the transfer of the lots, and plaintiffs were not entitled to have established any title in their favor. The consideration having totally failed, we do not think that it was essential that defendants should have here demanded, by cross-complaint, that the deed be delivered up and canceled by reason thereof, but that they might, as they did, defend against plaintiffs' asserted right to title and maintain the decree as it was entered in their favor.

[4, 5] Our conclusions on the questions we have discussed dispose of the vital matters involved, and it becomes unnecessary to consider the further points, of which there are a number, urged on behalf of appellants. The fact that defendants were in possession, by themselves and their predecessors in interest, and had paid all taxes levied against

the property, for more than five years prior to the commencement of this action, would not establish adverse title in their favor, because such title could not have been adverse to plaintiffs prior to the time when Freeman left the deed with Van Alstyne. Prior to that time there could have been no right or claim of title to be asserted on behalf of plaintiffs. However, evidence of the fact that plaintiffs did not obtain or seek to take possession of the property for a long period of time, to wit, from November, 1902, until September, 1906, when they brought this action, was pertinent as a circumstance at least tending to corroborate the contention of defendants as to the understanding had at the time the deed was made.

The order denying the motion for a new trial is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

19 Cal. App. 439

SPANGENBERG v. SPANGENBERG.

(Civ. 1,006.)

(District Court of Appeal, First District, California. July 12, 1912. Rehearing Denied by Supreme Court Sept. 10, 1912.)

1. Pleading (§ 214*)—Complaint — Demurrer.

A complaint must be deemed true for the purpose of determining its sufficiency as against a demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525–534; Dec. Dig. § 214.*]

2. Descent and Distribution (§ 82*) — Agreement by Heirs—Construction.

Under Civ. Code, §§ 1655, 1656, 3529, providing that all things incidental to a contract or necessary to carry it into effect are implied therefrom, a contract between children for the equal distribution of the property which their father will leave on his death, notwithstanding any will to the contrary, executed during the lifetime of the father, in consideration of the love and affection which the children bear toward one another and their desire to avoid litigation over the estate of their father, makes distribution of the estate of the father, on his death testate, a necessary incident to the performance of the contract, and it contemplates that final distribution will be made within a reasonable time, and the refusal of a child appointed executor to apply for distribution when the estate is in a condition to be closed is a breach of contract, and gives another child a right of action for the sum stipulated and due thereunder.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 318–321; Dec. Dig. § 82.*]

3. Courts (§ 198*) — Contracts — Enforcement—Jurisdiction.

A contract between children, providing for the equal division of the estate which their father may leave on his death, notwithstanding any will to the contrary, is only an agreement by heirs apparent to ignore the will of the father on his death; and, though the contract is assumed to be in the nature of an assignment of an expectant interest, it is but an attempted conveyance by one who has no transferable interest in the property involved, and the determination of the rights under the contract is not within the jurisdiction of the probate court, but the only remedy available to a child is an action on the contract.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 469, 471–475, 478; Dec. Dig. § 198.*]

4. Courts (§ 198*)—Jurisdiction — Probate Court.

The probate court, though having jurisdiction to determine the right to distribution of one claiming as an assignee of an heir, devisee, or legatee under a conveyance made subsequent to the ancestor's death, has no jurisdiction to adjudicate a claim to distribution of an assignee or grantee of an heir apparent under a conveyance made prior to the ancestor's death.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 469, 471–475, 478; Dec. Dig. § 198.*]

5. Contracts (§ 108*) — Invalidity as Against Public Policy.

The right to make contracts will not be unduly restricted, and no agreement will be adjudged void, as against public policy, unless it clearly contravenes that which has been declared by statute or by judicial decisions to be public policy, or unless the agreement tends in some way to injure the public.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498–503, 505, 507, 509–510½; Dec. Dig. § 108.*]

6. Contracts (§ 142*) — Invalidity as Against Public Policy — Question for Court.

Whether a contract is contrary to public policy is a question of law, to be determined from the circumstances of the case.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1826; Dec. Dig. § 142.*]

7. Contracts (§ 108*) — Invalidity as Against Public Policy.

A secret contract between children, which provides for an equal distribution between them of any estate which their father may leave on his death, executed during the lifetime of the father, in consideration of the love and affection which the children bear toward one another, and their desire to avoid litigation over the estate of their father on his death, is not invalid, as contrary to public policy, but, if fairly made, will be enforced.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498–503, 505, 507, 509–510½; Dec. Dig. § 108.*]

8. Contracts (§ 183*)—Joint and Several Obligations.

Under Civ. Code, §§ 1430, 1431, 1659, declaring that an obligation imposed on or a right created in favor of several persons may be joint, several, or joint and several, and such obligation or right is presumptively joint, except where the parties uniting in a promise receive some benefit from the consideration, in which case their promise is presumptively joint and several, an obligation by several persons to pay several sums of money is several, and not joint, though the sum agreed to be paid by each makes up an aggregate sum; and where several distinct sums are by contract payable to several distinct persons, any one may sue separately for his share.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780–785, 788; Dec. Dig. § 183.*]

9. Contracts (§ 183*)—Joint and Several Obligations.

A contract between children, which provides for an equal distribution between them of any estate which their father may leave on his death notwithstanding any will giving one child more than an equal share, executed during the lifetime of the father, who dies testate leaving a child an estate in excess of an equal share, creates an obligation which is several,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and any child may sue alone to enforce his right to an equal share.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 780–785, 788; Dec. Dig. § 183.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Fernando Spangenberg against Rudolph Spangenberg. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

F. J. Castelhun, for appellant. McKee & Tasheira, for respondent.

LENNON, P. J. The plaintiff in this action seeks to recover the sum of $3,907.61, alleged to be due to him from the defendant by the terms of a contract whereby the plaintiff, the defendant, and four other children of one Ferdinand Spangenberg agreed, during the lifetime of their father, that if he "should die possessed of any property, and give, devise, or bequeath to any of said parties more or less than one seventh ($^1/_7$) of the total amount of the property given, devised, or bequeathed to all of said parties, then whatever property said parties, or any of them, received from said estate upon a partial or final distribution thereof shall be pooled and divided equally among said parties, share and share alike." The consideration for the contract was expressly stated to be the love and affection which the parties thereto bore toward one another, and their desire to avoid litigation over the estate of their father.

Ferdinand Spangenberg died in the city of New York on the 2d day of May, 1903, leaving a will bearing date the 2d day of May, 1902, wherein the defendant, Rudolph Spangenberg, of the city of Oakland, Cal., was nominated executor. On July 9, 1903, the Surrogate Court of the county of New York, in the state of New York, made an order admitting said will to probate, and appointing the defendant as executor thereof. The defendant qualified as such executor. Letters testamentary were issued to him, and he still is the qualified and acting executor of said will. At the time of his death the testator left surviving him seven children, all of whom, but one, Lavinia Spangenberg, were parties to the contract in controversy. In addition to several minor bequests to persons other than his children, the testator bequeathed to each of the six children who were parties to the contract, and all residents of the state of California, the sum of $4,000. The further sum of $4,000 was bequeathed to the defendant, Rudolph Spangenberg, and his sister, Isabella Paull, in trust, however, for Lavinia Spangenberg. All the rest, residue, and remainder of the testator's estate was bequeathed in equal shares to two of the parties to the contract, viz., Rudolph Spangenberg, the defendant, and Isabella Paull, a daughter of the deceased.

The total value of the estate of which the deceased died possessed and which came into the hands of the executor, amounted to $80,951.21, and, after deducting the costs and expenses of administration, there was paid, on partial distribution of said estate, to each of the six children who had entered into the contract in suit, the several sums of money specifically bequeathed to them. Upon partial distribution, there was also paid to the defendant, Rudolph Spangenberg, and his sister, Isabella Paull, the sum of $4,000 specifically bequeathed in trust for Lavinia Spangenberg. The defendant, as executor, has paid to said Isabella Paull her share of the residue of said estate, amounting to the sum of $23,445.66, which leaves in the hands of the defendant, as executor, the sum of $23,445.66, which will be paid over to him upon final distribution as his share of the residue of the estate.

For more than one year prior to the commencement of the present action the said estate has been ready for final distribution and in a condition to be closed, but for the purpose of evading the payment to the plaintiff of the amount alleged to be due to him under the contract the defendant has neglected and refuses to have final distribution of the residue of said estate made to himself. Plaintiff has, at different times, demanded of the defendant payment of the one-sixth of the residue of said estate to which it is alleged plaintiff is entitled under the contract, but the defendant refuses to pay the same to the plaintiff.

The foregoing is a substantial narrative of the facts alleged in the plaintiff's complaint to constitute his cause of action. The defendant interposed a demurrer to the plaintiff's complaint upon all of the statutory grounds. The demurrer was sustained, with leave to the plaintiff to amend; but the plaintiff declined to amend, and accordingly judgment was rendered against him, from which he has appealed.

[1,2] In support of the judgment the defendant, among other things, contends that the complaint does not state facts sufficient to constitute a cause of action, in this: That no breach of the contract sued on is shown. In this behalf the argument is made that the contract expressly requires, as a condition precedent to its performance, partial or final distribution of the estate of Ferdinand Spangenberg, and that until the happening of said condition no right of action on the contract exists in the plaintiff. In short, the defendant takes the stand that his agreement with the plaintiff and the other parties to the contract was merely to pool his share of the estate only when he received it, either by partial or final distribution, and that, inasmuch as he did not expressly agree to procure distribution of the estate, he is under no obligation to do so within any particular

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time, or at all, and that, until final distribution is had to him, he will have nothing to share with the plaintiff. The contract in question may be susceptible of the narrow construction here contended for by the defendant, but it will not be so construed.

The complaint alleges, and for the purpose of the demurrer it must be taken as true, that the estate might have been closed and final distribution ordered in accordance with the terms of the will at the expiration of one year from the date of issuance of letters testamentary, and to construe the contract as the defendant would have it would leave the plaintiff without a remedy and at the mercy of the defendant for an indefinite period of time, and, perchance, would enable the defendant to altogether evade the obligation of his contract. For instance, if the defendant should assign his interest in the estate and procure distribution to be made to his assignee, the plaintiff, under the construction of the contract here contended for, could not maintain his action on the contract, because distribution had not been made personally to the defendant.

All things which in law or usage are considered as incidental to a contract, or necessary to carry it into effect, or to make it reasonable, "are implied therefrom, unless some of them are expressly mentioned therein," in which event "all things of the same class are deemed to be excluded." Civil Code, §§ 1655, 1656. Distribution of the estate of Ferdinand Spangenberg obviously was a necessary incident to a performance of the contract in controversy, and, although not specially mentioned therein, the contract impliedly contemplated that final distribution would be made within a reasonable time and without any unnecessary delay by the person who might be nominated and appointed executor of the will. The contract, therefore, should be interpreted so as to require the defendant, who was both a residuary legatee and executor under the will, to apply for and procure distribution to him of his share of the estate whenever the estate was in a condition to be closed, and his voluntary failure to do so cannot avail him in an attempted avoidance of his contract, because "that which ought to be done is to be regarded as done, in favor of him to whom, * * * and for whom, performance is due." Civil Code, § 3529.

If it be conceded, as the defendant contends, that distribution was a condition precedent to the performance of the contract, then it must follow that, if distribution had been made to the defendant, the plaintiff then would have had a cause of action for a subsequent refusal to perform the contract. The complaint alleges that, notwithstanding there was no obstacle in the way of closing the estate of Ferdinand Spangenberg, defendant purposely refrained from applying for distribution of the residue to him, in order that he might evade the obligation of his contract with the plaintiff. In other words, the defendant deliberately refused to do that which, in legal effect, he had agreed and was required to do. This we think was tantamount to a breach of the contract, and gave the plaintiff a right of action for the sum stipulated and due thereunder. Wolf v. Marsh, 54 Cal. 228; Love v. Mabury et al., 59 Cal. 484; Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Crane v. McCormick, 92 Cal. 176, 28 Pac. 222; Bagley v. Cohen, 121 Cal. 604, 53 Pac. 1117; Moffitt v. Rosencrans, 136 Cal. 416, 69 Pac. 87.

[3] It is next claimed upon behalf of the defendant that the plaintiff, assuming that he has any existing rights under the contract, has not only mistaken his remedy, but the forum as well in which the wrong complained of can be righted. It is asserted that the plaintiff's remedy, if any he has, must be sought and applied in the Surrogate Court of the state of New York, where the estate of Ferdinand Spangenberg is pending in probate. It is conceded that, inasmuch as the plaintiff has, upon partial distribution, received the specific legacy bequeathed to him by the will, he has no longer any standing in that court as an heir, legatee, or devisee under the will sufficient to enable him to coerce the defendant into closing and distributing the estate. It is insisted, however, that the parties to the contract in controversy stand in the relation of "mutual assignees of each other" with respect to their several inherited interests in the estate of their father, and from this it is argued that the plaintiff, equally with the defendant, is in a position to compel distribution to himself, in the Surrogate Court of the state of New York, of such portion of the defendant's share in the estate as the contract calls for, and that it is incumbent upon the plaintiff to exhaust his remedy in the New York court before he will be heard to complain, in this action, of the defendant's neglect to close and distribute the estate.

In our opinion the contract in question cannot be said to be strictly an assignment or conveyance of the legal title of the defendant in and to any portion of his inherited interest in the estate of his deceased father. The contract does not purport, either directly or by implication, to assign any portion of the estate to the parties thereto. It is nothing more nor less than an agreement by heirs apparent to ignore the will of their ancestor; but, even assuming it to be in the nature of an assignment of an expectant interest, it was, as such and at best, but "an attempted conveyance by one who then had no transferable interest in the property here involved, and the determination of questions relating thereto is not within the scope of probate proceedings, and is not authorized by statute." Estate of Ryder, 141 Cal. 366-371, 74 Pac. 993.

[4] Assuming the contract to be nothing more nor less than a conveyance of the expectant interest of an heir apparent, the probate court in California, if the estate in question had been settled here, would not have had jurisdiction to determine the interest of plaintiff (if any) in the defendant's share of the estate. While our probate court has jurisdiction to consider and determine the right to distribution of a person claiming as an assignee of an heir, devisee, or legatee under a conveyance made subsequent to the death of the decedent, it has no jurisdiction to adjudicate the claim to distribution of the assignee or grantee of an heir apparent under a conveyance made prior to the death of the deceased. Estate of Ryder, supra. If it be true, as counsel concede, that the law of the state of New York is substantially the same as the law of the state of California upon the subject of assignments or conveyances by an heir apparent of an expectant interest in the estate of an ancestor, it must follow that the plaintiff would not be required, nor would he be permitted, to litigate his claim in the Surrogate Court in the state of New York, and in no event could he participate in the distribution of the defendant's share of the estate without the latter's consent. This being so, it is obvious that the only remedy available to the plaintiff is his present action on the contract.

[5, 6] The contention that the complaint does not state a cause of action, because the contract sued on is against public policy, and therefore void, is made here for the first time. It is to the interest of the public generally that the right to make contracts should not be unduly restricted, and no agreement will be pronounced void, as being against public policy, unless it clearly contravenes that which has been declared by statutory enactment or by judicial decisions to be public policy, or unless the agreement manifestly tends in some way to injure the public. Whether or not a contract in any given case is contrary to public policy is a question of law, to be determined from the circumstances of each particular case. Smith v. Du Bose, 78 Ga. 413, 3 S. E. 309–316, 6 Am. St. Rep. 260; Weber v. Shay, 56 Ohio St. 116, 46 N. E. 377, 37 L. R. A. 230, 60 Am. St. Rep. 743; Pierce v. Randolph, 12 Tex. 290; Printing Numerical Registering Co. v. Sampson, 19 L. R. Eq. Cas. 465.

[7] The contract in controversy is in effect but an agreement whereby the parties thereto, "because of their love and affection for one another" and being "desirous of avoiding litigation over the estate" of their father "in case of his death," agreed to ignore his will in the event that he made one, and then share his estate equally as if he had died intestate. In other words, the contract was but an agreement of heirs apparent not to contest the will of an ancestor. There is nothing to be found in our code or statutory law prohibiting the making and enforcement of such a contract, and it has been held in this state that a contract, made after the death of the deceased, not to contest his will, is purely personal to the parties making it, that it is not against public policy, and that, when fairly made, it will be enforced. Estate of Garcelon, 104 Cal. 570, 38 Pac. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134.

The case of Stringfellow v. Early, 15 Tex. Civ. App. 597, 40 S. W. 871, involved the enforcement of a contract between heirs whereby it was agreed that the will of an ancestor should not be probated, and that his estate should be divided among the parties to the contract in such proportions as they would be entitled to as heirs at law if the testator had died intestate. It was held in that case that such an agreement was not contrary to public policy, and that "such adjustments by contract are favored by the law * * * and are not to be deemed an unwarranted interference with the jurisdiction of the courts."

In the case of Phillips v. Phillips, 8 Watts (Pa.) 197, it was said: "It cannot admit of doubt that before probate the parties in interest under a will would have the right to set aside a will, and such an act would be favored when the object was to avert a family controversy." Clearly, if the contract in controversy had been made and executed subsequent to the death of Ferdinand Spangenberg, it could not have been successfully assailed and set aside, because it was violative of any law or principle of public policy, and we can see no difference in its effect upon the policy of the public, between a contract to refrain from contesting a will made during the lifetime of a testator and such a contract made after his death. The identical question involved upon this phase of the present case was decided adversely to defendant's contention here in the two cases of Beckley v. Newland, and Wethered v. Wethered, respectively reported in 24 Eng. Rep. 691 (2 Pierre Williams, 182), and 57 Eng. Rep. 757 (2 Simon, 183).

In all of their essential features of law and fact, these two cases are exact counterparts of the case at bar, and in each instance it was held that an agreement stipulating that whatever the sons, in one case, and the heirs presumptive, in the other, might receive by will, should be equally divided between them, was valid, enforceable, and not contrary to public policy. In those cases, as here, it was objected, in substance, that a contract by heirs, devisees, or legatees, made during the lifetime of the testator, to divide his estate, to which, at the time of the making of the contract, the parties had no manner of right, and possibly might never have, was a fraud upon the testator, who, in all probability, would not have bequeathed anything to any of the parties to the agreement, if he could have foreseen that his will would have been frustrated, by the act of the parties, immediately upon his death.

It was ruled, however, in the case of Beckley v. Newland, and subsequently reaffirmed in the case of Wethered v. Wethered, that "the agreement to share equally would not be disappointing the intent of the testator, for he did not design to put it out of either of the devisee's power to dispose of the estate after it should come to him; but, on the contrary, when the testator gave it to either of them, he, by implication, gave that person a power to dispose of the estate when it should come to him." It was further held in those cases in effect that inasmuch as the tendency of agreements similar to the one in question here was to guard against undue influence over the testator, and as it could not be said to be unreasonable to covenant to do what the law would have done if the testator had died intestate, the notion that they were contary to the policy of the law was not supported by the principles of law applicable to such cases, and that performance of such contracts should be decreed, even though there was no other consideration for their execution than the reciprocal benefit which might accrue to the parties.

We are not unmindful of the many cases in this country and in England, cited to us by counsel for the defendant, declaring the invalidity of secret contracts made with strangers to the family of the testator, by his heirs, during his lifetime and without his knowledge and consent, purporting to convey an expectant interest in his estate. In all of the cases cited such contracts were declared void, primarily, for fraud upon the testator, and, secondarily, as being contrary to public policy, unless it was pleaded and proven that they were made and executed with the knowledge and consent of the testator. The reasoning of those case proceeded upon the theory that such conveyances, if permitted, would perpetrate a fraud upon the testator, by diverting his bounty from his heirs to strangers, and such conveyances were declared to be contrary to public policy, because of their tendency to encourage extravagance, prodigality, and vice in the heirs, and, in some instances, a desire in an avaricious or vicious purchaser for the death of the testator.

The reasoning and the rule of those decisions do not apply, however, to contracts exclusively between heirs, legatees, or devisees, which have, as has the contract in the case at bar, the declared object of avoiding litigation and the implied purpose of suppressing fraud and undue influence. Where, as here, there was a fair, though a secret, agreement among all of the heirs of the testator to share his estate equally, the situation and the resulting rule of law are very different from that which obtains in contracts between an heir apparent and a stranger to the estate, for the reason that the agreement between the heirs would have the commendable "tendency to suppress all attempts of one or more to overreach the others, as well as to prevent all exertions of undue influence. * * * And it cannot be truly said to disappoint the testator's intention" nor contravene public policy. 1 Story's Eq. Jur. §§ 265, 343; Beckley v. Newland, supra; Wethered v. Wethered, supra.

It must be conceded that some of the cases cited to us by the defendant do involve and avoid contracts, similar to the one in the case at bar, which were made between heirs during the lifetime of the testator and without his consent. It cannot be disputed that those cases expressly decide and declare that a complaint which does not directly or impliedly plead the consent of the testator to such a contract does not state facts sufficient to constitute a cause of action. Those cases, however, are the exception rather than the rule, and they fail to satisfy us that any principle of public policy, statutory or otherwise, in this state, at least, would be violated by the enforcement of the contract under consideration here.

[8] Finally, the defendant insists that the complaint is defective because of the nonjoinder, as plaintiffs or defendants, of all of the other parties to the contract. This contention cannot be sustained. "An obligation imposed upon several persons, or a right created in favor of several persons, may be joint, several, or joint and several," and generally such obligation or right is presumed to be joint, rather than several, save and except in cases "where the parties who unite in a promise receive some benefit from the consideration, whether past or present," and in such cases "their promise is presumed to be joint and several." Civil Code, §§ 1430, 1431, 1659. Where several distinct sums are by contract payable to several distinct persons, any one of the parties may sue separately for his share; and where several persons obligate themselves to pay several sums of money, their obligation is several, and not joint, notwithstanding that the sum agreed to be paid by each goes to make up an aggregate sum. Moss v. Wilson, 40 Cal. 159; Craig v. Fry, 68 Cal. 363, 9 Pac. 550.

[9] In the present case all of the parties to the contract presumably derived some benefit from the consideration for its execution, and as the plaintiff's cosigners of the contract, other than the defendant, could not possibly have any interest in the sum sought to be received from the defendant, his obligation under the contract must be deemed to be several, and a several action may be maintained thereon, without joining, either as plaintiff's or defendants, the other parties to the contract.

Upon the whole case, we are of the opinion that plaintiff's complaint is free from defect and states a cause of action, and that the defendant's demurrer thereto was improperly sustained. It is ordered, therefore, that the judgment appealed from be and it is hereby reversed, and the cause remanded to the lower court, with instructions to overrule the demurrer and require the defendant to answer.

We concur: HALL, J.; KERRIGAN, J.

(19 Cal. App. 428)

BACON v. SOULE et al. (Civ. 1,001.)

(District Court of Appeal, First District, California. July 12, 1912. Rehearing Denied by Supreme Court Sept. 10, 1912.)

1. FRAUD (§ 7*)—"CONFIDENTIAL RELATION"—"FIDUCIARY RELATION."

A "confidential relation," with which a "fiduciary relation," is ordinarily synonymous, and like it is founded on trust or confidence reposed by one person in the integrity and fidelity of another, and precludes the idea of profit or advantage to the person in whom confidence is reposed from dealings with the other, is any relation existing between parties to a transaction whereby one of them is in duty bound to act with the utmost good faith for the benefit of the other.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 7.*

For other definitions, see Words and Phrases, vol. 2, pp. 1423–1424; vol. 3, p. 2761.]

2. FRAUD (§ 7*)—CONFIDENTIAL RELATION—PRESUMPTION—BROTHER AND SISTER.

A confidential relation is not presumed to exist between brother and sister merely because of their blood relation.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 7.*]

3. FRAUD (§ 17*)—SUPPRESSION OF FACTS.

Fraud may be predicated on the suppression of a material fact; and, when a confidential relation exists, it is the duty of the person in whom confidence is reposed to fully and fairly disclose every material matter in his knowledge of which he knows the other is ignorant, failing of which he is guilty of fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 15; Dec. Dig. § 17.*]

4. FRAUD (§ 50*)—PLEADING AND PROOF.

The burden of charging as well as proving fraud, actual or constructive, is ordinarily on the party claiming it.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. § 50.*]

5. FRAUD (§ 41*)—CONFIDENTIAL RELATIONS—PLEADING.

Plaintiff does not show a confidential relation between defendants, his sisters, and him, by averring that he relied absolutely on their honesty and integrity and their natural love and affection for him, without alleging facts tending to show they voluntarily assumed towards him a relation of personal confidence; but, in fact, showing they had been for years at war, dealing with each other at arms' length.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 36, 37; Dec. Dig. § 41.*]

6 FRAUD (§ 7*)—CONFIDENTIAL RELATIONS—STOCKHOLDERS AND DIRECTORS—INDIVIDUAL TRANSACTION.

As to individual transactions between directors of a corporation and a stockholder thereof, in which the officers are not acting as representatives of the corporation, there is no confidential relation merely because of their relations to the corporation.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 7.*]

7. PLEADING (§ 8*)—ACTUAL FRAUD—PLEADING FACTS.

Actual fraud is not shown by the allegation that defendants "at all times fraudulently concealed from plaintiff the facts," this being a conclusion, and averments showing the facts and circumstances of the concealment being necessary.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12–28½; Dec. Dig. § 8;* Fraud, Cent. Dig. § 37.]

8. FRAUD (§ 17*)—FRAUDULENT CONCEALMENT—SILENCE.

In the absence of a confidential relation, defendants in a transaction with plaintiff were under no obligation to volunteer to him information as readily accessible to him as them; so that their mere silence as to a matter not mentioned by him was not fraudulent concealment.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 15; Dec. Dig. § 17.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Frank P. Bacon against Ella Etta B. Soule and another. Judgment for defendants. Plaintiff appeals. Affirmed.

F. A. Berlin, for appellant. John A. Percy, for respondents.

LENNON, P. J. This is an appeal from a judgment entered upon an order sustaining defendants' demurrer to plaintiff's fourth amended complaint without leave to further amend.

The cause of action stated in plaintiff's complaint sounds in damages for fraud and deceit alleged to have been practiced upon plaintiff by the defendants in the negotiation and consummation of an agreement whereby certain real property of the Bacon Land & Loan Company, Inc., was transferred to the plaintiff in lieu of his stock and interest in the corporation.

The salient features of the transaction out of which the controversy arose and upon which the plaintiff's cause of action purports to be founded are stated in the complaint to be these:

The plaintiff, Frank P. Bacon, is a brother of the defendants, Ella Etta B. Soule and Carrie J. Bacon. They, the plaintiff and defendants, were the owners in equal shares of the entire corporate capital stock of the Bacon Land & Loan Company, and at one time all three were directors and officers of the corporation. In the year 1895 the plaintiff resigned as the president and as a director of the corporation. The defendants, however, continued to be officers and directors of the corporation until it was dissolved in the year 1905. The dissolution of the corporation was brought about by the dissensions and disagreements and the constantly conflicting views and opinions of the plaintiff and defendants as to the proper management of the corporation, and from this resulted the agreement, which is the basis of this action, wherein the properties of the corporation were partitioned and transferred to the plaintiff and the defendants in lieu of the surrender and cancellation of their respective stock holdings in the corporation.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

This agreement was entered into and completely executed in the year 1905, whereupon the corporation was dissolved. Pursuant to the agreement, plaintiff selected and received, as a portion of his share of the assets of the corporation, a certain lot of land with a dwelling house thereon at the agreed valuation of $30,000. When plaintiff had last seen and examined the dwelling house some two years before, it contained fixtures and furnishings valued at $2,000, which he believed were still in place at the time he selected the property in question as a portion of his share of the corporation assets. The fixtures and furnishings, however, had been sold by the corporation and removed from the house by the purchaser some time prior to the consummation of the agreement between plaintiff and the defendants. This fact was not disclosed to the plaintiff by the defendants during the negotiations for the division and distribution of the corporation assets, and it was not discovered by plaintiff until three months later, and after he had accepted and received the property in question without having seen or examined the house or its contents for a period of two years.

The plaintiff in negotiating with the defendants "supposed and believed" that the house was fitted and furnished as when he last saw it, and in accepting the property without personal or any investigation of its condition and contents he relied "upon the honesty and integrity of his sisters and upon their natural love and affection" for him, never believing that they, "his nearest blood relatives, would defraud or impose upon him or in any way deceive him or conceal from him any fact relating to their dealings with each other."

The defendants, however, "allowed the plaintiff to accept the property" without disclosing to him that the fixtures and furnishings had been previously sold and removed, notwithstanding the fact that they knew that the plaintiff, when he agreed to accept the property at a valuation of $30,000, was acting under the "inducement and belief" that the house was in the same condition as to fixtures and furnishings as it was some two years before. It does not appear, however, that the defendants, either by words or artifice calculated to deceive, induced the belief in plaintiff that the property in question was in the same condition as when he last saw it, and it is not claimed or alleged that the defendants knew or had any reason, aside from their blood relationship, to suppose that the plaintiff was placing any trust or confidence in them in connection with this particular transaction.

Plaintiff's complaint, in part, proceeds also upon the theory that, because the plaintiff and defendants were stockholders in the corporation, they were business partners in the ordinary sense, and in that behalf the complaint alleges that the plaintiff was induced to accept the property in question without an investigation as to its condition or its fixtures or furnishings because of "his confidence in the defendants as his partners in the joint ownership of the large properties involved, amounting to several hundred thousand dollars."

It is further alleged that, if the fixtures and furnishings of the house had not been removed, the rental value of the house would have been $50 per month, but because of their removal the house could not be rented and remained vacant for a period of 18 months. Although the plaintiff had agreed to take the property in question at the valuation of $30,000, its actual market value at the time of its transfer to him was not more than $20,712 because of the removal of the fixtures and the consequent damage to the house. By reason of all this the complaint alleges that the plaintiff was damaged in the sum of $10,188.

From the foregoing statement of the essential facts upon which the plaintiff's cause of action is founded, it is evident that damages are sought primarily upon the theory that a confidential or fiduciary relation existed between the plaintiff and the defendants because of their blood relationship, and because of the further fact that the defendants were officers and directors of a corporation in which the plaintiff was a stockholder, and that, therefore, the allegations of the complaint prima facie imposed a legal obligation upon the defendants to voluntarily disclose to the plaintiff the exact status of the corporation's assets before he had selected and received his share of the same. It is conceded that the complaint does not state a cause of action if the pleaded facts do not show actual fraud or do not actually, or as a matter of law, show the existence of a confidential or fiduciary relation between the parties with reference to the transaction out of which the controversy arose.

[1] The law relating to the subject of confidential relations has been so often declared and is generally so well understood that a mere reference to its underlying principles will suffice for the discussion and decision of the paramount point presented upon this appeal. A "confidential relation" in law may be defined to be any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises

where confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. A "fiduciary relation" in law is ordinarily synonymous with a "confidential relation." It is also founded upon the trust or confidence reposed by one person in the integrity and fidelity of another, and likewise precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed. Civ. Code, § 2219; Meyer v. Reimer, 65 Kan. 822, 70 Pac. 869; Robins v. Hope, 57 Cal. 493. Confidential relations are presumed to exist between husband and wife, partners, parent and child, priest and parishioner, principal and agent, guardian and ward, counsel and client, etc., and in each of said relations the party in whom the confidence is reposed must stand in his dealings with the other party unimpeached of the slightest abuse of the confidence reposed, and, if he derives or claims any advantage from the relation, the law places upon him the burden of showing that the transaction out of which the advantage arose was fair and just and fully understood and consented to by the party confiding in him. Smith on Fraud, § 190; Robins v. Hope, supra; Brison v. Brison, 75 Cal. 525, 17 Pac. 689, 7 Am. St. Rep. 189; Jackson v. Jackson, 94 Cal. 446, 29 Pac. 957; Dimond v. Sanderson, 103 Cal. 97, 37 Pac. 189.

[2] No such confidential relation, however, is presumed to exist between brother and sister merely because of their blood relationship. While it is true that the relationship of brother and sister is a material circumstance to be considered in determining whether or not in any given case a confidential relation actually existed, nevertheless the mere fact that the parties to the transaction are brother and sister does not in and of itself create a confidential relation. Odell v. Moss, 130 Cal. 352-356, 62 Pac. 555. This being so, it follows that plaintiff's cause of action in so far as it proceeds upon the claim of fraud, actual or constructive, arising out of a confidential relation, must rest upon the theory that the defendants did in fact voluntarily assume toward the plaintiff a relation of personal confidence as defined and contemplated by section 2219 of the Civil Code.

[3] Constructive fraud may be said to consist of (1) any breach of duty which, without an actual fraudulent intent, gains an advantage to the person in fault by misleading another to his prejudice; or (2) of any such act or omission which the law specifically declares to be fraudulent without respect to actual fraud. Civ. Code, § 1573. The existence of actual fraud is always a question of fact, and may consist of any of the following acts committed by the party to the contract with the intent to deceive the other party thereto, or to induce him to enter into a contract, viz.: (1) The suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the positive assertion in a manner not warranted by the opinion of the person making it of that which is not true, though he believes it to be true; (3) the suppression of that which is true by one having knowledge or belief of the fact; (4) any other act fitted to deceive. Civ. Code, §§ 1572-1574. It will thus be seen that fraud may be predicated upon the suppression of the material facts of a transaction. It may be inferred from the circumstances of the transaction and the condition of the parties, and when a confidential relation exists, either in fact or in contemplation of law, it is the duty of the person in whom the confidence is reposed to fully and fairly disclose every material matter within his knowledge of which he knows the other party to be ignorant. Failing to do so, the party in whom the confidence reposes is guilty of fraud and is liable in damages for the resulting loss to the other party. Belden v. Hendriques, 8 Cal. 87; Colton v. Stanford, 82 Cal. 351, 23 Pac. 16, 16 Am. St. Rep. 137; Smith on Fraud, § 9; Smith v. Patterson, 33 Ohio St. 70.

[4] The burden of charging, as well as proving, fraud, actual or constructive, is ordinarily upon the party alleging it, and the sufficiency of the facts pleaded in the present case to constitute a cause of action depends upon whether or not the allegations of the plaintiff's complaint show that the defendants did in fact voluntarily assume a relation of personal confidence with the plaintiff which was subsequently betrayed in the transaction complained of.

[5] The only support for plaintiff's claim of the existence of a confidential relation is to be found in those allegations of the complaint wherein it is averred in substance that the plaintiff relied absolutely upon the honesty and integrity of his sisters, upon their natural love and affection for him, and upon his confidence in them as his partners.

Aside from the question of partnership, which will be dealt with and disposed of later, these allegations of the complaint were not sufficient to create a confidential relation within the meaning of section 2219 of the Civil Code. In and of itself the allegation that the plaintiff relied upon the honesty and integrity of the defendants merely because they were his sisters counts for naught in the creation of a confidential relation. In order to burden the defendants with the duties and responsibilities which ordinarily arise out of such a relation, it was incumbent upon the plaintiff, not only to allege his trust and confidence in the defendants, but to aver, if he could truthfully do so, the existence of facts and circumstances showing, or tending to show, that they "voluntarily assumed" towards him "a relation of personal confidence." Ruhl v. Mott, 120 Cal. 668, 53 Pac. 304. No such situation of the parties is alleged, nor can such a situation be fairly inferred from the associations and dealings of the parties prior to the time and at the time that the contract in controversy was executed. Not only is the complaint silent upon this subject, but it affirmatively appears therefrom that there was no love lost between the plaintiff and his sisters. "They were never able to agree upon any harmonious line of action." The constant conflict between them in matters of business was so sharp and disagreeable that the plaintiff was compelled some 10 years before the transaction complained of to resign as a director of the Bacon Land & Loan Company, and thereafter was practically excluded by the defendants from any participation in the management of its affairs.

In addition to this, it further appears from the allegations of the complaint that about three years prior to the execution of the contract in controversy the plaintiff was compelled by the defendants to give up his residence in his father's home. It does not appear from the complaint that the plaintiff ever thereafter saw the defendants, or that he ever thereafter had any personal communication or dealings with them whatsoever. Thus it appears from the complaint in its entirety that for at least a period of 10 years prior to the transaction in question the plaintiff and his sisters were at war and dealing with each other at arms' length; and that finally, because of the hostile attitude of the defendants, the plaintiff was compelled to segregate his interest from theirs. Surely in such a situation it cannot be fairly claimed that there existed between the plaintiff and the defendants any mutual love and affection or trust and confidence. In short, while the plaintiff alleges generally that he had confidence in his sisters, "he shows specifically that he had not." Tillaux v. Tillaux, 115 Cal. 663–675, 47 Pac. 691, 695.

[6] The plaintiff, as hereinbefore indicated, relies in part, to support his claim of a confidential relation, upon the theory that he and the defendants were partners. The complaint, it is true, alleges that the plaintiff in negotiating the settlement of the corporation's affairs relied "upon his confidence in the defendants as his partners." It, nevertheless, appears clearly enough from the complaint as a whole that the plaintiff and defendants were not and never had been partners in the ordinary sense of the term. The claim of a confidential relation in this behalf is founded solely upon the erroneous assumption that, because the plaintiff was a stockholder and the defendants directors of the same corporation, the defendants were therefore partners of and trustees for the plaintiff in all matters and transactions arising between them, whether in or out of the corporation. This position is untenable. It may be conceded that generally the director of a corporation is a trustee for the corporation and its stockholders in the management of the corporation's affairs, and in the disposition of its property, but "the doctrine that officers and directors are trustees of the stockholder applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they took advantage of knowledge gained through their official position." 21 Am. & Eng. Ency. of Law (2d Ed.) p. 898; 2 Cook on Corporations (6th Ed.) § 640. In the case at bar it is apparent that in dealing with the subject-matter of the controversy the defendants were not acting in any manner as the representatives of the corporation. On the contrary, they as individuals were dealing with the plaintiff as an individual in a transaction purely personal to each of them, and therefore their respective duties and obligations to one another must be measured by the rules relating to the ordinary transactions of individuals rather than by those which pertain to and govern the conduct of officers of a corporation in the management and control of the corporation's affairs and property.

[7] The complaint is barren of facts sufficient to constitute a cause of action for actual fraud. The nearest approach to a statement of actual fraud is the allegation that the defendants "at all times fraudulently concealed from the plaintiff the fact" that the corporation had previously sold the fixtures and furnishings of the house selected by the plaintiff as his share of the corporation assets. This, however, was not enough to fasten a charge of actual fraud upon the defendants. It was at best but a conclusion of the pleader, and facts showing actual fraud must be averred. In the absence of averments showing the facts and circumstances of the concealment alleged to have been practiced upon the plaintiff, the complaint "must be held to be as destitute of allegations of fraud as if it were entirely silent upon the subject." Kent v. Snyder, 30 Cal. 667; Feeney v. Howard, 79 Cal. 525, 21 Pac. 984, 4 L. R. A. 826, 12 Am. St. Rep. 162; Semple v. Hagar, 27 Cal. 163; Green v. Hayes, 70 Cal. 276, 11 Pac. 716. No claim is made that the plaintiff was acting under a mental disability or that the defendants misrepresented anything to him, or misled him to his detriment in any particular, or in any manner prevented him from investigating and ascertaining for himself the true condition of the property allotted to him.

[8] In the absence of a confidential relation, the defendants were under no obligation to volunteer information to the plaintiff which was as readily accessible to him as it was to the defendants, and as "the law will not undertake the care of persons who will not, with the means at hand, take care of themselves," the mere silence of the defendants cannot be construed to be a fraud-

ulent concealment sufficient to support an action for fraud. Commissioners v. Younger, 29 Cal. 172-176; Hanscom v. Drullard, 79 Cal. 234-237, 21 Pac. 736; Champion v. Wood, 79 Cal. 17-20, 21 Pac. 534, 12 Am. St. Rep. 126; Ruhl v. Mott, supra.

The complaint does not state facts sufficient to constitute a cause of action and the demurrer thereto was properly sustained.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

(19 Cal. App. 488)

OAKLAND PAVING CO. v. DONOVAN.

(Civ. 928.)

(District Court of Appeal, Third District, California. July 16, 1912.)

1. OFFICERS (§ 40*) — DE FACTO OFFICERS — EXISTENCE.

There can be no de facto officer where there is no de jure officer provided by law, or where the de jure officer is discharging his functions.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 62; Dec. Dig. § 40.*]

2. OFFICERS (§ 104*)—DE FACTO OFFICERS—EFFECT OF ACTS.

The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of the office, as binding as if he were an officer legally elected and qualified and in full possession of it.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 173; Dec. Dig. § 104.*]

3. MUNICIPAL CORPORATIONS (§ 147*) — SUPERINTENDENT OF STREETS—DE FACTO OFFICERS.

Though a city charter provide for a superintendent of streets, but not for an acting superintendent, one who discharged the functions of that office during the superintendent's absence, and who was recognized by the public as such officer, was a de facto officer, regardless of any power to appoint him, and his acts concerning a street improvement are valid, as concerning the right of a paving company to enforce an assessment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 324, 325; Dec. Dig. § 147.*]

4. OFFICERS (§ 39*)—"DE FACTO OFFICER"—DEFINITION.

A "de facto officer" is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid, so far as they involve the interest of the public or third persons, where the duties of the officer were exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such as ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 61; Dec. Dig. § 39.*

For other definitions, see Words and Phrases, vol. 2, pp. 1845-1851.]

5. OFFICERS (§ 41*)—DE FACTO OFFICERS.

Finding a person in charge of a public office and transacting its business in a regular way, under an assumption of right to act as the officer charged with the duties of such office, third parties are not bound to ascertain his authority so to act, but as to them the courts will hold him to be an officer de facto, and will not permit his title to be collaterally assailed.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 63; Dec. Dig. § 41.*]

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Oakland Paving Company against Robert T. Donovan. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Reversed.

Johnson & Shaw, for appellant. W. J. Donovan and R. M. F. Soto, for respondent.

CHIPMAN, P. J. This action was commenced to enforce a street assessment lien for work done in the city of Oakland under the so-called Vrooman act (Stats. 1885, p. 147, and acts amendatory thereof previous to 1904). The resolution of intention was adopted March 7, 1904, and the work was done pursuant to contract duly let, as appears from the complaint and is not denied. It is further alleged in the complaint that the superintendent of streets of the city of Oakland made, issued, and recorded the assessment roll, authenticated the record thereof, and recorded the return on the warrant. The answer denied that the superintendent of streets did any of the acts so alleged to have been performed by him, and at the trial defendant had judgment, from which, and the order denying its motion for a new trial, plaintiff appeals.

We take, from appellant's opening brief, the following statement, which correctly shows, in part, what occurred at the trial: "Plaintiff offered, but was not permitted to introduce in evidence, a warrant, assessment, and diagram, made and signed by W. W. Blair, acting superintendent of streets of the city of Oakland, which were recorded by W. W. Blair, acting superintendent of streets of said city, in a book kept by the superintendent of streets of the city of Oakland in his office for that purpose. Plaintiff also offered in evidence a contractor's return, which was filed in the office of the superintendent of streets, and recorded therein by W. W. Blair, acting superintendent of streets, and an original contract, upon which the assessment was based, which was recorded by W. W. Blair, acting superintendent of streets, in a book kept by the superintendent of streets of the city of Oakland, in his office for that purpose, and said record was signed by W. W. Blair, acting superintendent of streets. Plaintiff introduced in evidence a resolution, adopted by the board of public works of the city of Oakland on August 16, 1905, granting Charles F. Ott, superintendent of streets of the city of Oakland, a leave of absence for 60 days. Plaintiff then offered, but was not permitted to introduce in evidence, a resolution of the board of public works, to show that on said 16th day of August, 1905, said board of public works of the city of Oakland appointed W. W. Blair acting superintendent of streets for and during the time the said Charles F. Ott was absent from the city of Oakland, and by said appointment authorized and appointed said W. W. Blair to do and perform all acts and things required by law of the superintendent of streets to be done and performed, and such other acts and things as may be required of him by the general laws of the state of California and the charter of the city of Oakland. Plaintiff then called and examined witnesses, who were not permitted by the court to answer questions: (1) As to whether or not Charles F. Ott was in possession of the office of superintendent of streets of the city of Oakland, and performed the duties of the office at any time during the period in question; (2) as to whether or not W. W. Blair was in the actual possession of the office of superintendent of streets and performed all the duties of the office during all of the time of the period in question; (3) as to whether or not said W. W. Blair was reputed to have official authority to exercise and perform the duties of the superintendent of streets of the city of Oakland; (4) as to whether or not the community accordingly acquiesced."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The acts performed by Blair were done at dates within 60 days after August 16, 1905. The trial was commenced on January 8, 1910, and W. W. Blair testified that he had been connected with that office for over 5 years; that a sufficient certificate was made and signed by the city engineer, describing the work performed by plaintiff, which was indorsed at the foot: "Recorded September 6th, 1905. W. W. Blair, Acting Superintendent of Streets of the City of Oakland." The usual certificate of assessment and diagram were similarly certified on the same date. A warrant, made and signed in the same manner, of like date, countersigned by the mayor of the city of that date, was also produced; also a contractor's return, "Recorded October 4, 1905," all attached to each other. It was admitted by defendant's counsel that the book offered in evidence by plaintiff was a book, coming from the superintendent's office, "which is used for the purpose of recording assessments, and another book, which is used for the purpose of recording the contracts and bonds," and that in these books "were copied the papers that you have offered in evidence, and are authenticated by Mr. Blair in some capacity; that the return thereon is on file, and the record is in the hands of Mr. Ott. I admit all the papers have been copied in the book. I don't mean they are recorded there, copied as a matter of fact, and that the record purports to be signed on October 4, 1905." The offer of the books and other documents was objected to, and objection sustained, on the ground that the documents therein appearing "purport to be authenticated and in fact were authenticated by W. W. Blair, acting superintendent of streets, and that he has no authority to authenticate said record." It was further admitted by the attorney for defendant "that the ordinary course of business was pursued, save whatever was done was done by Mr. Blair, purporting to act as acting superintendent of streets, and was authenticated in the usual way, except that the record purported to be authenticated in the same capacity as the other instruments." It thus appears that plaintiff complied in all respects with the law, except that his documents were authenticated by one who was assuming to act as superintendent of streets, in the absence of the duly appointed and qualified superintendent.

The objection to the introduction of these documents and the evidence offered went to the authority of Blair to perform the duties of superintendent of streets. In ruling on this objection the learned trial judge said: "It will have to be sustained, on the theory that he was not an officer, and did not have the authority. That is all I pass upon." The resolution of the board of public works granting a leave of absence to Mr. Ott recites that he is superintendent of streets, and we understand it to be an admitted fact that he was such officer at the time. Appellant rests its claim that the court erred in refusing the offered evidence on the proposition that, if not an officer de jure, Blair was an officer de facto, and that evidence tending to prove that he was superintendent of streets de facto, acting under color of title, was admissible to show that his acts were valid as far as the public and third persons are concerned.

The position taken by respondent may be thus summarized: "That unless the Vrooman act controls, the authority to create the office of acting superintendent of streets, such office being a municipal affair, reposes in the city council" (Oakland Freeholders' Charter, §§ 73, 195, 199, 201, 204; Stats. 1889, p. 513); that if the city charter is inadequate to control the situation, the Vrooman act (section 34, subd. 8) confers the power to appoint a superintendent of streets upon the city council (Stats. 1885, pp. 147, 164); that the charter of the city provides that, if a vacancy occur, it shall be filled by the appointment of the mayor (section 202, Stats. 1889, supra); that there is but one office, filled by an incumbent de jure—Blair being purely a private individual in all that he did as acting superintendent of streets. Hence all the acts of Blair in his assumed official capacity were nullities. Finally, respondent dismisses the contention that Blair was an officer de facto with the statement that "he did not claim to act as superintendent; for he could not do so, since there was an incumbent of the office de jure. Blair assumed to act only as acting superintendent, and by virtue of the supposed appointment of the board of public works, which was absolutely without authority. Hence Blair was not, as he could not be, acting under color of authority. There was, moreover, no office of acting superintendent."

Appellant contends, and section 73 of the Oakland charter (Stats. 1889, p. 540) provides, that the board of public works shall have authority to appoint the superintendent of streets, and requires him to keep a public office, in which shall be kept the records of his office and a register of all streets accepted by the city, and he shall have power to perform the duties required of that officer by the so-called Vrooman act of 1885 and amendatory acts; that the power is given the board to remove such officer and appoint another to perform the duties of his office. It is undisputed that there was, at the time involved, a superintendent of streets de jure, then on leave of absence; that there was no such officer known to the Oakland charter, or to the general law, as an acting superintendent of streets; nor was there any provision of law, so far as we know, authorizing such officer to act in the absence or inability of the superintendent. Provisions for filling a vacancy apply to vacancies created by death, resignation, and removal from, or expiration of the term of, office. They do not apply to temporary absences from duty. The sole question, then, is whether, in view of the circumstances, the principle under which the acts of officers de facto are held to be valid, as affecting the public and third parties, should be applied in the present case.

This principle is of very ancient origin, and, as administered in England and in this country, the rule does not materially differ. In some early English cases it is said that, in order to constitute one an officer de facto, it is necessary that his claim to the office should be supported by some form of color of an election, and these cases have had some following in the United States. But in a later English case Lord Ellenborough defined an officer de facto to be "one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law" (R. v. Bedford Level, 6 East, 356); and Mr. Mechem says: "This definition has, in substance, been adopted by the majority of the cases, and the necessity for a color of election has not been affirmed so far as the rights of third persons are concerned." Mechem on Offices and Officers, §§ 317, 318. See Am. & Eng. Ency. of Law (2d Ed.) vol. 8, pp. 815, 816. State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409, is a leading case, frequently cited with approval. Said Butler, C. J.: "The de facto doctrine was introduced in the law as a matter of policy and necessity, to protect the interests of the public and individuals, where those interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It was seen that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title, and these became settled principles in the law. But to protect those who dealt with such officers when apparent incumbents of offices, under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons on the ground that, as to them, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid."

[1] Two different persons cannot, at the same time, be in actual occupation and exercise of an office for which one incumbent only is provided by law. If the officer de jure is in, i. e., is performing the duties of the office, there is no room for an officer de facto. And it is also true that there can be no officer de facto where no officer de jure is provided by law. There may be officers de facto, but cannot be an office de facto, under a constitutional government.

[2] The lawful acts of an officer de facto, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of the office, as binding as if he were an officer legally elected and qualified and in full possession of it. Mechem's Offices and Officers, § 322 et seq.

[3] In the case now here, the office, the duties of which for the time were being performed by Blair, existed. The evidence offered tended to show that Blair was in full possession of this office in the absence of the officer de jure, was performing that officer's duties admittedly within the scope of the office, was holding himself out to the world and was reputed to be legally exercising these duties, was in charge of the books and records of the office, and, to every appearance, was the superintendent of streets, acting as such and so recognized by the public, and in fact the officer he represented himself to be. It seems to us that, if the facts were such as the offered evidence tended to establish, the plaintiff had a right to deal with Blair as authorized to act as superintendent of streets, and his acts as such should be given validity. It was error, therefore, to refuse the offered evidence.

The rights of plaintiff are not to be made to depend upon the power of the board of public works to appoint Blair as acting superintendent of streets, but rather upon the facts as they existed at the time with reference to the execution of the duties of the office of superintendent of streets as plaintiff found them to exist and being performed. Plaintiff was not required to investigate Blair's title or authority to act in the capacity in which he was assuming to act. It was sufficient for plaintiff that it found him in possession of the office and all its records, invested with its insignia, being treated and regarded by the public as rightfully performing the duties of the office. State v. Barnard, 67 N. H. 222, 29 Atl. 410, 68 Am. St. Rep. 648.

[4] The definition given by Chief Justice Butler, in State v. Carroll, supra, has met with the very general approval of the courts as perhaps the most comprehensive yet given. He said: "An officer de facto is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice, will hold valid so far as they involve the interest of the public or third persons, where the duties of the officer were exercised: First, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such as ineligibility, want of power, or defect being unknown to the public; fourth, under color of an election or appointment by or pursuant to a public unconstitutional law, before the same is adjudged to be such."

This definition embraces the case of an officer assuming to act, under the circumstances stated, "without a known appointment or election"; and it also embraces the case of an officer acting, as here, under color of a known appointment, void, it may be admitted, "because there was a want of power in the electing or appointing body." The validity of the appointment cannot be the true test; for if the appointment be valid, the appointee would be an officer de jure. The very purpose of the doctrine is to protect the public and third persons where officers are assuming to act as such without strict legal right, and there is an appearance or color of title, but which is in fact no title.

[5] Where, without opposition, the duties of an officer are notoriously discharged by a person in an official capacity, the public apparently acquiescing and those in authority approving, these circumstances give rise to an appearance of right imparting official reputation, upon which third parties are justified in regarding such person as an officer. Finding a person in charge of a public office and transacting its business in a regular way under an assumption of right to act as the officer charged with the duties of such office, third parties are not bound to ascertain his authority so to act; but as to them the courts will hold him to be an officer de facto and will not permit his title to be collaterally assailed. Nofire v. United States, 164 U. S. 657, 17 Sup. Ct. 212, 41 L. Ed. 588; Gonzales v. Ross, 120 U. S. 605, 7 Sup. Ct. 705, 30 L. Ed. 801; McDowell v. United States, 159 U. S. 596, 16 Sup. Ct. 111, 40 L. Ed. 271; Susanville v. Long, 144 Cal. 362, 77 Pac. 987; Petersilea v. Stone, 119 Mass. 465, 20 Am. Rep. 335. Numerous other cases to like effect might be cited. The subject will be sufficiently expounded in the following cases: State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; Hamlin v. Kassafer, 15 Or. 456, 15 Pac. 778, 3 Am. St. Rep. 176; Jewell v. Gilbert, 64 N. H. 13, 5 Atl. 80, 10 Am. St. Rep. 357.

The judgment and order are reversed.

We concur: HART, J.; BURNETT, J.

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19 Cal. App. 475

McLAIN v. DAHLSTROM METALLIC DOOR CO. et al. (Civ. 1,087.)

(District Court of Appeal, Second District, California. July 16, 1912. Rehearing Denied Aug. 14, 1912; Denied by Supreme Court Sept. 13, 1912.)

1. Master and Servant (§ 258*)—Injury to Servant—Negligence—Complaint.

A complaint in an action for personal injury to an employé, which alleges that the injury was occasioned by reason of defendant's negligent acts performed through a foreman, sufficiently charges the negligence of the employer, and the designation in the complaint of the agent through whose acts the negligence arose does not affect the sufficiency of the complaint.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816–836; Dec. Dig. § 258.*]

2. Master and Servant (§§ 279, 277*)—Injury to Servant—Negligence—Evidence.

Evidence *held* to support a finding that plaintiff, suing defendant for a personal injury, was at the time of the injury an employé of defendant, and that the negligence causing the injury was committed by a vice principal of defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973–975, 978–980, 953; Dec. Dig. §§ 279, 277.*]

3. Master and Servant (§ 279*)—Injury to Servant—Negligence—Vice Principal.

Where the vice principal of a contractor to erect the interior finish of a building in process of construction, instructed an employé, in charge of the men while at work, to direct the men to use a temporary elevator placed in the building by an independent contractor as a substitute for a staging, and one of the men, while obeying the order, was injured because of defects in the elevator, observable by casual inspection, the employé was the vice principal of the employer, who was liable for the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973–975, 978–980; Dec. Dig. § 279.*]

4. MASTER AND SERVANT (§ 116*)—INJURY TO SERVANT—SAFE APPLIANCES.

A contractor to erect the interior finish of a building, and to furnish all scaffolding necessary for use in the work, must furnish reasonably safe scaffolding for his employés in the performance of the work, and where he negligently fails to do so he is liable for injuries to an employé occasioned by defective scaffolding.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 207; Dec. Dig. § 116.*]

5. EVIDENCE (§ 514*)—OPINION EVIDENCE—EXPERT TESTIMONY.

An expert may testify as to the proper kind of a knot necessary to properly tie ropes by which an elevator, for use as a staging by employés, was sustained, to afford reasonably safe protection for the employés.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2319–2323; Dec. Dig. § 514.*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by J. A. McLain against the Dahlstrom Metallic Door Company and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Scarborough & Bowen, for appellant. George M. Harker and George E. Overmyer, for respondent.

ALLEN, P. J. Action for personal injuries; plaintiff alleging that the same were occasioned through the negligence of defendant, and while he was an employé of defendant, and were received in the course of his employment. It appears from the record that defendant entered into a contract with the owners of a building in the course of construction in the city of Los Angeles, through which it agreed to furnish material and labor to prepare and erect all interior trim, sash and metal frames, and work of kindred nature, which contract forbade the subletting of any part of the work without the architect's consent; that by the terms of the contract defendant was to furnish and pay for all scaffolding, staging, etc., necessary for use in the construction work, and should personally superintend the work, keeping a competent foreman direct from the factory on the job. This contract was never assigned. One Bedell negotiated, with reference to the contract entered into by defendant, with the owners and thereafter assumed charge of the superintendence of the work. Through Bedell plaintiff was employed, and his injury was occasioned by reason of a defective elevator furnished as an appliance or place upon which to work. The direction to use such appliance came from one Fickes, a foreman employed upon the job, and under whom plaintiff was working. This injury was of a serious character, permanent in its nature, and the amount of $6,000, assessed by the verdict against appellant alone, was in no sense excessive, upon the assumption of defendant's liability in any respect. From the judgment rendered upon such verdict, from an order denying a new trial, and from an order refusing to vacate the judgment, defendant appeals.

[1] The first point made by appellant is that the complaint is insufficient, in that no averment is made therein of negligence upon the part of defendant. We think there is nothing in this point. It is alleged that the injury was occasioned by reason of defendant's negligent acts performed through a foreman. The designation of the agent or servant through whose acts the negligence arose does not detract from the force of the charge that defendant's negligence occasioned the injury.

[2] It is next claimed that there is no evidence tending to show that the superintendent, through whose direction the elevator was used, was a vice principal of defendant, or that plaintiff was an employe of defendant. Whether or not plaintiff was an employé of defendant depends upon the relation which Bedell bore to defendant. We find some evidence in the record which, in our opinion, tends to show that Bedell was recognized as, and was in fact, an agent and servant of defendant. It is true that defendant introduced evidence tending to show that, when Bedell was ostensibly negotiating the contract on behalf of defendant, he was in fact an employè of a San Francisco firm; that this firm, after the execution of the contract, and without the architect's knowledge or consent, and without the assignment or subletting of the contract, undertook the work of erecting in the building the material which by the terms of the contract defendant was to furnish. There is, however, other evidence which shows that this San Francisco firm, in receiving payments due under the contract, signed receipts therefor as agents of defendant. There is other evidence that notices posted about the building were to the effect that defendant was doing the work of erecting and putting in place the material so by it contracted to be furnished. There was no foreman directly from the factory, unless Bedell be such individual. These posted notices above referred to were signed by Bedell as contracting agent of defendant. If the San Francisco firm did undertake any independent contract, they did it in violation of the terms of the written agreement of defendant, secretly and without the knowledge of any employé, or of the owners of the building. The court very properly instructed the jury that the verdict must be for defendant, unless it found from the evi-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence that plaintiff was employed by Bedell, acting as agent of defendant, with authority in that regard, and was injured in the course of his employment, and, further, that if defendant permitted and turned over the work to be performed by Bedell, or the persons whom he represented, as subcontractors, and that such subcontractors had the full control, direction, and performance of said work, and the mode of doing the work, on their own account, and were not acting as the agents and servants of defendant in the performance of defendant's contract, and that in the performance of said work they alone employed the plaintiff, then the jury were instructed to find in favor of defendant. They were further instructed that, if they believed from the evidence that the San Francisco firm were acting merely as the agents of defendant in the erection of said work, and not as independent contractors, then that would not relieve the defendant as contractor for the erection of said work. These questions of fact, generally and under special interrogatories submitted, were found by the jury against defendant, and we are not prepared to say that there is nothing in the evidence supporting such implied findings and the answers to such special interrogatories. There are circumstances connected with the case which might well lead the jury to regard with disfavor the claim that the San Francisco firm were in fact independent contractors. The fact that defendant wired Bedell certain instructions during the construction was not without significance; that the payments were made to defendant, either directly or by their written order; that checks issued by Bedell in paying the men had thereon the initials of defendant's company, and the secrecy sought to be thrown around the transaction, all no doubt tended to satisfy the minds of the jurors that defendant in fact was the contractor, and that the San Francisco firm's relation thereto was but one of agency. There being, therefore, sufficient testimony in support of the verdict in the regard stated, we cannot, under the rule, disturb the same.

[3] The elevator, a temporary one, and the defective character of which occasioned the accident, had been placed in the building by other independent contractors before defendant commenced the performance of its contract. Fickes, the foreman, is shown to have had charge of the men while at work, purchased tools to be used in connection with the work, directed the men what to do and how to do it, and with reference to the use of this elevator had special instructions from Bedell. The elevator was attempted to be used as a staging, for the reason that the staging formerly in use in connection with the particular work about to be done was insecure and inconvenient, and Fickes, under Bedell's instructions, directed the use of this elevator as a substitute for the staging theretofore in use. The ropes by which the elevator was suspended were insecurely tied, a fact which might have been observed by casual inspection, and an opportunity for which was afforded Fickes before the use of the elevator was attempted. Under this state of facts, Fickes became a vice principal in connection with the direction to use said staging. It matters not that he performed manual labor in addition to exercising his general powers as foreman. In so far as he possessed authority to direct the use of appliances, the duty to provide which devolved upon defendant, he represented the defendant. Nixon v. Selby Smelting Co., 102 Cal. 463, 36 Pac. 803.

[4] It is of no material consequence that the elevator was in place before Fickes directed its use. This direction to use it was not with the knowledge or consent of those who constructed the elevator, nor of the owners of the building, and such parties were in no respect, as affecting such use or the disastrous results which followed, joint tort-feasors. The duty of furnishing scaffolding and staging under the contract was upon defendant, and it was bound to furnish reasonably safe appliances suitable for the purpose intended. We see no error in the action of the court in refusing to instruct the jury that the direction to use the elevator in question came from a fellow servant.

[5] The defect connected with the elevator was occasioned by the manner in which certain knots were tied, and we see no impropriety in permitting expert testimony as to the proper kind of a knot necessary under the circumstances to afford reasonably safe protection in connection with the use of the elevator. The matter of tying knots in such a way as to prevent slipping and accident certainly requires skill, and it could scarcely be presumed that a jury would understand the technical matter involved, and for that reason we think it was proper to call witnesses expert in such matter, and to permit them to give an opinion as to the safe or unsafe condition of the elevator with reference to such knots, and the weakness apparent from an inspection, if had.

Reading all of the instructions of the court together, we see no merit in the criticism with reference to instruction No. 7. We think it a correct statement of the law, and in no sense objectionable, as omitting any question in connection with the authority to furnish the appliance. We have examined the instructions criticised, and see no merit in such criticism, especially when we consider the instructions as a whole.

Numerous errors are specified with reference to the admission of evidence. We see, however, no error in connection therewith, nor in any action of the trial court in any matter in connection with the admission of evidence, or of its conduct or statements in the presence of the jury, prejudicial to defendant, or of such erroneous character as would justify a reversal of the judgment.

A careful examination of the entire record satisfies us that the verdict was a proper one, and the judgment and orders appealed from are therefore affirmed.

We concur: JAMES, J.; SHAW, J.

163 Cal. 597

WOLF et al. v. ÆTNA INDEMNITY CO. OF HARTFORD, CONN. (S. F. 5,867.)

(Supreme Court of California. Aug. 26, 1912.)

1. Trial (§ 395*)—Findings—Sufficiency.

Where, in an action on a building contractor's bond in the penal sum of $4,000, the complaint alleges the contractor's abandonment of the work and the completion thereof by the owner at a cost of $12,000 over and above the contract price remaining unpaid, a general finding that each of the allegations of the complaint is sustained by evidence and is true, and that each of the denials and allegations in the answer of the surety is not sustained by evidence and is untrue, supports the judgment for $4,000.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934, 939; Dec. Dig. § 395.*]

2. Principal and Surety (§ 161*)—Discharge of Surety—Premature Payments—Evidence.

In an action on a building contractor's bond based on the contractor abandoning the work, evidence *held* to support a finding that partial payments made by the owner to the contractor were not prematurely made under the contract stipulating for partial payments as the work progressed, and the surety was not released from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 439–441; Dec. Dig. § 161.*]

3. Principal and Surety (§ 114*)—Discharge of Surety—Premature Payments—Evidence.

Where money was due a building contractor under the contract, payment thereof by the owner to the creditors of the contractor with the latter's consent freely given did not release the contractor's surety from liability on the ground that the payment was not made to the contractor himself.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 240–243; Dec. Dig. § 114.*]

4. Principal and Surety (§ 161*)—Action on Contractor's Bond—Evidence—Sufficiency.

In an action on a building contractor's bond, based on the contractor abandoning the work, evidence *held* to justify a finding that the owner expended a specified sum in the completion of the work over and above the contract price remaining unpaid, authorizing a judgment against the surety in the penal sum of the bond which was less than the amount so expended.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 439–441; Dec. Dig. § 161.*]

5. Appeal and Error (§ 1011*)—Findings—Conclusiveness.

A finding on conflicting evidence and supported by evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

6. Principal and Surety (§ 161*)—Action on Contractor's Bonds—Evidence—Sufficiency.

In an action on a building contractor's bond, evidence *held* to justify a finding that there was no substantial difference between the building erected and the building called for by the plans and specifications, and the surety was liable on the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 439–441; Dec. Dig. § 161.*]

7. Principal and Surety (§ 100*)—Building Contractor's Bond—Discharge of Surety—Alterations in Plans.

A surety on the bond of a contractor to erect a building under a contract permitting the owner to request alterations which should not void the contract, but the amount of the alterations should be added to or deducted from the contract price, and that on the demand of either the contractor, owner, or architect the valuation of all changes should be fixed in writing, is not released from liability because of alterations in the building increasing the cost in a trifling sum as compared with the contract price, though the character and valuation of the changes were not agreed on and fixed in writing for want of demand by the contractor, owner, or architect.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 162–165; Dec. Dig. § 100.*]

8. Principal and Surety (§ 155*)—Building Contracts—Bonds—Actions—Pleadings.

Where an owner sues on the bond of a contractor to erect a building under a contract permitting alterations without making the contract void, because of the abandonment of the work by the contractor and the completion thereof by the owner at a cost in excess of the contract price remaining unpaid, he need not allege alterations made before the contractor abandoned the work, and the complaint referring to the contract is not bad for failing to refer to the small changes in the plans during the progress of the work by the contractor, and is sufficient to justify a recovery against the surety for the damages caused by the contractor's breach.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 422; Dec. Dig. § 155.*]

9. Appeal and Error (§ 1056*)—Harmless Error—Rulings on Evidence.

Where, in an action on a building contractor's bond, the court found, on sufficient testimony, that a payment by the owner to a third person was in fact a payment to the contractor, the sustaining of an objection to the question asked the owner on cross-examination, as to whether he did not make a payment to the third person instead of to the contractor, was not prejudicial error.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.*]

10. Principal and Surety (§ 160*)—Building Contractor—Actions on Bond—Evidence.

In an action on a contractor's bond based on his abandonment of the work, evidence of the amount of bids received by the contractor for the mill, marble, tile, and glass work, and for the cornice and sheet metal of the building, was incompetent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 436-438; Dec. Dig. § 160.*]

11. Principal and Surety (§ 160*)—Building Contractor—Actions on Bond—Evidence.

In an action on a building contractor's bond based on the contractor abandoning the work, which was completed by the owner at a cost in excess of the amount due under the contract, evidence that a third person, after the contractor ceased work, submitted an offer to do the work necessary to complete the building for a sum much less than the sum the owner incurred in completing the work, was incompetent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 436-438; Dec. Dig. § 160.*]

In Bank. Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Hyman Wolf and another against the Ætna Indemnity Company of Hartford, Connecticut. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. F. Hatton and H. F. Peart, both of San Francisco, for appellant. A. A. Sanderson, of San Francisco, for respondents.

ANGELLOTTI, J. This is an action on a bond given by B. W. Lattimore, as principal, and the Ætna Indemnity Company of Hartford, Conn., a corporation, as surety, in the penal sum of $4,000, given upon a building contract. Lattimore, who was a party defendant, defaulted. The case was tried as between plaintiffs and the surety defendant, and judgment was given in favor of plaintiffs and against the surety and Lattimore for $4,000. This is an appeal by the surety from the judgment and from an order denying its motion for a new trial.

[1] The complaint alleged the making of the building contract by plaintiffs (the owners) and Lattimore, a copy of which (exclusive of the plans and specifications according to which the building was to be built) was annexed, the giving by Lattimore and the surety of the bond in suit, a copy of which was also annexed, that Lattimore began work under the contract and was paid in accord with the terms of the contract on account of the contract price of $16,000, the first, the second, and third payments, aggregating $8,500; that on or about July 20, 1908, he, without fault on plaintiffs' part, ceased and abandoned work under the contract, and refused to go on therewith; that plaintiffs notified the surety thereof and demanded that it assume and complete the contract as provided in its bond, but that it refused to do so; and that thereafter plaintiffs proceeded to complete such contract and did complete it in accord with the terms thereof at a necessary cost of $12,000. It was further alleged that Lattimore had failed to keep said building free and clear of claims of lien, claims to the extent of $2,000 having been recorded and being charges against the same; but on the trial plaintiffs introduced no evidence on this score and waived all claim against the surety on account thereof. The trial court adopted, probably because the findings were so prepared by counsel, the unsatisfactory method of finding simply generally "that each and all of the allegations of the plaintiffs' complaint are true and are sustained by the evidence and that each and all of the denials and allegations in the answer of the said defendant the Ætna Indemnity Company are untrue and are not sustained by the evidence." Clearly, in the respect just mentioned there is no evidence to sustain the findings, but, of course, this fact is immaterial if the findings are sustained in all other respects. The amount of the bond, and consequently the amount of the judgment, is only $4,000, which is less than the amount alleged to have been necessarily expended by plaintiffs in the completion of the contract, over and above the amount of the contract price remaining after making the three alleged payments to Lattimore.

[2] It is claimed that the second and third payments by plaintiffs to Lattimore were prematurely made, and that the evidence was insufficient to support a contrary conclusion, with the result that the surety should be held discharged from liability. The contract provided in regard to the first three payments that the first payment, $3,000, was to be made "when entire concrete foundation walls are in and second-story floor joists are laid"; the second payment, $3,000, "when entire frame is up, building inclosed and roof on"; and the third payment, $2,500, "when entire building is brown coated." It was expressly provided therein: "That when each payment or installment shall become due, and at the final completion of the work, certificates in writing shall be obtained from the said architect, stating that the payment or installment is due or work completed, as the case may be, and the amount then due; and the said architect shall at said times deliver said certificates under his hand to the contractor, or, in lieu of such certificates, shall deliver to the contractor in writing, under his hand, a just and true reason for not issuing the certificates, including a statement of the defects,

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if any, to be remedied, to entitle the contractor to the certificate or certificates." The three payments were made respectively April 18, 1908, May 3, 1908, and June 20, 1908. Each was made on the certificate of the architect, stating that the same was due to the contractor. It is claimed that the evidence is not sufficient to sustain a conclusion that at the time of the second payment the building was "inclosed" within the meaning of the contract; the provision of the contract as to this payment being "when entire frame is up, building inclosed and roof on." The entire frame was up and the roof on at such time. There was ample evidence to sustain a conclusion that the sides and rear elevations were covered with the sheeting paper and rustic called for by the specifications, and that the Oregon pine sheeting called for on the front elevation had been put on. The plans and specifications required that rustic or ship-lap should be put on the front elevation over the pine sheeting, and this had not been done, at least entirely, at the time of the second payment. Although the plans and specifications were in evidence in the lower court, they are not contained in the record on appeal, and we have no means of determining whether their provisions would throw any light upon the question what is meant by the term "building inclosed" in the provision that we have quoted from the contract, except so far as the testimony of Lattimore and the architect assist in that regard. Lattimore testified substantially that the "plans and specifications" required that the front should have both sheeting and rustic on at the time of such payment. There was no dispute that the specifications called for both sheeting and rustic on the front, and we think it is clear that this requirement is the whole basis of Lattimore's testimony that both should be on before the second payment should become due, for we know that neither plans nor specifications would ordinarily contain any provision as to the times when payments shall be made. On the other hand, the architect testified most positively that all the payments "were made in conformity with the plans and specifications and the terms of the contract." This was tantamount to saying that the building was "inclosed" within the meaning of the contract at the time of the second payment. With sufficient evidence as to the actual condition to warrant a conclusion that the sides and rear elevations were fully covered by rustic, and the front elevation by the Oregon pine sheeting, we are satisfied that it must be held there was enough in the testimony of the architect to sustain a conclusion that the building was "inclosed" within the meaning of that word as used in the contract, at the time of the making of the second payment. It is not disputed that the entire building was "brown coated" at the time the third payment was made; the objection as to such payment being the same as that in regard to the second payment, viz., that the building had not then been "inclosed." What we have said in regard to the second payment disposes of this objection. There is nothing in Bacigalupi v. Phœnix Building & Construction Co., 14 Cal. App. 632, 112 Pac. 892, in conflict with our conclusion herein.

[3] It is further claimed that the finding that the third payment was made to Lattimore is not sustained by evidence. This claim is based on the fact that the amount thereof ($2,500) was divided among various subcontractors, materialmen, and labor claimants. There was ample evidence to sustain the conclusion that these amounts were so paid in the presence of the contractor, and with his consent freely and voluntarily given, he putting his "OK" on each of said claims and giving his receipt to the plaintiffs for the full amount. In their reply brief, counsel for appellant practically admit that these facts are conclusive against the contractor, but seem to contend that the surety's rights were infringed upon by the payment to creditors of the contractor on this building, instead of to the contractor himself. But clearly this cannot be so. The money was due the contractor under the terms of the contract, to be paid to him or to whomsoever he chose to designate, and when plaintiffs paid it in accord with his expressed consent, freely given, the plaintiffs paid it to him.

[4, 5] It is claimed that the evidence was insufficient to support the conclusion that in order to purchase the necessary material and pay for the necessary labor to complete the contract, after it was abandoned by Lattimore, plaintiffs were obliged to expend and did expend the necessary sum of $12,000. After the contractor had failed to go on with his contract, and the surety, after notification of his default, had failed to proceed with the work, as required by its undertaking, plaintiff proceeded with the work by day's labor without making any effort to secure a contractor to complete the contract. They employed a superintendent who purchased all necessary material and employed the necessary labor. Vouchers were presented for all expenditures, and the total cost of completion according to the plans and specifications, including cost of superintendence, was shown to have been $12,628.31. There is no claim that this amount was not actually expended in the completion of the contract. Admittedly, the testimony of the superintendent was to the effect that this expenditure was reasonable and necessary. Opposed to this was the testimony of several witnesses, as to their opinions of the amount necessary to complete the contract; one of them putting such amount at $7,491. The greatest difference between the amounts actually expended and those testified to by defendant's witnesses appears to have been in the matter of labor. So far as the item of mill work

is concerned, the amount expended appears to have been less than any of the estimates. Undoubtedly, the testimony of these witnesses created a substantial conflict on the question, and it may be that if we were discharging the functions of a trial judge herein our conclusion as to the reasonable cost of completing this contract would differ from that of the learned trial judge. But we are satisfied that it cannot be held that his conclusion is not sufficiently supported by evidence. The evidence is not such as to compel the conclusion that the cost would have been less had bids been called for and a contract awarded for the completion of the work.

[6] The plans and specifications showed a building 120 feet in depth by 27½ feet in width. Two witnesses for defendant, each of whom was a surety on an indemnity bond given to the surety company in this matter, testified that according to a measurement they made of the building after its completion it was 121 feet 7 inches in depth. They testified that the measurement was made with a tapeline 50 feet long. The contractor gave no testimony on this point whatever, and there is nothing to indicate that anybody had any idea that a longer building was being constructed than that called for by the plans and specifications until such measurement was made by these witnesses. In fact, at the time of the giving of the testimony, the allegation in this regard was that the building erected was about two feet less in length than was provided for by the plans and specifications, and the answer was amended after the giving of such testimony. The testimony of witnesses for plaintiffs was positive to the effect that no change in the plans and specifications was ever suggested by anybody in this regard, and also that the building was constructed exactly according to the plans and specifications. If there was any difference in this respect, it was evidently due solely to a mistake of those engaged in doing the work, without knowledge on the part of plaintiffs or their agent that there was any departure from the plans and specifications, and we do not see how such a situation could affect the liability of the surety. But after an examination of the testimony on this matter, we do not feel that we would be warranted in holding that there is not sufficient support in the evidence for the conclusion of the trial court that there was no substantial difference, so far as depth was concerned, between the building as it stood on the ground and the building called for by the plans and specifications.

[7] The building contract contained the following provisions in regard to alterations. etc.:

"Eighth. Should the owner or the architect, at any time during the progress of the work, request any alterations or deviations in, addition to, or omissions from, this contract or the plans or specifications, either of them shall be at liberty to do so, and the same shall in no way affect or make void this contract; but the amount thereof shall be added to, or deducted from, the amount of the contract price aforesaid, as the case may be, by a fair and reasonable valuation. And this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature or extent thereof.

"Ninth. The rule of practice to be observed in the fulfillment of the last foregoing paragraph (eighth) shall be that, upon the demand of either the contractor, owner or architect, the character and valuation of any or all changes, omissions, or extra work, shall be agreed upon and fixed in writing signed by the owner or architect and the contractor, prior to execution."

The following changes or departures in the plans and specifications were made by the contractor, Lattimore, in the doing of the work, after the character and valuation thereof had been agreed upon and fixed in writing, signed by the owners and the contractor, viz.: An extra stairway to basement apartment and more storage room to rear, for $50; changes and extra work involving seven extra clothes closets and labor thereon, $150. These changes being authorized by the contract and being made in the manner provided in the contract, the liability of the surety cannot be held to have been affected thereby.

Certain other changes are claimed by appellant to have been made by the contractor at the request of the owner, at an aggregate cost of $130, without compliance with the provisions of the ninth paragraph of the contract, which is quoted above, and it is contended that such departure from the contract had the effect of releasing the surety. It was shown that certain changes were made, the testimony being such as to force the conclusion that a change was made in the location of a door in the basement, before it was framed in, and that 12 windows in kitchens were raised 6 inches, the size of the windows not being changed. It was also shown that there was certain extra work in taking up floors that had been laid to allow the plumber to put in the gas outlets, but there was no departure from the original plans and specifications in the completed work in this regard. There was testimony that the increased cost by reason of these various items was $30 for the basement door change, $50 for the raising of the windows and $50 for the flooring work. As to none of these things was any writing signed by any of the parties.

It may be conceded that material changes in the plans and specifications not expressly authorized by the contract, or material changes authorized by the contract, made by the parties without following a particular method prescribed therefor by the contract, made without the knowledge or consent of the surety, would operate to discharge the surety on the bond of the contractor. But the difficulty with defendant's position here is that the building contract expressly authorized the making of such changes (see eighth paragraph above quoted), and the ninth paragraph, upon which it bases its claim, is applicable only where "contractor, owner or architect" demands the agreement or written statement showing the character and valuation of the "changes, omissions or extra work." The language of the provision is clear and explicit and admits of no other construction. The contract authorized such changes, and required a previous agreement and statement in writing as to value and character only when the same was demanded by one of the parties named, contractor, owner, or architect. It may be that it was very unwise for the surety company to become surety on a contract drawn in this way, but that it is bound by the provisions of the contract we cannot doubt. The cases cited by counsel for appellant in this connection are all cases where there was a plain departure from the express terms of the contract in the matter of changes. It follows that there was no discharge of the surety on account of these changes.

We do not understand that any claim is made for a deduction from the amount of the judgment on account of the cost of these changes. If the whole amount thereof, together with the amount agreed upon as to the value of changes agreed on in writing, which would make an aggregate of $330, were to be charged against plaintiffs, it would still leave them entitled under the findings to more than $4,000, the amount of the bond and the judgment thereon.

[8] It is contended that, even if all the changes were made in the manner provided for in the contract, "nevertheless the contract as changed should have been pleaded," and that as the complaint makes no mention of any such changes—alleges no modifications—it in fact alleges a "different contract" from that followed in doing the work, and cannot serve as a basis of recovery in this action, and the judgment must be reversed. This claim is based on the case of People's Lumber Co. v. Gillard, 136 Cal. 55, 68 Pac. 576, which, it must be conceded, gives much support to the contention of appellant. But we are satisfied that the general rule upon which that case was decided, to the effect that the pleader can recover only upon the contract alleged and not upon some other and different contract, does not require a reversal under such circumstances as exist here. This action was upon the bond given by appellant. The only changes shown as to the contract between the owners and the contractor were the changes from the original plans and specifications already noted, as to which, as we have already seen, the contract expressly provided that "the same shall in no way affect or make void this contract, * * * and this contract shall be held to be completed when the work is finished in accordance with the original plans, as amended by such changes, whatever may be the nature and extent thereof."

There was no new or substituted contract between the contractor and the plaintiffs by reason of such changes from the plans and specifications. The action was one for damages caused by the breach of the original contract, whereby the contractor had in effect agreed to construct the building according to the plans and specifications as they were at the time of the execution of the contract, amended by such changes as might be made in such plans and specifications by the parties during the progress of the work. The few small changes in the plans and specifications noted had all been made by the contractor before he ceased work upon the building, and the alleged default of the contractor was solely in the matter of failing to go on with the work and complete the building, so that such changes were entirely immaterial as far as the matters involved in this action are concerned. It is therefore easy to understand why the framer of the complaint, in referring to the contract, made no reference to the fact that in certain small details the plans and specifications had been changed during the progress of the work by the contractor, and we are unable to see how such an allegation was at all necessary.

The cases cited in the opinion in People's Lumber Co. v. Gillard, supra, as authorities sustaining the conclusion there reached, have no proper application to such a case as this. In Victor S. M. Co. v. Scheffler, 61 Cal. 530, the case principally relied upon, the action was upon a bond given to secure the faithful performance of his contract as an agent of the Victor Sewing Machine Company by one Lonsdale, to whom sewing machines were to be shipped on consignment for sale. There was no provision in the contract for any modification or change in the terms of the contract; but the surety in his bond agreed that certain changes might be made without affecting his liability. The contract between Lonsdale and the sewing machine company was subsequently changed in such a manner as to make a new and different contract between them, and the difference between the terms of the old and the new contract was such, it was held by this court, as was not permitted by the terms of the bond, with the result that the surety was discharged. The complaint was based squarely on the first or old contract and charged a breach thereof alone, and the court further held that, even if the change in terms had not been such as to release the surety, still plaintiff could not recover in that action brought for breach of the original contract, "since plaintiff proved that the original contract had ceased to be in force prior to the alleged nonperformance of its conditions by Lonsdale." In Daley v. Russ, 86 Cal. 114, 24 Pac. 867, the action was for a commission for negotiating a loan; a written contract being alleged which was annexed to the complaint. Performance on his part of this contract by the plaintiff was alleged. The evidence showed affirmatively that the plaintiff had not performed his part of such contract. The court said: "We think that the plaintiff failed to prove the case set forth in his complaint. * * * The evidence, therefore, did not show performance of the contract set forth in the complaint. And if the contract of the defendant amounted to a modification of the contract, it should have been declared on as modified." O'Connor v. Dingley, 26 Cal. 11, was an action in general assumpsit for work and labor, by a building contractor who had entered into a written contract with the owner which had been materially deviated from and modified during the progress of the work by common consent. The material question in the case was whether, under our practice act, the exception existing at common law to the general rule requiring a party to a special contract which remains open and unrescinded to sue in special assumpsit on the contract and forbidding a suit in general assumpsit, to the effect that where the special contract has been deviated from or modified by common consent and the service has been performed, the party claiming compensation must sue in general assumpsit, was still in force. It was held that it was not, that the action must be upon the contract as modified, and that the general allegation in the complaint "that the defendant is indebted to the plaintiff for work and labor," etc., was not a statement of the cause of action shown by the evidence.

We think it obvious that none of these cases is applicable to such a case as is here presented, and that the objection of appellant, based on the authority of People's Lumber Co. v. Gillard, supra, is without merit. In so far as the opinion in the latter case is opposed to our conclusions, it is overruled.

[9] There was no prejudicial error in sustaining the objection to the question asked plaintiff Hyman Wolf on cross-examination, whether he did not pay $250 of the third payment to the Doe Lumber Company instead of to the contractor. That he did so was fully shown by all the evidence, the only question being whether he did so under such circumstances as to make it, in fact, a payment to the contractor. This the court found on sufficient testimony was the fact.

[10] The objections to questions asked the contractor (Lattimore) as to the amount of certain bids received by him for the mill work, the marble and tile work, the glass work, and for the cornice and sheet metal on this building were properly sustained. The proposed evidence was incompetent.

[11] For the same reason, the trial court properly sustained an objection to the question asked witness John Couglin, as follows: "After Mr. Lattimore ceased working on that building, did you submit an offer to do all the work necessary to complete the building for the sum of $1,500?"

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.; HENSHAW, J.; LORIGAN, J.; MELVIN, J.

(163 Cal. 630)

SMITH v. SMITH. (L. A. 2,861.)

(Supreme Court of California. Aug. 27, 1912.)

1. Appeal and Error (§ 500*)—Sufficiency of Bill of Exceptions for Review.

Where a bill of exceptions does not indicate any ruling of the court or any exception registered on behalf of an appellant, the reviewing court cannot pass on possible errors of law committed at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295–2298; Dec. Dig. § 500.*]

2. Marriage (§ 50*)—Existence of Status.

In an action for divorce, evidence *held* to show that the parties were never married.

[Ed. Note.—For other cases, see Marriage, Cent. Dig. §§ 79–89; Dec. Dig. § 50.*]

Department 2. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Minnie Abbott Smith against I. H. Smith. From an order denying a motion for new trial, plaintiff appeals. Affirmed.

George A. Boden and John F. Poole, both of Los Angeles, for appellant. Clement L. Shinn and Hutton & Williams, all of Los Angeles, for respondent.

MELVIN, J. Plaintiff sued for a divorce upon the grounds of adultery, willful desertion, and failure to provide. The alleged adultery consisted in the defendant's living with one Isabella Keating, whom he had married after the date of the marriage with plaintiff averred in the complaint, and with another woman whom he had wed after the death of said Isabella. Defendant answered, admitting his marriage to Isabella Keating and to another woman following the former's death, but denying that he was ever married to plaintiff. The court found in favor of defendant, and decreed that he and plaintiff were never husband and wife. This appeal is from the order denying plaintiff's motion for a new trial. No appeal is prosecuted from the judgment.

[1] Plaintiff's bill of exceptions fails to indicate any ruling of the court or any exception registered on her behalf. We cannot therefore pass upon any alleged errors of law committed at the trial.

[2] The specifications of the insufficiency of the evidence to support the decision (erroneously described as "the verdict" by the

notice of motion and in the bill of exceptions) were entirely too general, but nevertheless we have carefully examined the record, and find that the court's conclusions were amply sustained by the evidence. There were conflicts of testimony. The case is not one, as appellant asserts that it is, in which the marriage of plaintiff and defendant was proven without material conflict. It was shown without contradiction that on February 4, 1889, defendant, who was then 18 years of age, secured a license to marry plaintiff. She testified that this was followed by a marriage ceremony performed by a justice of the peace. It was admitted that no record of any such marriage had ever been filed. Defendant testified that he secured the license for the purpose of showing it to plaintiff's mother in order that the latter might leave home, but he denied that any marriage ceremony had ever been performed, or that he and plaintiff had ever intended to live together as husband and wife. He admitted that they had meretriciously cohabited for several years, and that two children (one of them since deceased) had been born to plaintiff during that period. One of these children, now a married woman, whom he acknowledged at the trial as his offspring, testified as a witness for her father that in 1908 her mother had said she did not know whether she was married to Smith or not. Other witnesses contradicted plaintiff with reference to the supposed marriage ceremony, and corroborated defendant's account of the reason for which the marriage license was secured. An effort was made to prove a common-law marriage supported by evidence of cohabitation and repute, and certain witnesses testified that defendant had at different times introduced plaintiff as his wife. Other witnesses, however, stated that soon after the alleged marriage in 1889 plaintiff was working in a place called the "Club Theater," where she was known as "Minnie Abbott." She admitted that in 1890, she entered a house of prostitution at San Bernardino as an inmate, and that she was either a prostitute or the owner of a house of ill fame from October, 1890, to August, 1907. One witness, formerly a peace officer in San Bernardino, testified that plaintiff was known as "Minnie Abbott" during 17 years of her life in that city. Other witnesses corroborated this testimony, and plaintiff herself did not deny it. She introduced certain letters and postal cards written by defendant and sent to her at various times in 1905 and 1906. One of these was signed "Your old hubby, Zeck," but all of them that showed formal direction for transmission by post were superscribed "Miss Minnie Abbott." Plaintiff said upon cross-examination: "From a time prior to August, 1907, until the day before I filed this suit, I lived with Pete Laird as his wife and went under the name of Mrs. Laird." In view of this sort of testimony we are somewhat surprised at the contention of counsel with respect to the absence of "substantial conflict" in the evidence relating to the alleged marriage.

The order from which the appeal is taken is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

(163 Cal. 579)

CONTINENTAL BUILDING & LOAN ASS'N v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT NO. 1, et al. (S. F. 6,310.)

(Supreme Court of California. Aug. 22, 1912.)

1. BANKRUPTCY (§ 56*)—"BANKRUPT."

A "bankrupt" is one who, by his acts and conduct, affords evidence of his inability to pay, or his intention to avoid payment of, his debts; and within Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]) § 3, defining acts of bankruptcy, a person guilty of any of such acts is a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 61–65, 67, 68, 86–96; Dec. Dig. § 56.*

For other definitions, see Words and Phrases, vol. 1, pp. 700–701; vol. 8, p. 7587.]

2. BANKRUPTCY (§ 9*) — NATIONAL BANKRUPTCY ACT—POWERS OF STATES.

The national bankruptcy act does not prohibit the state from preventing a corporation from conducting business for acts without the contemplation of bankruptcy, and to take control of the affairs of the corporation, terminate its business, and pay its creditors; and where the state does so for acts not within the bankruptcy act the proceedings are not in bankruptcy, merely because the procedure adopted is identical with that in case of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7–9; Dec. Dig. § 9.*]

3. BANKRUPTCY (§ 9*) — NATIONAL BANKRUPTCY ACT—POWERS OF STATES.

Building and Loan Commissioners Act (St. 1911, p. 607), creating a bureau of building and loan supervision, providing for the appointment of a building and loan commissioner, and for the appointment of receivers of corporations violating the law, or conducting business in an unsafe manner, is a bankruptcy act, in so far as it provides that procedure shall be taken against a corporation which is insolvent; but it contains provisions foreign to the bankruptcy act, and where a state court finds that a corporation is bankrupt, within the bankruptcy act, further proceedings must be had in the bankruptcy court; but where the corporation is not a bankrupt, but is accountable for noncompliance with the law, the state court may proceed in conformity with the statute.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 7–9; Dec. Dig. § 9.*]

In Bank. Application for prohibition by the Continental Building & Loan Association against the Superior Court in and for the City and County of San Francisco, Department No. 1, and the Judge presiding, to restrain proceedings in a case. Denied.

Gavin McNab, B. M. Aikins, R. P. Henshall, and A. H. Jarman, all of San Francisco, for petitioner. U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., for respondents.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

HENSHAW, J. This is an application for writ of prohibition directed to the respondents above named, restraining them from proceeding further with the case of the People of the state of California, upon relation of George S. Walker, against the Continental Building & Loan Association.

The ground for the application is that the court is proceeding without and in excess of its jurisdiction. The reasoning upon which this ground is based is that the states have surrendered to the general government the power to pass "uniform laws on the subject of bankruptcy throughout the United States"; that Congress has passed such a law (1 Fed. Stats. Ann. Supp. 1912, p. 464; Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]); that ex proprio vigore this statute suspends the operation of all state bankrupt or insolvency laws; that the state law under which the Superior Court is proceeding, known as the "Building and Loan Commissioners Act" (Stats. of California 1911, p. 607), is such a bankrupt or insolvency law. If these positions are well taken, the conclusion for which petitioner contends is irresistible, for it is conceded that petitioner is a corporation conducting a business which brings it within the scope and purview of the national bankruptcy act; and it is unquestioned that when the general government has spoken upon the subject of bankruptcy the operation of all state laws upon the same subject-matter is suspended. The ultimate question, then, is whether, under these concessions and admissions, there is still left in the state law any valid provisions entirely without the scope of the national bankruptcy act, which provisions may be enforced by the state courts, or whether, as petitioner earnestly contends, the state law is as a whole, and without severable or separable parts, a single bankruptcy or insolvency act.

[1] Preliminary to this consideration, since the states, out of their plenary powers of sovereignty, have conferred upon the United States the power to pass "uniform laws on the subject of bankruptcy" only, it is proper, if not necessary, to consider who, within the meaning of this grant of power, is a bankrupt, or what is bankruptcy. Philologically and historically, a bankrupt is but a broken bank or bench. Such bank or bench, or "counter," as we would in this day designate it, was the bench over which the money lender, trader, or merchant transacted his business; and it was broken for or by him as an evidence of the discontinuance of his business. At English law at the time of the adoption of our Constitution, the meaning of the word was usually limited to persons engaged in trade, in one form or another, who did certain acts affording evidence either of an inability to pay their debts, or of an intention to avoid such payment. Other persons not engaged in trade, and who showed a like disposition to avoid, or a like inability to meet, their obligations to their creditors, were ordinarily called insolvents. By definition in the last federal bankruptcy act, insolvents, as well as bankrupts proper, are included, and the only persons exempt from the operation of the present national law are "wage-earners" and "persons engaged chiefly in farming or tillage of the soil." Whether or not this is an extension of the common-law definition of a bankrupt, and is justifiable, is not a matter of present interest. A bankrupt, then, being as defined a person who, by his acts and conduct, affords evidence of his inability to pay, or his intention to avoid payment of, his debts, it is quite within the scope of the bankruptcy act to define the acts or omissions of the debtor which shall afford prima facie or conclusive evidence of bankruptcy. This the national bankrupt act has done. Section 3 declares:

"Acts of bankruptcy by a person shall consist of his having

"(1) Conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or

"(2) Transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors;

"(3) Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or

"(4) Made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or

"(5) Admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

Bankruptcy proceedings are primarily designed for the protection of the creditors, and have for their principal object the payment of the debts of the bankrupt, and to this end the distribution of his assets ratably amongst his creditors under equitable principles. Secondarily, though not necessarily, such acts usually contemplate the relief and discharge of the debtor upon full disclosure of his property and compliance with the law. The court in bankruptcy simply marshals the assets of the debtor and distributes them, having regard to the preferences created by law. All other proceedings, such as the dissolution of attachments, the barring of nonpresented claims, and the like, are mere incidents, which may or may not be found in a bankruptcy act, and which, if not found, in no sense affect its construction as a bankruptcy act.

[2] Even so far as this consideration has proceeded, it must be clear, we think, that a person is a bankrupt, within the meaning of the federal statute, only when he has been guilty of one or another of the forbidden acts whose commission stamp him as a bankrupt. It does not at all follow that the state, for good reasons of its own, may not prevent a person or corporation from conducting business, and in so preventing it take control of its affairs, terminate its business, and pay its creditors for acts entirely foreign to and absolutely without the contemplation of bankruptcy. And if the state does this thing for acts not within the contemplation of the bankruptcy law, it is futile to argue that, because the procedure which it adopts for the payment of creditors is similar to or identical with the procedure adopted in case of bankruptcy, therefore the proceedings are in bankruptcy. To illustrate: It is competent for the state to declare that if a corporation shall lend any money to one of its directors its charter shall be forfeited, its business cease, its affairs be wound up by the state courts, and its creditors paid, and that the provisions of the law and the machinery applicable to proceedings in bankruptcy shall, one and all, be applied in such a case. This does not make the proceeding one in bankruptcy. Indeed, the corporation may be concededly solvent, prosperous, and in all respects conducting a safe and conservative business; but it has violated the law, and as a consequence of its violation has forfeited its right to do business. Having forfeited this right, it becomes necessary that its business affairs should be wound up and its creditors paid. And certainly the state has the right to direct the method or methods by which this shall be done. If further elucidation of this proposition, which seems so plain, be considered necessary, it will be found in the answer to this question: Could a corporation be decreed a bankrupt in the bankruptcy courts of the United States under a state law which declared that its charter should be forfeited, its business cease, and its affairs be wound up if it lent money to its directors? There can be but one answer to this question. The federal statute does not contemplate that a bankruptcy can arise by any such act. Yet, upon the other hand, it is certainly within the sovereign power of the state to decree that such an act shall work the forfeiture of a charter, and to provide for the termination of the company's business and the payment of its debts.

[3] So we are brought to the ultimate question in this consideration: Is the state statute above referred to simply a bankruptcy act, the whole operation of which is suspended by virtue of the federal statute; or, conceding it to be in part a bankruptcy act, is it something different as well? That it is a bankruptcy act in the sense that it contemplates and provides that procedure shall be taken against a corporation which is insolvent admits of no doubt. Indeed, section 13 of the act provides for punishment of the commissioner if, "having knowledge of the insolvent condition * * * of any such association, corporation or society," he neglects or refuses to perform his official duty. The act itself contemplates that under these proceedings the insolvency of the corporation may be disclosed, and prescribes the duties of the court and commissioner if such insolvency is found to exist. But, upon the other hand, the law also contemplates that for other acts amounting to neither bankruptcy under the federal law, nor to insolvency in its general definition, the state may either check the practices of such a corporation until it ceases them and reforms its business methods, or it may terminate the business absolutely, not because of bankruptcy nor insolvency, but to protect the public against practices which may lead to such results. Again, the law contemplates that the same procedure shall follow if such an association violates "the provisions of its charter or the laws of this state provided for its government." And here, as in the instance above cited, a corporation may subject itself to state intervention and control for one or another of these violations, which may have nothing to do with and no bearing whatsoever upon the question of its bankruptcy or insolvency. All this is made plain by section 9 of the act, the opening paragraph of which is the following:

"If the commissioner, as the result of any examination, or from any report made to him or to the shareholders, shall find that any association, corporation or society licensed by him is violating the provisions of its charter, or of the laws of this state provided for its government, or is conducting its business in an unsafe or unauthorized manner, he may, by an order addressed to the association, corporation or society so offending, direct a discontinuance of such violations or unsafe practices and a conformity with all the requirements of law; and if such association, corporation or society shall refuse or neglect to comply with such order within the time specified therein; or if it shall appear to the commissioner that any such association, corporation or society is in an unsafe condition, or is conducting its business in an unsafe manner, such as to render its further proceeding hazardous to the public or to those having funds in its custody; or if he shall find that its assets are impaired to such an extent that, after providing for all liabilities other than to shareholders, members and investors, they do not exceed in volume the dues or principal payments paid in by the shareholders, members and investors and credited to or on account of all classes of stock, shares, or certificates of investment, issued and outstanding, he shall, in order to prevent waste and diversion of assets, assume and take charge of the affairs and business of such association, corporation or society and possession and control of all its property and assets, and retain such possession pending action by the proper court. Upon taking such action, he may, under his hand and official seal, appoint a custodian, require from him a good and sufficient bond, and place him in charge as his representative. He shall immediately notify the Attorney General of his action and of all the necessary facts in connection therewith; and thereupon it shall become the duty of the Attorney General to at once apply to the superior court of the county in which such association, corporation or society has its principal place of business, for an order citing such association, corporation or society to show cause, if any it may have, within not exceeding ten days, why the action of the commissioner should not be approved and confirmed by the court, and made permanent. Such court may in such application, and after a full hearing, approve or disapprove of the action of the commissioner. If the court shall approve and confirm the action of the commissioner, such approval and confirmation shall operate as a permanent injunction against the further prosecution of business by such association, corporation or society, and the commissioner shall proceed immediately to liquidate the business and affairs thereof, and so continue until such liquidation has been completed. If the action of the commissioner shall be disapproved by the court, the commissioner shall cause all reasonable expenses incurred by him during his occupancy or possession, including not exceeding eight dollars per diem, for each business day, as the compensation of the custodian, to be paid from the funds of such association, corporation or society, and immediately restore the balance of the property and assets thereof to the possession of the proper officers."

We conclude, therefore, that the act known as "The Building and Loan Commissioners Act," while in certain features a bankruptcy act, contains provisions entirely foreign to the national bankruptcy act, or to the legal concept of bankruptcy. If the investigation which the state courts are authorized to conduct shall result in a finding of bankruptcy or insolvency, within the meaning of the federal act, then, under such finding or judgment, by force of the federal act itself, the jurisdiction of the state courts would be suspended, and further proceedings would necessarily be had before the federal bankruptcy courts, as contemplated by section 3, subd. 4, of that act. If, upon the other hand, it shall be disclosed upon hearing that the corporation is neither a bankrupt nor an insolvent within the meaning of the federal bankruptcy act, but is accountable under the provisions of section 9, as above set forth, then the power of the state court to proceed in conformity with the state law may not be questioned. Petitioner's position, however, is that it is not insolvent; that it has done nothing in violation of the national bankruptcy act, but that, nevertheless, it is entitled to appeal to that act and its exclusive jurisdiction to protect it against these proceedings in the state court. With this position we cannot agree.

For these reasons, the application for a writ of prohibition is denied.

We concur: LORIGAN, J.; MELVIN, J.; SLOSS, J.

(163 Cal. 636)

PEOPLE v. BERCOVITZ. (Cr. 1,724.)

(Supreme Court of California. Aug. 27, 1912.)

1. BANKS AND BANKING (§ 21*)—STATUTORY OFFENSES—UTTERING CHECK WITHOUT SUFFICIENT FUNDS—EFFECT OF POSTDATING.

Under Pen. Code, § 476a, which provides for the punishment of one "who willfully, with intent to defraud, makes or utters or draws or delivers to another * * * any check or draft * * * knowing at the time * * * that he has not sufficient funds in or credit with" the bank on which it is drawn to meet such check, or draft, in full on its presentation, a prosecution may be had for the utterance of a check within its terms, though such check was postdated.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 25; Dec. Dig. § 21.*]

2. CRIMINAL LAW (§ 371*)—EVIDENCE—UTTERING CHECK WITHOUT SUFFICIENT FUNDS—SIMILAR TRANSACTIONS TO SHOW KNOWLEDGE.

In a prosecution for uttering a check without sufficient funds in the bank on which it was drawn with which to meet it, evidence of other transactions involving the giving of other checks on the same bank by the defendant to other parties on the same and the preceding day was admissible to show the defendant's knowledge, at the time of the giving of the check in question, of the condition of his account at the bank and intent to deceive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. § 371.*]

In Bank. Appeal from Superior Court, Kern County; J. W. Mahon, Judge.

B. Bercovitz was convicted of a felony, and appeals from the judgment and an order denying a motion for new trial. Affirmed.

E. F. Brittan, of Bakersfield, for appellant. U. S. Webb, Atty. Gen., and Geo. Beebe, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. Defendant was convicted of a felony and appeals from the judgment and from an order denying his motion for a new trial. The information was drawn under the provisions of section 476a of the Penal Code, and charged the defendant with having on or about the 6th day of February, 1911, at Bakersfield, Cal., with intent to defraud one H. Cohn, made, uttered, and delivered to said Cohn a check drawn for the sum of $85 upon a Bakersfield bank, when he, the defendant, had not sufficient funds in or credit with the bank to meet the check in full on presentation, as he then and there well knew. A correct copy of the alleged check was contained in the information and was as follows: "2/6 1911 No. ———. The Bank of Bakersfield pay to H. Cohn or bearer $85.00 eighty-five and no/100 dollars. [Signed] B. Bercovitz." The evidence showed that the defendant on Saturday evening, February 4th, entered the jewelry store of the complainant and purchased a diamond ring and a pair of cuff buttons which he took away. When the price for the articles was agreed upon, he gave in payment his check for the sum of money mentioned. This check was postdated by two days, so that it was not payable until Monday, February 6th.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1] Defendant, as one of his grounds for reversal, urges that the evidence does not sustain the verdict, because a postdated check is not such an instrument as is intended to be described by section 476a, Penal Code. The section mentioned reads as follows: "Every person who willfully, with intent to defraud, makes or draws, or utters, or delivers to another person any check or draft on a bank, banker, or depositary for the payment of money, knowing at the time of such making, drawing, uttering or delivery, that he has not sufficient funds in or credit with such bank, banker or depositary to meet such check or draft in full upon its presentation, is punishable by imprisonment in the state prison for not less than one year nor more than fourteen years. The word 'credit' as used herein shall be construed to be an arrangement or understanding with the bank or depositary for the payment of such check or draft."

Defendant had a checking account with the bank of Bakersfield from November, 1910. At the close of business on February 4, 1911, which was a Saturday, his balance was only $23.62. No further deposit was ever made by him. The check was refused payment for want of funds. The evidence was ample to support the conclusion that defendant knew that he had not sufficient funds in or credit with said bank to meet such check or draft upon its presentation, and that he made, drew, and delivered the same to Cohn with the intent to defraud him. It is not necessary to state the evidence in this regard, as no point is made that it is not sufficient to show what we have stated.

We are of the opinion that these facts show the offense defined by section 476a, Penal Code, and that it is altogether immaterial that the check was dated February 6, 1911, when delivered during the evening of February 4, 1911. Even if we assume in accord with appellant's claim that, by reason of the fact that the instrument was postdated, it was not a "check" within the meaning of that word as used in section 476a, Penal Code, which we do not concede, it was clearly a "draft," the giving of which under such circumstances is likewise inhibited by the section, the language being "any check or draft," and the variance between the allegation of the information, which set forth a true copy of the instrument, and the proof, is altogether immaterial. The offense defined by such section is the giving to another, with intent to defraud, "any check or draft on a bank, banker or depositary for the payment of money, knowing at the time * * * that he has not sufficient funds in or credit with such bank, banker or depositary to meet such check or draft in full upon its presentation." There is nothing in the language used having the effect of excepting a case from the operation of the statute merely because the "check or draft" is postdated. It is essential, of course, that there should be on the part of one giving the check or draft both present knowledge of the insufficiency of funds and absence of credit with such bank, etc., to meet the check or draft in full upon its presentation, and an intent to defraud; but no reason is apparent why both of these elements may not exist as well in the case of a postdated check or draft as in the case of one bearing the date of its delivery.

We are not here concerned with a case where the fact of want of sufficient funds and credit is made known by the drawer to the person to whom he delivers the check or draft at the time of the delivery, and the payee chooses, with such knowledge, to rely on a promise or representation of the drawer that he will make such provision that the amount thereof will be paid on presentation. It may be that, as to such a case, a conviction could not properly be had under the section in question. In the case at bar, the evidence was ample to support the conclusion that nothing was said from which it might be inferred by the person to whom the check or draft was given that the drawer did not then have sufficient funds in the bank to pay the amount named therein on its presentation. In fact, according to Mr. Cohn, defendant told him substantially that he had ample money to meet it. There is also evidence that Mr. Cohn did not in fact notice that the check was dated February 6th until some time after its delivery. The case clearly falls within the express terms of section 476a, Penal Code.

[2] Complaint is made that the trial court erred in admitting evidence of other transactions involving the giving of other checks on the same bank by defendant to other parties, on both February 3 and 4, 1911. Clearly all of this evidence was admissible on the question of defendant's knowledge at the time of the giving of the Cohn check of the condition of his account at the bank. In other respects, in so far as such evidence tended to

show other offenses of a similar nature to the one here involved, it was also admissible under the rule applied in such cases as People v. Whalen, 154 Cal. 476, 98 Pac. 194, and People v. McGlade, 139 Cal. 70, 72 Pac. 600, to show guilty knowledge and intent to deceive in the matter of the Cohn check.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J.; SHAW, J.; LORIGAN, J.; MELVIN, J.; HENSHAW, J.

163 Cal. 652

MARTIN v. PINNEY et al. (L. A. 2,859.)

(Supreme Court of California. Aug. 29, 1912.)

PATENTS (§ 218*) — LICENSES — CONTRACTS — CONSTRUCTION.

Where plaintiff, obtaining by contract with the holder of patent rights the exclusive right to manufacture and sell in enumerated states a gas furnace invented by a third person, and improvements on the furnace made during the life of the agreement, assigned to defendant such right by contract reciting plaintiff's exclusive right and granting to defendant such right in præsenti for specified royalties, the acceptance by defendant of the grant was an admission of plaintiff's right to make the grant, and where defendant claimed that nothing passed thereby, and that the furnace was in no respect covered by the patents, he must establish the fact by competent evidence to avoid liability for the royalties.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 330–338; Dec. Dig. § 218.*]

Department 2. Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by S. W. Martin against Charles L. Pinney and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Frederick S. Lyon, of Los Angeles, for appellants. Miller, Gardner & Miller, of Los Angeles, for respondent.

MELVIN, J. Defendants appeal from a judgment against them for sums found to be due under a contract giving them the exclusive right to manufacture and sell certain gas furnaces in California, Oregon, and Washington. In this contract Martin was designated as the party of the first part, and defendants as parties of the second part. The agreement provided "that said first party, having the exclusive right to manufacture and sell in the states of California, Oregon, and Washington, until the 8th day of February, 1914, the Vulcan gas furnace, with all improvements thereon or variations thereof, under the terms of an agreement with the Springfield Heating & Ventilating Company, a copy of which is hereto annexed and made part thereof, marked 'Exhibit A' (the time limit of which contract has been extended to February 8th, 1914), does hereby sell, assign, and transfer to said second parties the exclusive right to manufacture, sell, and install in the states of California, Oregon, and Washington, for the term expiring February 8th, 1914, said Vulcan gas furnace and all improvements upon or variations of said furnace, which may be made during the life of this agreement, upon the following terms and conditions, to-wit:" Attached to this agreement as an exhibit was a copy of the contract between Martin and the Springfield Heating & Ventilating Company, in which the said corporation gave to him "the exclusive right to manufacture and sell in the states of California, Oregon, and Washington, for a period of five (5) years from the date hereof, the Vulcan gas furnace, an invention of R. S. Thompson of the city of Springfield, state of Ohio (said Thompson having assigned all his rights in said invention to the said party of the first part), and all improvements upon or variations of said furnace which may be made during the life of this agreement." It is not denied by defendants that, if bound by the agreement, they would be indebted to the plaintiff in the sum demanded in the complaint. Their defense is, first, actual fraud on plaintiff's part in securing their assent to the contract; and, second, "failure of plaintiff's grant and consequent failure of consideration for defendants' covenant to pay royalty." Without an extended review of the evidence we may say that the court's finding of the absence of fraud was amply sustained. When the agreement was made, the plaintiff, according to his testimony, gave full disclosure of all information which he had regarding the rights of his assignors.

The next point is the one upon which appellant apparently relies for a reversal of the judgment. At the trial defendants introduced proof that certain patents had been granted to R. S. Thompson, but sought to show by expert testimony that such patents covered mere structural peculiarities, and that the principles upon which the furnaces were constructed had long been open to use by any one wishing to employ them. Respondent contends that the validity or invalidity of the patents was not in issue, but that even assuming that subject to be a material one the court heard the offered evidence, examined the furnaces manufactured by defendants, and determined that the Thompson patents covered them. Appellants concede that the validity of a patent may not be questioned by one who has manufactured the article purporting to be protected by such patent, under a license so to do, but they insist that nothing passed from plaintiff to them, and they therefore assert that they may establish such fact in defense of an action like this. We think the court properly admitted evidence regarding the Thompson patents. The recital in the agreement that plaintiff possessed the exclusive right to manufacture the particular furnaces in Washington, Oregon, and California was followed by a grant of such right in præsenti. The acceptance by defendants of that grant was an admission on their part of plaintiff's title and right to make the grant. If, however, nothing passed by the contract, it was incumbent upon the defendants to establish that fact by competent evidence. Bowers' California Dredging Co. v. S. F. Bridge Co., 132 Cal. 345, 64 Pac. 475. It was shown at the trial that the furnaces manufactured by the defendants were essentially the same as the samples delivered to them by plaintiff Martin. In fact, this was admitted by counsel for defendants at the trial. If, then, defendants failed to establish their position that nothing passed by the contract, and that the furnaces were in no respect covered by the Thompson patents, judgment was properly given in favor of plaintiff. The court personally examined the furnaces, heard the evidence, and found that the furnaces manufactured came within the terms of the contract and under the patents. We, of course, have not seen the furnaces that the court inspected. While the expert's testimony tended to show that the important principles claimed by inventor Thompson in his applications were open to the use of any one, the court upon a full hearing and an examination of furnaces made by defendants under the contract with plaintiff decided that these furnaces came within the contract and under the patents. We cannot say that the evidence failed to uphold such conclusions by the court.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The judgment is affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

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163 Cal. 617

WALKER v. PRICE. (L. A. 2,894.)

(Supreme Court of California. Aug. 27, 1912.)

1. Appeal and Error (§ 1002*)—Review—Findings of Fact.

Findings on a substantial conflict of evidence as to the terms of an oral contract cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. § 1002.*]

2. Work and Labor (§ 14*)—Repudiation of Contract.

A party to a contract having repudiated it and prevented the other party from fulfilling it according to its terms, the other may treat it as broken and at an end, and at his election, instead of suing for damages for its breach, may sue for the value of his services performed under it up to the time of the breach as on a quantum meruit.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 31–33; Dec. Dig. § 14.*]

Department 2. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by George H. Walker against W. R. Price. From a judgment for plaintiff and an order denying a motion for new trial, defendant appeals. Affirmed.

Hatch & Lloyd and Paul W. Schenck, both of Los Angeles, for appellant. F. A. Knight, of Long Beach, for respondent.

LORIGAN, J. This action (an amendment to the complaint having been allowed by the court at the close of the evidence in the case) was brought by plaintiff under the common count of quantum meruit to recover from defendant the sum of $5,109, the alleged reasonable value of services performed by him at the request of defendant in selling 15,000 shares of the capital stock of the National Gold Dredging Company. The answer denied all the allegations of the complaint, which were only such as are usual in charging on this common count. Plaintiff had judgment for $3,750, and defendant appeals therefrom, and from an order denying his motion for a new trial.

There is only one point in this appeal that merits any consideration. The evidence on the part of plaintiff was that about January 28, 1908, a verbal agreement, which was to be thereafter reduced to writing and executed by defendant, was made between plaintiff and defendant, who was president and treasurer of the above corporation, whereby plaintiff should immediately undertake and effect the sale of 20,000 shares of the capital stock of the corporation at $1 per share, and in consideration thereof plaintiff should receive for every two shares of said stock sold by him one share of the stock of said company for himself and be made vice president of the corporation and general manager thereof at a salary of $300 per month; that on making this verbal arrangement plaintiff was directed by defendant to proceed forthwith and as rapidly as possible to effect a sale of the stock, as the company was in immediate need of funds, defendant assuring him that a written contract, as agreed, embodying the above terms, would be prepared by him and executed; that plaintiff at once proceeded to sell said stock, and by March 1, 1908, had made various sales thereof at the stipulated price of $1 per share, turning over to defendant the proceeds thereof; that while making such sales he frequently requested the defendant to deliver to him the written contract agreed on between them, but on different pretexts the defendant postponed doing so; that he made sale of 15,000 shares of the stock, and at the time he turned over the last amount of money for the sale thereof—about March 1, 1908—he again requested that such written contract be delivered to him; that defendant then, for the first time, denied that he had agreed to give plaintiff a written contract, or had made any such arrangement with him as plaintiff claimed, or that he had at all arranged with plaintiff to sell said stock, but asserted that any arrangement respecting the sale thereof was made between plaintiff and one Dubois, and thereupon directed plaintiff to make no further contracts for the sale of, or sell, the rest of the 20,000 shares; that plaintiff did not, and thereupon commenced this action.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On the part of defendant evidence was introduced tending to show that the arrangement respecting these 20,000 shares of stock was between plaintiff and one Dubois, who was one of the original promoters of the corporation and owner with defendant and one other person of all the issued capital stock of the corporation, and patentee of the gold-dredging machine to be operated by the company; that under their arrangement plaintiff was to purchase said 20,000 shares of corporate stock at $1 per share, or place it among his friends, where he could control it, and that if he did so he was to be elected a director of the company and its vice president and have a position as business manager at the dredging plant; that no arrangement or agreement of any kind was made to pay any commissions to plaintiff, nor any agreement made as to his salary as business manager; that this was the sole arrangement under which the delivery of the stock to defendant was made and payments received; and there was no agreement by any one connected with the transaction that plaintiff should have a written contract.

[1] While the matter of the contract is in dispute, there can be no question, under the evidence, but that plaintiff made sale of the 15,000 shares of stock and turned the money over to defendant, and that a reasonable compensation or commission for making such a sale, in the absence of any specific contract on the subject, was the amount as found by the court. While the defendant attacks the findings (which follow the allegations of the complaint, except as to the amount claimed as compensation for making the sale) on the ground that they are not sustained by the evidence, it is unnecessary to discuss this point. It is mainly directed to the terms of the special contract asserted by the parties; but, as the evidence was in substantial conflict on that subject, we cannot disturb the conclusion of the court, which was necessarily in favor of the claim of plaintiff, and sustaining his right to recover upon a quantum meruit for its breach.

[2] The main claim of appellant is, however, that, conceding that the claim of the plaintiff as to what the contract between the parties was is true, it does not support his right to recover in this character of action; but that under the contract, as he claims it was made, his sole remedy for its breach by defendant was an action for damages, and not on quantum meruit. But this claim is without merit under the evidence and findings of the court. The agreement between the plaintiff and defendant was an entire contract. Under it plaintiff was to sell 20,000 shares of the capital stock, in consideration of which defendant agreed that certain benefits and advantages should be received by plaintiff, and as an essential part of the arrangement defendant was to execute a written agreement with plaintiff embodying such terms. Under the assurance that such written agreement would be executed by defendant and carried out on his part, plaintiff entered upon the fulfillment of his part of the contract, and when it had been partially performed by him through the sale of 15,000 of the 20,000 shares defendant refused to execute the contract, denied its terms, and repudiated it and refused to permit plaintiff further to proceed with carrying it out by a sale of the remainder of the stock.

It is well settled that where one party to a contract repudiates it, or prevents the other party from fully performing it according to its terms, the latter may treat the contract as broken and at an end, and at his election sue either for damages consequent on its breach, or for the value of his services performed under it up to the time of the breach as upon a quantum meruit. Plaintiff elected to adopt this latter course, and, under the evidence, was fully warranted in doing so.

Other points are made by appellant, but in our opinion they are without any merit and need no mention or discussion.

The judgment and order appealed from are affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(163 Cal. 632)

LILLY-BRACKETT CO. v. SONNEMANN.
(L. A. 2,903.)

(Supreme Court of California. Aug. 27, 1912. Rehearing Denied Sept. 26, 1912.)

JUDGMENT (§ 884*)—ACTION ON FOREIGN JUDGMENT—MERGER.

A judgment rendered by a court of one state is not merged in the judgment obtained in another state in an action thereon; but an action on the original judgment is maintainable, unless it has been satisfied.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1661–1663; Dec. Dig. § 884.*]

Department 2. Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by the Lilly-Brackett Company against A. H. Sonnemann. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 157 Cal. 192, 106 Pac. 715.

J. W. McKinley, of Los Angeles, for appellant. Herbert Cutler Brown and George H. Moore, both of Los Angeles, for respondent.

MELVIN, J. Plaintiff brought suit upon a judgment against defendant, obtained in the state of Massachusetts. Defendant answered, alleging that a judgment, based upon the Massachusetts judgment, had been obtained by plaintiff against him, and had become final in the state of Washington. The court gave judgment for plaintiff on the pleadings, and from it this appeal is taken.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The only question presented is whether or not the judgment rendered in Massachusetts was merged in the judgment, based upon it, which was given in favor of plaintiff in Washington. This is a new question in California, so far as we are advised, and the authorities in other jurisdictions are in conflict. Appellant, in commending to our attention the authorities favoring the theory of merger, says that if the original judgment or "debt of record" is to remain of full vitality in the state in which it was originally obtained, and judgments in other states, based upon it, are also to be enforceable, a debtor may be harassed in various states in which he may own property and prevented from selling it to advantage by the existence of the creditor's judgments. Respondent's answer is that this hardship may be avoided by the payment of the debt. Ames v. Hoy, 12 Cal. 19.

In 23 Cyc. at page 1474, the rule is thus stated: "According to the weight of authority, where an existing judgment is sued on as a cause of action, and a new judgment recovered on it, there is no merger of the first judgment; nor is it extinguished without satisfaction of the second." Lawson, in his work on Rights, Remedies, and Practice (volume 5, p. 2580), says: "No merger takes place where the two securities are of equal degree." The leading case holding the contrary doctrine has been followed in some jurisdictions by the courts and adopted as convincing authority by some text-writers. In 92 Am. St. Rep. at page 778 is a note reviewing the decisions, and announcing the better rule to be that a judgment is extinguished when, by its use as a cause of action, it grows into another judgment. This view is also approved by Mr. Freeman, in his work on Judgments (as indicated in the note in 92 Am. St. Rep. cited above), and to the same effect is the text in 15 Am. & Eng. Ency. of Law, 336. After stating this doctrine and the authorities for it, the Supreme Court of Colorado, in Wells v. Schuster-Hax Nat. Bank, 23 Colo. 537, 48 Pac. 810, says: "The contrary doctrine is announced in other authorities and proceeds upon the theory originally given for the rule that merger takes place only where a security, or indebtedness, of an inferior passes into one of a superior degree. Weeks v. Pearson, 5 N. H. 324; Mumford v. Stocker, 1 Cow. (N. Y.) 178; Bates v. Lyons, 7 Paige's Chan. 85; 2 Black on Judgments, § 864; Hogg v. Charlton, 25 Pa. 200; McLean v. McLean, 90 N. C. 530; Andrews v. Smith, 9 Wend. (N. Y.) 54. It is said, however, that the later authorities predicate this doctrine of merger upon the ground that the allowance of a new suit is superfluous and a vexatious encouragement to litigation injurious to the defendant, and of no benefit to the plaintiff. Without further pursuing the inquiry, we content ourselves by saying that it seems more in consonance with principle to base the doctrine upon the reason originally given for its establishment, and that, so long as the indebtedness is unsatisfied, successive suits in different states may be prosecuted." In Armour Bros. Banking Co. v. Addington, 1 Ind. T. 304, 37 S. W. 102, this language is used with reference to the same problem as that before us here: "But a second judgment obtained upon the first is of no higher security than the first. Both should stand until the debt which is evidenced by them is fully paid off and satisfied. The first judgment is neither satisfied, merged, nor extinguished by a second judgment on the same cause of action, or by an affirmance thereof by a superior court. 'Satisfaction' is a technical term, and in its application to a judgment it means the payment of the money due on the judgment, which must be entered of record; and nothing but this is a legal satisfaction of the judgment." In Weeks v. Pearson, 5 N. H. 325, the court said: "The reason why a former recovery for the same cause is a bar to a second action is that the cause of action has passed in rem judicatam, and is determined by the judgment. But this reason does not exist where there has been a recovery in another state in debt upon a judgment rendered here. For one judgment being of as high a nature as another, a judgment in another state cannot extinguish or determine a judgment rendered here." In Springs v. Pharr, 131 N. C. 193, 42 S. E. 590 (92 Am. St. Rep. 775), the rule was thus phrased: "We must concur in this conclusion that a judgment upon a judgment, being of the same dignity, does not fall within the general rule that a cause of action is merged in the judgment." See, also, Griswold v. Hill, 11 Fed. Cas. 63, No. 5,836; Mumford v. Stocker, 1 Cow. (N. Y.) 178. Mr. Bigelow, in his note to section 599a of Story on Conflict of Laws, says: "It may be inconvenient that two judgments should subsist in the same state against the same person on the same demand; but no such inconvenience can exist in the case of judgments rendered in different states; and there is no sufficient reason for the application of the purely technical doctrine of merger, subversive of substantial justice, as it would be, in such cases. Indeed, in view of the fact that one satisfaction would satisfy both judgments, there is little to be said in favor of the doctrine of merger, reasonable as that doctrine may be in ordinary cases, by a second judgment obtained upon the first, even in the same state."

We can add nothing to the reasoning of these cited authorities, except to say that, in our opinion, it is sound, in accordance with justice, and should be adopted in California as establishing a rule that comports with reason.

Judgment affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(163 Cal. 648)

UNKEL v. ROBINSON et al. (L. A. 2,899.)

(Supreme Court of California. Aug. 28, 1912.)

LIMITATION OF ACTIONS (§ 37*)—CONSTRUCTIVE TRUSTS—ACTIONS TO ENFORCE.

An action to establish a constructive trust in real estate, on the ground of defendant fraudulently procuring from plaintiff the money used in the acquisition of the real estate, and for a sale thereof to pay the amount fraudulently procured, is governed by Code Civ. Proc. § 338, subd. 4, requiring an action for relief on the ground of fraud to be brought within three years after the discovery of fraud, and not within section 343, providing that an action for relief not otherwise provided for must be commenced within four years after the accrual of the cause of action; and where the complaint is not filed until more than three years after the discovery of the fraud, the action is barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182–186; Dec. Dig. § 37.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by William Unkel against Pauline Robinson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

John Dennison, of Los Angeles, for appellant. Isidore B. Dockweiler, of Los Angeles, for respondents.

LORIGAN, J. The complaint in this action alleged that defendant had, between the months of May and November, 1905, fraudulently procured from plaintiff various sums of money, aggregating $4,020, which she had used in purchasing a house and lot in the city of Los Angeles, and that such fraud was not discovered by plaintiff until about November 1, 1905. The prayer was that it be declared that defendant held said real property as a trust for plaintiff for the amount of said $4,020, that said property be sold, and that the said amount so fraudulently procured from plaintiff be paid to him from the proceeds of such sale. A demurrer to the complaint, on the ground, among others, that it appeared on the face thereof that the action was barred by the statute of limitations, was sustained; and, plaintiff declining to amend, judgment was entered for defendant, from which plaintiff appeals.

The only point involved here is the bar of the statute of limitations. Appellant's cause of action is based on section 2224 of the Civil Code, which declares that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act is, unless he has some other and better right thereto, an involuntary trustee of the thing for the benefit of the person who would otherwise have had it."

The periods prescribed for the commencement of actions other than those for the recovery of real property (section 335, Code Civ. Proc.) are as follows: "Sec. 338. Within three years: * * * 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." The superior court held that the cause of action alleged in the complaint was barred by said subdivision 4 of this section.

The claim of appellant is that the purpose of this action is to establish a constructive trust, and is controlled by section 343 of the said Code of Civil Procedure, which provides that "an action for relief not heretofore provided for must be commenced within four years after the cause of action shall have accrued." True, the appellant is seeking to establish a constructive trust; but such a trust may arise under various circumstances, which may embrace no element of fraud in fact, or even technical fraud within the law. Here the constructive trust which appellant endeavors to have established is based on fraud as the substantive cause of action; and how section 343 can apply, and why subdivision 4 of section 338 does not, appellant has not undertaken to point out in his brief. He contents himself by declaring that it is an action to establish a constructive trust, that section 343 applies, and cites a number of cases as sustaining his declaration—cases such as Oakland v. Carpentier, 13 Cal. 540, Murphy v. Crowley, 140 Cal. 146, 73 Pac. 820, and Daniels v. Dean, 2 Cal. App. 421, 84 Pac. 332. But all of these actions were for the recovery of real property; the relief sought being grounded on fraud. Section 343 had no consideration in any of these cases; the question therein being whether subdivision 4 of section 338, prescribing the three-year limitation in actions based on fraud, or section 318 of the same Code, providing a five-year period for the recovery of real property, applied. It was held in these cases (the matter being more particularly discussed in the cited case of Murphy v. Crowley) that sections 318 and 338 were to be construed together, and that, as by section 335 the provisions of section 338 only applied to actions other than for the recovery of real property, section 318 must govern where, though the principal ground for relief is on account of fraud, still in the action the party seeks the recovery of real property on the ground of such fraud. In such case the bar of section 338 does not apply, but the action is controlled by the five-year statute of limitation provided by section 318. As said in Murphy v.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Crowley, supra, 140 Cal. 146, 73 Pac. 820, after fully discussing this subject: "It seems to be established, therefore, by these cases, that, although the main ground of action is fraud or mistake, whereby the defendant has obtained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet, if the plaintiff alleges facts which show, as matter of law, that he is entitled to possession of the property, and a part of the relief asked for is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred, except by the five-year limitation contained in section 318."

This is not an action brought by plaintiff to recover real property, and plaintiff does not insist that section 318 has any application in the case at bar, and it is not observable how the cases he cites can have any relation to this case. Plaintiff was never the owner of the property, or in possession of it. What he seeks is simply to establish a constructive trust in his favor on the ground of fraud, and to have the property sold, and from the proceeds to have refunded him the moneys fraudulently obtained from him and invested in the property. Not a case is cited by him which holds that section 343 applies in a case like the one here. That section is a residuary clause, which applies only when no other section is applicable. Section 338 is, however, clearly applicable, as fraud is the gravamen and very essence of the cause of action set out in this complaint, and the relief sought is on the ground of fraud under the cited section of the Code which provides for relief on that ground. This action is governed as to the statute of limitations by the cases of Boyd v. Blankman, 29 Cal. 30, 87 Am. Dec. 146, and Duff v. Duff, 71 Cal. 513, 12 Pac. 570, which were actions brought to establish trusts in favor of plaintiffs in certain real property on the ground of fraud, and it was held that subdivision 4 of section 338 was applicable to such actions. In People v. Blankenship, 52 Cal. 619, Moore v. Moore, 56 Cal. 89, and Castro v. Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84, actions brought to set aside conveyances on the ground of fraud or undue influence, it was also held that subdivision 4 of section 338, was applicable.

As the complaint in this action was not filed until more than three years after plaintiff alleges in his complaint that he had discovered the alleged fraud, the action was therefore barred by subdivision 4 of section 338, and the order of the superior court, sustaining the demurrer on that ground, was correct.

The judgment appealed from is affirmed.

We concur: MELVIN, J.; HENSHAW, J.

(163 Cal. 644)

SMILEY v. READ et al. (L. A. 2,876.)

(Supreme Court of California. Aug. 28, 1912.)

1. SPECIFIC PERFORMANCE (§ 101*)—TENDER—WAIVER OF OBJECTION.

Under Code Civ. Proc. § 2076, which provides that objection to a tender may be waived by a failure to specify the objection at the time of such tender, one who did not object at the time a conveyance was tendered him that the amount of land was not the same as that in the contract could not at any time after his acceptance of the tender make such an objection.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311–317; Dec. Dig. § 101.*]

2. SPECIFIC PERFORMANCE (§ 114*)—PLEADING—ALLEGATION OF ADEQUACY OF CONSIDERATION.

In a complaint for specific performance of a land contract, an allegation that such contract "was fair, equitable and reasonable" is insufficient as an averment of adequacy of consideration.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356–372; Dec. Dig. § 114.*]

Department 2. Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by David Smiley against George J. Read and others. From a judgment for plaintiff, defendants appeal. Reversed.

R. B. Bidwell, of Glendora, for appellants.
C. H. Converse, of Glendora, for respondent.

MELVIN, J. Plaintiff and defendants entered into an agreement whereby the former promised to purchase and the latter covenanted to sell certain real property described in the contract as "the 10.90 acres in the southwest corner of Grand and Minnehaha aves., known as the Geo. Read Tract." Thereafter defendants caused their land to be platted and a portion thereof to be dedicated for street purposes. A part of said property was designated as "Lot 1 of tract 478," and a deed indicating it by that form of description was tendered to plaintiff. He accepted the deed, paid the balance of the purchase price together with a note and mortgage in accordance with the terms of the contract of sale, and then made demand for a conveyance of a difference of acreage between that mentioned in the agreement and the area of "lot 1 of tract 478." This being refused, he sued for specific performance of the contract, or, if that were no longer possible, for damages arising from the breach. The court determined that defendants had put specific performance out of their power, and gave judgment for damages in the sum of $753.52 with costs. Defendants prosecute this appeal from the said judgment. The appeal is upon the judgment roll alone.

[1] Appellants rely for a reversal of the judgment principally upon an alleged estoppel. Respondent denies the estoppel and insists that in any event, as no estoppel was

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

pleaded, none may be recognized. There was, however, a pleading of facts which, if established, would estop plaintiff from denying full satisfaction of his claim arising under the contract, for defendant George J. Read in his answer "denies that prior to the payments of the moneys or the execution and delivery of the securities hereinbefore alleged plaintiff did not know the number of acres conveyed by defendant's deed, but allege the facts to be that prior to the payment of said $3,000 and the execution and delivery of said securities the plaintiff examined the deed tendered by defendant, and also the certificate of title, and that, after said examination, plaintiff paid to said defendant the said sum of $3,000, and delivered the aforesaid securities and accepted said deed and certificate without any objection to the sufficiency thereof whatsoever." The court found: "That at the time said transaction was closed the parties met at the First National Bank of Glendora and there were present the plaintiff, and Mr. Converse, his attorney, the defendants not being present, but being represented by Mr. Weaver. That the certificate of title which the defendants tendered to the plaintiff showed said lot 1 to contain 9.676 acres of land, and the deed which defendants tendered described said land to be conveyed as lot 1 in tract 478. That plaintiff accepted said deed and certificate of title, paid the balance of the money he was to pay, and delivered the note and mortgage which he was to deliver, and went out. That, when Mr. Weaver went out, Mr. Converse served upon him a paper he had prepared before the deed was delivered and accepted, and stated that the land was short, and demanded that they give them full measure or pay them the money. That Mr. Weaver stated that he knew nothing about that, and that they should notify Mr. Read about that; and afterwards they did notify Mr. Read. That during all the negotiations defendants were acting as agents for each other." This finding establishes the estoppel for which defendant contends. Section 2076 of the Code of Civil Procedure provides that "the person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and, if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." It makes no difference how soon after the consummation of the sale plaintiff made his objection. His duty was to assert his unwillingness to accept the land offered at the time of the tender. Failing to do this, he was estopped from demanding the fraction of an acre representing the difference between the amount of land mentioned in the contract and that specified in the certificate of title. Montgomery v. De Picot, 153 Cal. 515, 96 Pac. 305, 126 Am. St. Rep. 84; Gregg v. Von Phul, 68 U. S. 274, 17 L. Ed. 536. The case last cited was one in which the vendee under a contract of sale refused to accept a deed when tendered in accordance with the terms of the contract. The court said: "He cannot now take exceptions to a deed which he failed to perceive when it was tendered to him, or if he knew then, failed to disclose." There is nothing in Cavanaugh v. Casselman, 88 Cal. 545, 26 Pac. 515, which is at all in conflict with the cases cited herein or with our determination of this appeal. Respondent quotes with apparent confidence, as determinative of this appeal in his favor, one paragraph of that decision, which is as follows: "The contention of the plaintiff that the contract was merged in the deed is also untenable. The plaintiff, by the execution of the contract of May 16th, had a valid obligation against the defendant for the conveyance of a tract of land. That obligation could not be satisfied by the conveyance of a part of the tract, any more than would the payment of a money obligation be satisfied by the payment of a part thereof. Whether the conveyance of a part was made with or without controversy between the parties is immaterial. Unless it was accepted in satisfaction of the agreement, the unexecuted part of the original agreement remained in full force. An agreement for the conveyance of 100 acres of land, except by an agreement between the parties, cannot be satisfied by a conveyance of 50 acres. Civ. Code, §§ 1477, 1524."

But the above language was used with reference to an entirely different state of facts from that which exists in the case before us. In the cited case a deed and bill of sale had been offered in satisfaction of the agreement between the parties to the action, and had been refused. Plaintiff then prepared and offered to defendant for execution a deed and bill of sale accurately conforming to the contract, but defendant declined to execute these instruments. Later, because of his anxiety to comply with a contract of lease made with third parties, plaintiff accepted the deed and bill of sale offered by defendant, and (we quote from the findings as set out in the decision) "the defendant then delivered the said deed and bill of sale to the plaintiff with full understanding that they were not accepted as a full performance of said contract, but that plaintiff reserved the right to sue defendant for said breach." It will thus be seen that the paragraph upon which respondent depends is not at all applicable to the facts of the case at bar.

[2] Appellants also contend that their demurrer to the complaint should have been sustained because there were no allegations in that pleading from which the court could determine that the consideration was adequate. The only averment in this regard

was "that said contract was fair, equitable, and reasonable." This does not amount to an allegation of adequacy of consideration. Herzog v. A. T. & S. F. R. R., 153 Cal. 500, 95 Pac. 898; Sunrise Land Co. v. Root, 160 Cal. 97, 116 Pac. 72.

The judgment is reversed.

We concur: HENSHAW, J.; LORIGAN, J.

163 Cal. 639

SEMI-TROPIC SPIRITUALISTS' ASS'N v. JOHNSON. (L. A. 2,913.)

(Supreme Court of California. Aug. 27, 1912.)

1. Trusts (§ 305*) — Sufficiency of Complaint for an Accounting—General Demurrer—Allegations of Consideration—"Advance."

A complaint in an action for an accounting, which alleged the purchase of lands for the complainant's benefit and the taking of title thereto by the defendant under an agreement that he should "advance" sums necessary to purchase, sufficiently charged, as against a general demurrer, that there was a consideration moving from the plaintiff to the defendant which would support the action, as the word "advance" implies the return of money furnished for a specific purpose.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426; Dec. Dig. § 305.*

For other definitions, see Words and Phrases, vol. 1, pp. 214, 215; vol. 8, pp. 7566, 7567.]

2. Interest (§ 67*)—Contract for—Implication from Loan.

Under Civ. Code, § 1914, which provides that a loan of money is presumed to be made upon interest, unless otherwise stipulated in writing, an advancement to purchase property will be presumed to be made upon interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 155, 156; Dec. Dig. § 67.*]

3. Contracts (§ 334*)—Sufficency of Complaint—General Demurrer — Quantum Meruit.

Where the complaint alleged certain services, which were to be performed for the plaintiff by the defendant, an agreement to pay a quantum meruit will be implied, and it is sufficient to show consideration as against a general demurrer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1660–1663; Dec. Dig. § 334.*]

4. Pleading (§ 205*)—Defective Statement of Essential Facts—Effect of General and Special Demurrers.

Where essential facts in a pleading are stated defectively, or without clearness, or appear only by implication, the defects may be reached by special demurrer alone.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491–510; Dec. Dig. § 205.*]

5. Trusts (§ 305*)—Complaint in Acounting—"Purchase."

In an action for an accounting, in which the issue was as to whether the defendant furnished the money to "purchase" property for the plaintiff, or purchased it for his own account, the complaint was not insufficient for alleging that the defendant purchased the property, thereby implying the payment of money, and negativing the possibility of a debt, a fiduciary relation, or duty to render an accounting, as such expression also means the acquisition of property by a party's own act, as distinguished from acquisition by act of law (citing 7 Words and Phrases, 5853).

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426; Dec. Dig. § 305.*]

6. Appeal and Error (§ 907*) — Presumptions—Referee's Findings.

The court, on review of an action for an accounting, must assume that a referee's general finding as to a sum due was supported by the evidence, without the necessity of more minute particularization, in the absence of a specification of instances in which it was not based on the referee's transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911–2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. § 907.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action for an accounting by the Semi-Tropic Spiritualists' Association against Peter Johnson. From a judgment for plaintiff, and an order denying a motion for new trial, defendant appeals. Affirmed.

Geo. P. Cook, of Los Angeles, for appellant. Julius Lyons, of Los Angeles, for respondent.

MELVIN, J. Defendant appeals from a judgment entered against him and from an order denying his motion for a new trial. The cause was tried before a referee, and his findings were adopted by the court. By stipulation the transcript of the testimony taken before the court commissioner was used as a statement of the case on defendant's motion for a new trial. As the procedure followed was that provided by section 953a et seq., Code of Civil Procedure, no printed transcript has been filed, but appellant preserves certain parts of the testimony in his brief.

The principal controversy is waged over the complaint and the court's action in overruling the demurrer thereto. The complaint alleged that plaintiff purchased a certain tract of land in Los Angeles county for the purpose of establishing a tabernacle for the said corporation and its members, that by mutual arrangement between plaintiff's board of directors and defendant it was agreed that the deed to said property should be taken for plaintiff in the name of defendant, and "that defendant should advance for plaintiff such sums as might be necessary for the purchase of said lands and for certain necessary improvements thereon." The complaint further alleges that it was agreed by the parties to this action that the portion of the property not needed for the tabernacle should be divided into lots and sold by defendant "for and in behalf of said plaintiff," that defendant should receive the revenue arising from the sale of lots, and should fully account to plaintiff for all moneys received and paid out by him. Then follow averments of the purchase of the property for plaintiff in defendant's name, the sale of lots, and the receipt of more money from said transactions than defendant had advanced, including interest on the advances. It is further alleged "that defendant has conveyed to plaintiff all of said premises remaining unsold." A demand is made for an accounting and payment to plaintiff of the amount found due. Another paragraph of the complaint states that defendant has caused the filing of a mechanic's lien on said premises, and the tabernacle erected thereon, for the sum of $500 claimed to be due from plaintiff to defendant, but that the claim is without merit. There is a prayer that defendant be required to satisfy said lien of record.

[1, 2] Appellant insists that the complaint utterly fails to aver any contract between the parties, or any consideration moving from plaintiff to defendant because of the acts to be performed by the latter. "There is no allegation," says defendant, "that plaintiff was to repay the defendant for the money he advanced, provided no lots were sold, or that, if defendant received from the sale of lots more than he had expended, he was to account and pay over the excess to the plaintiff." While defendant's demurrer was both general and special, the court's attention was not specially directed to the alleged failure to state a consideration. We must, therefore, consider this point under the general demurrer. Although we cannot commend plaintiff's pleading as a model, we think it is sufficient in form and substance to sustain the court's action in overruling the demurrer thereto. There is a distinct recognition in the complaint of defendant's right to a consideration, for it is alleged that the money received for sales of lots is greatly in excess of all moneys advanced, "including interest thereon." The complaint sets forth an agreement that defendant was to "advance" such sums as should be necessary to purchase the property. The word "advance" implies, when used in this connection, "to furnish money for a specific purpose, understood between the parties, the money or some equivalent to be returned." Black's Law Dict. The allegation of an advance, upon a mutual agreement of one to take and pay for property for another in his own name, implies an agreement upon the part of the beneficiary of such payment to reimburse the one who made the advancement. Such a loan, unless expressly stipulated in writing, is presumed to be made upon interest. Section 1914, Civ. Code.

[3, 4] The complaint alleges certain services which were to be performed for plaintiff by defendant Johnson. This implies an agreement to pay a quantum meruit. Toomy v. Dunphy, 86 Cal. 643, 25 Pac. 130. Where the essential facts are stated defectively, or without clearness, or appear by necessary implication, the defects may only be reached by special demurrer. Amestoy v. Electric Rapid Transit Co., 95 Cal. 314, 30 Pac. 550; Matteson v. Wagoner, 147 Cal. 742, 82 Pac. 436. Judged, then, by this rule, the complaint was good as against a general demurrer. It alleged a loan or advancement, implying a promise of repayment with interest, acknowledged plaintiff's obligation to pay interest, averred certain services by Johnson in plaintiff's behalf, implying a duty by the corporation to pay him a reasonable compensation, and pleaded the partial execution of the contract on the part of Johnson by his act of deeding the unsold lots to the plaintiff.

[5] Appellant calls our attention to the use of the word "purchased" in the complaint, wherein it is alleged that the defendant "purchased" the property in question. This, he says, implies the payment of money and negatives the possibility of a debt, a fiduciary relation, or a legal duty resting on defendant to render an accounting. While the word "purchase" does mean "to buy," it also means "the acquisition of property by a party's own act as distinguished from acquisition by act of law." 7 Words and Phrases, 5853. The complaint sets forth defendant's agency in a manner sufficient to call for an accounting, if the allegations are found to be true.

In his amended cross-complaint defendant pleaded an account stated, about August 26, 1907, "whereby plaintiff acknowledged itself indebted to defendant in the sum of five hundred dollars ($500.00) for a building purchased by defendant for plaintiff's use and benefit." Appellant insists that there was no finding upon this issue. He is in error. There was a finding: "That said defendant sold to plaintiff a tabernacle, which was placed upon said premises, and that the parties hereto agreed that said defendant was to receive therefor the sum of $480, with interest thereon at the rate of 7 per cent. per annum." And, if this were not sufficient, there is an additional finding: "That neither on or about the 2d day of July, 1906, nor at any other time, did plaintiff and defendant settle and close the mutual demands and credits existing between said parties hereto." True, the last-quoted finding has special reference to an averment contained in defendant's answer; but its language is sufficiently comprehensive to cover all matters of alleged accounts stated.

[6] Appellant quotes certain selected portions of the testimony given before the court commissioner, showing that there was a sharp conflict of evidence regarding the amount of money received by appellant upon certain contracts of sale. He insists that these and similar instances of conflict were entitled to specific findings, because, without such segregation, it is impossible to tell how the referee arrived at the general conclusion: "That defendant has received from plaintiff and from various purchasers of said lots, to be credited to plaintiff, the sum of $4,252.50." Of course, it is quite impossible, with-

out a painstaking examination of the referee's transcript (which we are not required by law to make, and which appellant's counsel has not made for us, and presented, even in an abbreviated form), to determine whether appellant's supposed difficulty is real or imaginary. It may be, for all that appears to the contrary in the record before us, that the referee's figures may be obtained by accepting in every instance the evidence offered on behalf of plaintiff and rejecting defendant's testimony, or that the opposite method may result in the figures adopted by the commissioner and the court. The superior court, with the whole record before the judge thereof, evidently experienced no difficulty in this regard, and, in the absence of any clear showing made here, we must assume that the general finding was clearly supported by the evidence, without the necessity of more minute particularization.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(163 Cal. 611)

LUCY v. DAVIS. (L. A. 2,883.)

(Supreme Court of California. Aug. 27, 1912.)

1. Vendor and Purchaser (§ 79*) — Construction of Land Contract—Conditions Precedent.

A land contract provided that a balance of the purchase price should be paid in monthly installments between the 1st and 15th of each month at a certain bank, "according to agreement with" a certain land and trust company. *Held*, the provision as to the agreement with the land and trust company was merely parenthetical, and explanatory of the previous agreement as to the time of making payment, so that specific compliance therewith was not necessary to be shown as a condition precedent to the purchaser's right to a deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127–131; Dec. Dig. § 79.*]

2. Contracts (§ 221*)—Construction—Conditions Precedent.

Courts will not ordinarily construe stipulations in a contract as conditions precedent, especially where such construction will work a forfeiture.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1015–1032; Dec. Dig. § 221.*]

3. Specific Performance (§ 121*) — Performance by Purchaser—Evidence.

In an action for specific performance of a land contract, evidence *held* to show the payment of installments of the purchase price in substantial accord with the provisions of the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387–395; Dec. Dig. § 121.*]

4. Depositions (§ 110*)—Admission of Evidence—Objection—Indefiniteness.

An objection to a deposition that practically all the evidence therein appeared on cross-examination to be "based on hearsay" was properly overruled for its indefiniteness.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 323–328½; Dec. Dig. § 110.*]

5. Trial (§ 93*)—Striking Out Testimony—Precision of Objection.

A motion to strike out testimony must be directed with precision to the testimony which the moving party desires the court to eliminate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 246; Dec. Dig. § 93.*]

6. Trial (§ 105*)—Weight and Sufficiency —Failure to Object or Contradict.

A trial court properly accepted a statement as to a balance due on a land contract, though shown by evidence of a hearsay character, where such evidence was not objected to, and not contradicted by evidence or mathematical calculation.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260–266; Dec. Dig. § 105.*]

7. Vendor and Purchaser (§ 187*)—Rights of Vendor's Transferee — Estoppel to Complain of Purchaser's Delay in Tender.

The transferee of the rights of the vendor in a land contract cannot complain of the purchaser's delay in tendering payments due thereafter, where he accepted the transfer with full knowledge of the purchaser's rights and without notifying him of the transfer.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

8. Vendor and Purchaser (§ 187*)—Tender by Purchaser—Waiver of Irregularities by Objection.

Where the transferee of the rights of a vendor under a land contract refused a tender made by the purchaser, for the reason that the purchaser owed him nothing, there was a waiver of all objection to the mode or time of the offer of performance, as well as to the sufficiency of the sum.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 374, 375; Dec. Dig. § 187.*]

9. Specific Performance (§ 101*)—Proof of Payment of Taxes—Effect of Waiver of Sufficiency of Tender.

Proof of the payment of taxes was not necessary to have specific performance of a land contract, which provided that the vendee should pay such taxes, where the vendor did not object to the sufficiency of a tender made, as, if the vendor had paid such taxes, he thereby waived his right to recover, and, if he had not, the vendee would take subject to the state's lien.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 290, 295, 311–317; Dec. Dig. § 101.*]

Department 2. Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by George W. Lucy against R. W. Davis. From a judgment for plaintiff on defendant's motion for nonsuit, and from an order denying a motion for new trial, defendant appeals. Affirmed.

F. C. Farr, of Imperial, for appellant. Eshleman & Swing, of El Centro, for respondent.

MELVIN, J. This is an action for specific performance of a contract to convey certain real property. After plaintiff had introduced certain evidence and had rested his case, the defendant moved for a nonsuit. This motion being denied, defendant introduced no evidence. Judgment was entered in favor of plaintiff. Defendant appeals from said judgment and from the order denying his motion for a new trial.

By a certain agreement in writing one William H. Allen (described as the party of the first part) agreed to sell to one Paul Rittner (called the party of the second part) certain real property in Imperial county for $1,200. According to the terms of the agreement, part of the purchase price was to be paid to the vendor in installments, the amounts and dates of which are set forth in the contract. These payments, according to the agreement, were to bear interest at the rate of 8 per cent. per annum from the date of the instrument. The contract also contains this language: "The balance of said $1,200 to be paid in monthly payments between the 1st and 15th of each month at the rate of $11.50 per month, and to be paid at the First National Bank of Imperial according to agreement with Renters' Loan & Trust Company of San Francisco, Cal., and the said party of the second part agrees to pay all state and county taxes or assessments of whatsoever nature which are or may become due on the premises above described." This agreement was dated May 23, 1905. It was admitted by the pleadings that $1,200 was a just, fair, and adequate consideration for the land described in the contract of sale. The complaint alleged and the court found that Rittner, by consent of Allen, assigned all his right, title, and interest in the agreement to plaintiff, George W. Lucy, and that he delivered to said Lucy peaceable possession of the property in question on January 15, 1907, and that plaintiff had since been in possession thereof. It is also alleged and found that, in accordance with the agreement of sale, plaintiff made payments to Allen of the amounts and at the times provided in the contract, but before the installment of March 1, 1908, was due plaintiff tendered to Allen the sum of $82 to cover said payment, with interest, but that Allen, without just cause, refused to accept the money; that a similar tender was made on August 31, 1908, to cover the installment and interest due the following day, but this tender was also refused by Allen; and that from January, 1907, to October, 1908, plaintiff, in accordance with the agreement, paid the Renters' Loan & Trust Company the regular monthly payments as provided in the contract of sale, but in the latter month the said company refused to accept further payments, although tender was regularly made. It was further alleged and found that in February, 1908, without plaintiff's knowledge, Allen sold and transferred to Paul H. Rittner all of his interest in the property, and that the latter, in turn, sold his interest to defendant, R. W. Davis, and that Rittner and Davis had full knowledge of plaintiff's existing claims to the land in question. It was also found by the court that plaintiff still owed to Allen or his successor in interest $552.30, which had been deposited to Davis' credit on May 7, 1908, by the plaintiff, who had kept his tender good at all times, and the judgment was that defendant, on receipt of that sum of money, should convey all of his title to plaintiff.

[1] Appellant says that the agreement contains a condition precedent, which has not been performed, namely, the carrying out of the contract between the Renters' Loan & Trust Company of San Francisco and Allen. His theory is that the proof should have shown just what this contract was, and that the payments by plaintiff in Allen's behalf were made in accordance with it. Appellant is entirely in error in this. It was not necessary that, in order to make plain the contract here considered, the terms of the agreement between Allen and the Renters' Loan & Trust Company should be ascertained and set forth, and compliance therewith made a condition precedent to plaintiff's right to a deed from Allen. The requirement that plaintiff should pay $11.50 a month to the corporation named was simply a covenant. The words "according to agreement with Renters' Loan & Trust Company" were merely parenthetical, and explanatory of the previous requirement that the installment should be paid between the 1st and 15th of each month. If the contract had provided that payment should be made to "John Smith, because the party of the first part owes him money," no one would contend that the reason for the indebtedness of the party of the first part to Smith would be material. This agreement does nothing more than order payment on account of a debt, except that it explains the time when amounts are due under some contract for the payment thereof.

[2] Courts are disinclined to construe stipulations of a contract as conditions precedent, especially when such course would work a forfeiture, and, even if we were in doubt, we would hesitate to reach the inequitable conclusion desired by defendant. Antonelle v. Kennedy & Shaw Lumber Co., 140 Cal. 315, 73 Pac. 966; Diepenbrock v. Luiz, 159 Cal. 718, 115 Pac. 743. But we are convinced that the part of the agreement under discussion does not express a condition precedent.

[3] The findings of the court to the effect that payments were made in substantial accord with the provisions of the contract, until plaintiff was prevented from further compliance therewith by the conduct of defendant, are sustained by the evidence. The plaintiff testified that he made certain payments to Allen in accordance with the terms of the agreement. It is true that Allen objected in one instance that there had been a miscalculation of the amount of interest due; but he accepted the check tendered, and accepted the amounts subsequently sent to him, until after the transfer of his interest in the property to Rittner. Plaintiff testified that

he made the payments to the Renters' Loan & Trust Company for 22 months, counting what his mother paid. The book containing receipts for these amounts was before him when he made this statement, and there seems to have been no objection to his testimony. His mother corroborated him with reference to the payments made by her.

[4, 5] After Mrs. Lucy's deposition was read, a motion to strike it out was made. This was based upon the ground that practically all of her testimony appeared on cross-examination to be "based upon hearsay." This objection was too indefinite. She testified positively that some payments were made by her to the corporation mentioned in the book then in court, and as the court stated in ruling that it was the book other parts of which had been introduced in evidence, the book and her payments also were thus identified as connected with the Renters' Loan & Trust Company. The objection to the admission of the book in evidence, as well as the vague and general motion to strike out her testimony, were properly overruled. A motion, to be available, must be directed with precision to the testimony which the moving party desires the court to eliminate. Wadleigh v. Phelps, 149 Cal. 644, 87 Pac. 93. Much of her testimony was based upon communications to her by her son and his attorneys; but in almost every instance defendant's counsel failed either to object to such testimony or to note an exception to an adverse ruling. Taken altogether, the evidence supports the findings.

[6] Appellant characterizes the testimony of respondent as almost entirely hearsay. Much of it doubtless was, but nearly all of his conclusions were allowed to go into the record without exception. For example, he said that $552.30 was the balance due to and demanded by Davis according to the information given him by his attorneys, although he had not personally conferred with defendant upon that matter. While this was, of course, hearsay, it went in without objection, and as it was not contradicted, either by evidence or by mathematical calculation, the trial court was justified in accepting it.

[7, 8] As Davis, having full knowledge of Lucy's rights, failed to notify the latter of the transfer to him of Allen's interest in the property, he is not in a position to complain of respondent's delay in tendering the payments due after said equitable assignment of the contract. As soon as Lucy heard of the transfer, he took prompt steps to discover the amount due and made tender thereof to Davis. That the sum of $552.30 was offered by plaintiff and by defendant refused is admitted by the answer. Appellant having stated no reason for refusing the tender, except that respondent owed him nothing, he waived all objections to the mode or time of the offer of performance which he might have made, as well as to the sufficiency of the sum tendered. Kofoed v. Gordon, 122 Cal. 320, 54 Pac. 1115; Latimer v. Capay Valley Land Co., 137 Cal. 288, 70 Pac. 82.

[9] No evidence with reference to payment of taxes was offered, although under the contract the vendee was to pay them. We do not see that appellant was injured by this omission. If he paid the taxes, he waived his right to recovery by failing to object to the amount tendered by respondent. If he did not pay them, he is not injured; for, in that event, respondent takes the property subject to the state's lien for taxes. No other alleged errors require discussion.

The judgment and order are affirmed.

We concur: LORIGAN, J.; HENSHAW, J.

(163 Cal. 609)

MOORE et al. v. CONLEY, Judge of Superior Court. (S. F. 6,313.)

(Supreme Court of California. Aug. 29, 1912.)

1. MANDAMUS (§ 172*)—PETITION FOR WRIT—CONCLUSIVENESS.

On application for a writ of mandate, the Supreme Court can merely assume that the facts stated in the petition are true, in the absence of opportunity to respondent to contest them.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 381–385; Dec. Dig. § 172.*]

2. INTOXICATING LIQUORS (§ 37*)—LICENSE SYSTEM—ELECTION TO ADOPT—CONTESTS—CONTINUANCE—POWER OF COURT.

While the provisions of Code Civ. Proc. § 1121, which limit the time that a superior judge may continue an election contest to 20 days, are merely directory, and their observance is not essential to the jurisdiction of the court to complete the hearing after an unwarranted continuance in a proceeding to contest an election to license the sale of intoxicating liquors, the court should conform to the law as closely as possible.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 42; Dec. Dig. § 37.*]

3. MANDAMUS (§ 16*)—RIGHT TO WRIT.

Writ of mandate to compel a superior judge to set for trial a contest under an election, by the returns of which it appears that license for the sale of intoxicating liquors was authorized in the city, will not be issued, though the hearing was adjourned for a longer period than was authorized by Code Civ. Proc. § 1121, where it appears that on account of the delay incident to hearing of the mandamus proceedings petitioners would derive no appreciable advantage.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 48; Dec. Dig. § 16.*]

In Bank. Application by W. A. Moore and others for writ of mandate against William L. Conley, Judge of the Superior Court, County of Madera. Application denied.

Drew & Drew, of Fresno, for petitioners.

BEATTY, C. J. The opinion filed in this proceeding on August 26, 1912, is hereby corrected to read as follows: This is a petition for a writ of mandate to compel the setting of an election contest for trial. It appears from the petition that certain citizens and electors of the city of Madera instituted a regular proceeding to contest an election, by the returns of which it appeared that a majority of the votes were cast in favor of licensing the sale of alcoholic liquors in said city. Stats. of April 4, 1911, p. 599. The respondent, in conformity to the provisions of section 1118, Code of Civil Procedure, appointed the 23d day of July as the date for holding a special session of the court for a hearing of the contest, in pursuance of which order citations were issued and served upon the proper parties. At the time so fixed, the parties appeared; but the respondent, deeming himself disqualified, continued the hearing of the contest to September 11th, at which time one of the superior court judges of Los Angeles county had agreed to hear the contest.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1-3] In disposing of this petition for the writ, we shall assume merely that the facts stated by petitioners therein are true; this being as far as we may go, in the absence of any opportunity afforded the respondent to contest them, which, of course, would necessarily be the effect of a denial of the petition on the ex parte statements contained therein. Assuming, then, that the facts stated in the petition are true, this order was unauthorized, because the statute (Code Civ. Proc. § 1121) does not permit a continuance for more than 20 days, and, although these provisions are merely directory, and their observance not essential to the jurisdiction of the court to complete the hearing after an unwarranted continuance, it is nevertheless the duty of the court to conform to the law as far as possible. The case as presented would therefore warrant the issuance of the writ of mandate, if that course seemed to be necessary for the protection of the rights of the petitioners. But the petition for the writ was only filed here on August 20th, and since the hearing of the contest was already set for September 11th we have concluded that the issuance of an alternative writ, the return to which could not conveniently be heard before the next law day (September 4th), would be of no appreciable advantage to the petitioners, and that the emergency is not serious enough to justify such action.

For this reason the petition is denied.

We concur: LORIGAN, J.; MELVIN, J.; ANGELLOTTI, J.; HENSHAW, J.

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163 Cal. 589

BROWN et al. v. SPENCER et al. (Sac. 1,923.)

(Supreme Court of California. Aug. 26, 1912. Rehearing Denied Sept. 25, 1912.)

1. Trusts (§ 70*)—Resulting Trusts.

Where purchasers of real estate obtained money to pay the price from a third person, who paid the vendor and took title under an agreement to hold the same until repayment of the loan, the third person became a trustee for the purchasers within Civ. Code, § 853, providing that, when a transfer of property is made to one person and the consideration is paid by another, a trust results in favor of the latter.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 95–97; Dec. Dig. § 70.*

For other definitions, see Words and Phrases, vol. 8, pp. 7116–7124; vol. 8, p. 7822.]

2. Evidence (§ 258*) — Existence of Relation—Evidence.

Where purchasers of real estate conveyed to a third person alleged that the third person advanced the price through her agent under an agreement that the title should be conveyed to her in trust for the purchasers, and it was not disputed that the money used to pay the price was paid by the agent, and that he obtained it from her, and there was evidence of declarations by her that after the transaction was completed she ratified the acts of the agent, there was sufficient prima facie proof of the agent's authority to loan her money, and take the deed to her as security, so that his declarations, constituting a part of the res gestæ, were binding on her.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

3. Principal and Agent (§ 22*)—Existence of Relation—Evidence—Admissibility.

The declarations of an agent are not competent proof of agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

4. Principal and Agent (§ 20*)—Existence of Relation—Evidence—Admissibility.

Where a debtor alleged that the loan was made by the creditor through a third person acting as her agent, and proved the declaration of the creditor to the effect that the agent transacted all her business, evidence that shortly before the loan the agent had loaned money of the principal to a third person, and had taken a mortgage from him in the principal's name as security, and that the creditor had either authorized such loan or approved of it, was admissible to prove agency, and to corroborate the creditor's declaration.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 37, 38; Dec. Dig. § 20.*]

5. Trusts (§ 87*)—Existence of Agency—Evidence—Admissibility.

Where, in a suit to establish a resulting trust in favor of plaintiffs and two of defendants, based on the fact that plaintiffs and the two defendants purchased real estate which was conveyed to codefendant advancing the price and agreeing to hold the title in trust until repayment, plaintiffs alleged that the loan was made by a defendant acting as an agent of codefendant, the conversations between plaintiffs and such defendant and of the agreement between all the purchasers was admissible to show the history of the transaction, and to establish facts making it necessary to make two of the purchasers defendants.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 129; Dec. Dig. § 87.*]

6. Frauds, Statute of (§ 56*)—Partnership to Buy and Sell Real Estate — Oral Agreements.

An agreement to form a partnership to buy and sell real estate and build canals and ditches need not be in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 84–89, 136–138; Dec. Dig. § 56.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

7. FRAUDS, STATUTE OF (§ 116*)—AGENCY TO MAKE LOANS AND ACCEPT SECURITIES.

An agreement authorizing an agent to make a loan for his principal and accept title to land as security need not be created in writing.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 251–260; Dec.Dig. § 116.*]

8. PRINCIPAL AND AGENT (§ 69*) — TRANSACTIONS BY AGENT—VALIDITY.

A partner in a firm engaged in buying and selling real estate may act as agent of a third person in making a loan for her to the firm and accepting title to firm land as security, in the absence of fraud or bad conduct.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 130–145; Dec. Dig. § 69.*]

9. TRUSTS (§ 371*)—RESULTING TRUSTS—ACTION TO ENFORCE—ISSUES, PROOF, AND VARIANCE.

There is no variance between a complaint alleging an express trust and the proof showing a resulting trust by operation of law from the facts pleaded.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588–599; Dec. Dig. § 371.*]

10. MONEY LENT (§ 1*)—IMPLIED PROMISE TO REPAY.

A loan of money raises an implied promise to repay it.

[Ed. Note.—For other cases, see Money Lent, Cent. Dig. §§ 1, 2, 4; Dec. Dig. § 1.*]

11. TRUSTS (§ 70*) — MORTGAGES (§ 423*) — FORECLOSURE.

Where purchasers of real estate unable to pay the price obtained the money therefor from a third person to whom the property was conveyed under an agreement to hold the same until repayment, no further promise on the part of the third person was necessary to constitute a resulting trust, and the third person could enforce payment of the money by action after the lapse of a reasonable time, and in the meantime hold the land as security.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 95–97; Dec. Dig. § 70;* Mortgages, Cent. Dig. § 1262; Dec. Dig. § 423.*]

12. EVIDENCE (§ 471*)—CONCLUSION OF WITNESS—"POSSESSION."

In common usage, the word "possession" is often used as synonymous with "occupancy," and, when it is so used and understood in a question asked a witness, "Who had possession of the land?" the question is not objectionable as calling for a conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149–2185; Dec. Dig. § 471.*

For other definitions, see Words and Phrases, vol. 6, pp. 5464–5470; vol. 8, pp. 7757, 7758.]

13. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ERRONEOUS RULING ON EVIDENCE.

Where the facts relating to the possession of land were shown, the error in allowing a question asked a witness, "Who had possession of the land?" was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. § 1051.*]

14. TRUSTS (§ 372*)—RESULTING TRUSTS—ASSIGNMENTS OF RIGHTS—EVIDENCE.

Where, in a suit to enforce a resulting trust in land, the complaint alleged a transfer by the beneficiary of his interest in the land to plaintiff, and no formal denial of the allegation was made, and the fact of the transfer was not disputed at the trial, and there was evidence of statements and conduct of the parties implying that the assignment had been made, a finding that an assignment had been made was supported.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 600–603; Dec. Dig. § 372.*]

Department 1. Appeal from Superior Court, Glenn County; A. M. Alberry, Judge.

Action by Thomas Brown and others against Eleanor Spencer and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

White, Miller & McLaughlin and B. F. Geis, for appellants. Frank Freeman and Charles L. Donohue, for respondents.

SHAW, J. The defendants appeal from the judgment. The appeal was taken within 60 days after its entry. The evidence and proceedings at the trial are presented in a bill of exceptions.

The defendants Frank and John Spencer are the sons of defendant Eleanor Spencer. According to the allegations of the complaint, they are interested in common with the plaintiffs in the cause of action, and they are made parties defendant solely because they refuse to join as plaintiffs. The plaintiffs are Thomas Brown, David Brown, and Hochheimer & Co., a corporation. The transactions upon which the alleged trust arose occurred in 1901. At that time Hochheimer & Co. was a partnership. In 1903 a corporation under the name Hochheimer & Co., was organized, and thereupon the interest of said firm of Hochheimer & Co. was transferred to said corporation, one of the plaintiffs herein. We use the term "plaintiffs," without regard to this change of character.

It is claimed that the complaint does not state facts sufficient to constitute a cause of action. As this is the main question in the case, and its determination will decide a number of alleged errors of law occurring at the trial, we take it up first. The plaintiffs and Frank and John Spencer were associated together in the business of buying and selling real estate and building canals and ditches. They had made an agreement to buy from one Ehorn a parcel of land at the price of $12,500. Frank and John Spencer had agreed to buy from one Sutton a contiguous parcel at the price of about $2,000. The parties did not have the money to pay for these lands, and thereupon it was agreed between them and Eleanor Spencer that she would loan to Frank, John, and the plaintiffs $12,178, being the amount necessary to complete the payment, that the purchase price should be paid with the money so loaned, that the lands should be conveyed to Eleanor Spencer as security for the money so loaned, and that she should thereupon hold the same in trust for Frank, John, and the plaintiffs until a reconveyance was demanded by them, or until the land should be sold, at which time the money was to be repaid to her with interest at 6 per cent. per annum. Said Eleanor loaned the money, the purchase price of the parcels was paid therewith, and the conveyances thereof were made to said Eleanor, all in pursuance of and as provided in said agreement. This was accomplished on October 3, 1901. She has ever since that day held the title in trust under the agreement, but at that time the plaintiffs took possession of the lands and they have ever since held possession and have received the rents, issues, and profits thereof. It was agreed between Frank, John, and the plaintiffs that Frank and John should jointly own one-third of said parcels, Hochheimer & Co. one-third, and the two Browns one-third. The said Eleanor now claims absolute title and repudiates the trust relation. Plaintiffs have paid her $2,000 as interest, and have tendered her the amount due under the agreement, and are ready and willing to pay it upon a conveyance of the property to them by her. They did not know of her claim of absolute right, or discover that she denied their rights or repudiated the trust, until three days before the action was begun. It is not alleged that any written agreement was made by or for Eleanor in regard to the alleged trust in the land. We will assume that no such writing was executed. The above are the essential facts as alleged in the complaint. The prayer is for an accounting, for a determination of the amount due Eleanor, and for a decree declaring the interests of the respective parties in the lands, and that she holds them in trust for the other parties as alleged.

[1] The substance of the cause of action thus set forth is that the consideration for the transfer of the land was paid by Frank Spencer, John Spencer, and the plaintiffs, and the conveyance thereof was made to Eleanor Spencer. In such cases a trust is presumed to result in favor of the persons paying the consideration, and the grantee will be declared a trustee for them as to the land. Civil Code, § 853. The loan of the money by Eleanor to the purchasers was, in legal effect, a transfer of the money to them. The consequence was that, when the money was paid in settlement of the purchase price, it was their money, and not Eleanor's that was so paid. The fact that it was paid directly to the vendors by her agent does not alter the legal effect of the transaction. The transfer being made to Eleanor, she became a trustee holding title to the land for the other interested parties. No writing was necessary to create a trust of this character. It is a trust which the law implies from the facts of the case and may be created without writing. The case falls exactly within the rule of the aforesaid section of the Civil Code. Campbell v. Freeman, 99 Cal. 546, 34 Pac. 113; Hidden v. Jordan, 21 Cal. 99; Millard v. Hathaway, 27 Cal. 139; Sandfoss v. Jones, 35 Cal. 486, Walton v. Karnes, 67 Cal. 255, 7 Pac. 676; Ward v. Matthews, 73 Cal. 16, 14 Pac. 604; Hellman v. Messmer, 75 Cal. 170, 16 Pac. 766; Moultrie v. Wright, 154 Cal. 523, 98 Pac. 257; Title, etc., Co. v. Ingersoll, 158 Cal. 491, 111 Pac. 360. Upon the facts alleged the plaintiffs were entitled to the relief prayed for.

The defendants answered separately. All the material allegations of the complaint necessary to the creation of the alleged trust were put in issue, except the allegation that the land was conveyed to Eleanor Spencer and the allegation that the money which paid for the land was obtained from her. Her claim is that she paid for the land as a purchaser, that there was no loan, and that she took the deed free from any trust. The findings are in favor of the plaintiffs. Judgment was given substantially as prayed for, directing the conveyance by Eleanor on payment of the amount found to be due her. The appellants claim that material errors of law occurred at the trial, and that the findings so far as they are against Eleanor are not sustained by the evidence.

[2] The plaintiffs allege that the loan was made by Eleanor Spencer through Frank Spencer, acting as her agent. There was proof of declarations by her, after the transaction was completed, that Frank had always transacted all of her business. It was not disputed that the money used to pay the purchase price was paid by Frank, and that he obtained it from her. She could not consistently claim otherwise, since her defense is that, although the money was paid by Frank, it was her own and was paid for her as the purchaser. There was also evidence of declarations by her showing that after the transaction was completed she had ratified the acts of Frank in the matter in her behalf, had accepted the transaction as a loan by her with the land as security, and was holding it in trust. This was sufficient prima facie proof of Frank's authority and agency to loan her money to himself and the other parties and take the deed to her as security. His agency being thus proven, there was no error in admitting in evidence testimony of declarations and statements made by him to his associates to the effect that she had the money to loan and was willing to make the loan to them on the terms stated and his further declarations and statements while the transaction was being carried on which were parts of the res gestæ thereof.

[3] His mere declarations would not have been competent proof of his agency, but, when the agency was proven by other evidence, his statements in the course of the transaction of the business in relation thereto were admissible in evidence as against her.

[4] Plaintiffs were allowed to prove that, shortly before the loan in question was made, Frank Spencer had loaned money for his mother to Ehorn, and had taken a mortgage from Ehorn in her name as security, and

that she had been informed thereof and had either authorized it or approved it. This evidence was admissible to corroborate the evidence as to the declaration of Eleanor to the effect that Frank had always transacted all her business, and as evidence tending to prove his agency.

[5] The evidence of conversations between the plaintiffs and Frank and John Spencer by which the loan was negotiated and agreed to and the statements made to each other regarding it were necessary to show the nature and history of the transaction, and were admissible for that purpose. The proof of the agreement between them as to their respective interests in the land was proper, in order to establish the facts which made it necessary to name the two sons as defendants, instead of plaintiffs.

[6] The agreement between them made them all partners in the affair. No writing was necessary to create such partnership in real property. Koyer v. Willmon, 150 Cal. 787, 90 Pac. 135. And, as there was enough evidence to show that Frank was the agent of his mother to make a loan for her and accept the security, his statements to his associates in regard to it were properly admitted.

[7] We know of no authority to the effect that an agency to loan money and accept title to land as security must be created by writing.

[8] Nor is there any reason, in law, why Frank could not act as her agent in making the loan while he was also interested as a partner with those to whom the loan was made. Hemenway v. Abbott, 8 Cal. App. 461, 97 Pac. 190. She denied his authority as her agent, but she does not claim that there was any unfair advantage taken, or actual or constructive fraud against her in his conduct. The dual relation he held would be of no consequence unless such fraud or bad conduct was involved.

[9] There is no merit in the point that there is a variance because the complaint alleged an express trust and the proof shows only a resulting trust arising by operation of law. The resulting trust appears from the facts alleged and there is no variance. Bayles v. Baxter, 22 Cal. 578.

[10] The point that there was no promise alleged or proved to repay the money to Eleanor is also without merit. The loan of the money would of itself raise an implied promise, binding on them in law, to repay it. Couts v. Winston, 153 Cal. 691, 96 Pac. 357.

[11] No further promise was necessary to constitute the trust alleged. There was nothing unfair in the transaction as found by the court. She was free to enforce payment of the money with interest, by a proper action, after the lapse of a reasonable time for the borrowers to sell the land. Campbell v. Freeman, supra. In the meantime she held the land as security.

[12, 13] We cannot perceive that any prejudice to the appellants arose from the ruling allowing the answer to the question, "Who had possession of the land?" The question what constitutes possession is sometimes a question of law, and interrogatories put in this form have sometimes been condemned because the conclusion of the witness as to a matter of law was called for in answer to it. But in common usage the word "possession" is often used as synonymous with "occupancy," and, when it is so used and understood, the question as above given is not objectionable in form. It is usually within the discretion of the trial court to allow or reject it. In the present case the actual facts relating to possession were shown, and it is not necessary for us to determine the sense in which the word was used and understood, since no harm could have been caused by the answer.

[14] It is claimed that there was no evidence to support the allegation and finding that the partnership, Hochheimer & Co., transferred its interest in the land to the corporation, Hochheimer & Co. The fact of this change of the character of the plaintiffs was disclosed in the course of the trial and the allegation appears in an amendment to the complaint made at that time. No formal denial was filed to this amendment, but it was stated that it would be considered as denied. From the colloquy that took place it appears probable that this particular allegation was admitted. But, conceding that it also was denied, the fact appears to be that it was not really disputed at the trial, and there is ample evidence of statements and conduct of the parties which necessarily implied that such assignment had been made. This is sufficient to support the finding.

We do not deem it necessary to discuss further the points presented in the voluminous briefs of the appellants. All of the arguments relating to matters of substance are fully answered in the opinions of this court in the several cases which we have cited. The other points could not under any circumstances have prejudiced the appellants, and we do not deem it necessary to consider them.

The judgment is affirmed.

We concur: SLOSS, J.; ANGELLOTTI, J.

(19 Cal. App. 497)

AMERICAN WELL & PROSPECTING CO. v. SUPERIOR COURT OF KERN COUNTY et al.

(Civ. 1,196.)

(District Court of Appeal, Second District, California. July 18, 1912. Rehearing Denied by Supreme Court Sept. 19, 1912.)

1. MANDAMUS (§ 35*)—COURT'S DISCRETION—DETERMINATION OF AMOUNT OF ATTACHMENT BOND.

The determination as to whether the amount of a bond in attachment should be raised on the motion of the owner of the property attached is within the discretion of the court, and mandamus will not, therefore, lie to control such determination.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 67; Dec. Dig. § 35.*]

2. MOTIONS (§ 62*)—ORDER—CHARACTER OF COURT'S DECISION—EXPRESSION OF OPINION.

An order of court, made in response to a motion to require an increased undertaking in attachment, will import that it was made on the merits, and an expression of the court's opinion from the bench as to a lack of jurisdiction, being no part of the decision, would not change its character.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 84–87; Dec. Dig. § 62.*]

Mandamus by the American Well & Prospecting Company against the Superior Court of Kern County and another. Application denied.

George E. Whitaker and T. N. Harvey, both of Bakersfield (Hunsaker & Britt, of Los Angeles, of counsel), for petitioner. Claflin & Owen, of Bakersfield, for respondents.

SHAW, J. The matter is presented upon a demurrer to the petition. It appears that the Midway Syndicate, Limited, brought an action against petitioner in the superior court of Kern county for the recovery of money. In aid of its action plaintiff sued out a writ of attachment, and, as required by the clerk of the court, gave an undertaking in the sum of $200, all in conformity with the provisions of section 539 of the Code of Civil Procedure. The writ was placed in the hands of the sheriff, who, by virtue thereof and as instructed by plaintiff, levied the same upon two rotary oil-drilling rigs belonging to petitioner, the defendant in said action. Thereafter, pursuant to notice, petitioner moved the court for an order increasing the amount of the undertaking from $200 to $30,000; the ground therefor being that the sum of $200 specified in the undertaking was inadequate to compensate defendant therein for damages which would be sustained by reason of the levy so made upon the property of petitioner. In support of the motion petitioner offered the files and records of the case and an affidavit tending to show the inadequacy of the undertaking, in that petitioner was then engaged as a contractor in the business of drilling oil wells, that he had no other drilling outfits in Kern county than those attached, and that by reason of being deprived of the use of the drilling rigs so levied upon he would be unable to perform certain contracts, which fact would entail a loss to him in the sum of $20,000, and that possibly he would be subjected to damage suits for breach of contract. Upon a hearing of the motion the court made an order in general terms denying the same.

[1] The question presented by the motion was one of fact, calling for an exercise of judicial discretion on the part of the court in deciding the same. The law is well settled that in such case mandamus will not lie to control the action of the court.

[2] Nor do we understand that petitioner controverts this proposition. Its contention is that the court did not decide the matter upon its merits, but held that the court was without jurisdiction to pass upon the question. This contention is based upon an allegation of the petition "that his (petitioner's) aforesaid application was not considered or denied by the court on its merits, but that said order was so made and entered for the reason that, in the opinion of the court, under the law, the action of the clerk in fixing the amount of the undertaking and accepting it was final, and not subject to review by the court, and that, the clerk having fixed said undertaking at $200 and accepted the same, the court had no authority, under the law, to require the plaintiff in said action to give an additional or increased undertaking." But, as stated, the order was general, made in response to the motion, and assuming, as claimed by petitioner, that the court had jurisdiction, it was made upon the merits, and, being that of a court of general jurisdiction, it imports absolute verity. The plain import of its language cannot be contradicted, nor its effect qualified or limited in the manner here proposed in a proceeding of this character. As is frequently said, the opinion of the court, expressed from the bench in deciding a case, is no part of its decision.

In denying the writ, we do so upon the assumption, without so deciding (such decision not being necessary to a determination of the case), that the court had jurisdiction to hear the motion upon its merits. If it did not have jurisdiction, clearly petitioner is not entitled to the writ. On the contrary, if it possessed jurisdiction, the order shows that its determination was made upon the merits. If as a matter of fact the action of the court was had and taken upon the ground of want of jurisdiction, as alleged in the petition, then it should have refused to hear the motion, and dismissed it, or, in other appropriate language, stated that the action was based upon want of jurisdiction.

The application for the writ is denied.

We concur: ALLEN, P. J.; JAMES, J.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(19 Cal. App. 501)

FIRST NAT. BANK OF SAN FRANCISCO v. GOLDEN. (Civ. 918.)

(District Court of Appeal, First District, California. July 22, 1912. Rehearing Denied by Supreme Court Sept. 20, 1912.)

1. Bills and Notes (§ 151*)—Negotiability—Conditions of Payment—Orders.

An order drawn by one on his deposit in a savings bank, which, though on its face payable on demand, was, by reason of a requirement of the bank not to be paid till after 30 days' notice to it, and by condition of the deposit required presentment with it of the depositor's passbook, of which facts its indorsee had notice, is merely a nonnegotiable chose in action.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 380–387; Dec. Dig. § 151.*]

2. Bills and Notes (§ 275*)—Nonnegotiable Order—Defenses Against Indorsee.

An order for payment of money, a nonnegotiable chose in action, without consideration, as between the drawer and payee, because of fraudulent representations on which it was given, is taken by its indorsee with the equities charged against it in the hands of the payee, unless the drawer is estopped to set up such equities.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 738–741; Dec. Dig. § 275.*]

3. Bills and Notes (§ 353*)—Nonnegotiable Order—Bona Fide Purchasers—Consideration—Extension of Time.

R. having given plaintiff his check for the amount of his indebtedness to it, and payment of the check having been refused for lack of funds, being pressed to make good the amount of the check, he obtained of defendant an order payable to him on defendant's deposit in a savings bank, which on its face was payable on demand, but, solely by reason of the bank having availed itself of the right to require 30 days' notice of withdrawal, was not to be paid for 30 days, and indorsed it to plaintiff. *Held* that, within the rule that, where one purchases in good faith and for value a nonnegotiable chose in action from one to whom the owner has transferred the apparent ownership, he obtains by estoppel a valid title, plaintiff parted with no value when he took the order; the order not being taken as a substitute for the original debt, there being no agreement to extend the time of payment, and no such extension resulting as a matter of law from the transaction, or, if resulting merely by operation of law, not being value within the rule.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 898–903½, 906; Dec. Dig. § 353.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by the First National Bank of San Francisco against William K. Golden. From a judgment for defendant, and an order denying a motion for new trial, plaintiff appeals. Affirmed.

Cushing & Cushing, of San Francisco, for appellant. Tobin & Tobin and F. S. Brittain, all of San Francisco, for respondent.

KERRIGAN, J. In this case a rehearing was granted, but after further consideration, with some minor changes and with the citation of additional authorities, we adhere to our original position. This is an appeal from a judgment in favor of defendant, and from an order denying plaintiff's motion for a new trial.

Prior to the 26th day of December, 1907, F. H. Rowe was indebted to the plaintiff in the sum of $3,825. On that date Rowe gave the plaintiff his check on the Canadian Bank of Commerce for the sum of $1,000, and the time for payment of the balance was extended to January 25, 1908. When this check was presented to the Canadian Bank of Commerce, it was refused payment for lack of funds to the credit of the maker. Between the 26th and 28th of December the plaintiff was pressing Rowe to make good the amount of the check. On the latter date Rowe, in company with the defendant, Golden, called at the bank of plaintiff, and Rowe stated that he was unable to raise the money to meet the check, but that Golden would give the plaintiff an order drawn upon his deposit in the Hibernia Savings & Loan Society for $1,000. Rowe called attention to the fact that said loan society, owing to the financial stringency prevailing at that time, was demanding of its depositors 30 days' notice before paying sums of $1,000 or over. To this observation the plaintiff, through its vice president, replied: "That is all right. We are quite willing to wait 30 days on the Hibernia Bank, as we know they are absolutely good." Thereupon an order or check in favor of Rowe was drawn by Golden upon said Hibernia Savings & Loan Society, which Rowe transferred to plaintiff by indorsement. Under the conditions upon which deposits are accepted by said society, they can be withdrawn only upon presentation of the depositors' passbook. Accordingly Golden's passbook was delivered to the plaintiff, and both the order and passbook were, on December 30, 1907, presented by the plaintiff to one of the tellers of the society, who in effect acknowledged receipt of the 30 days' notice of withdrawal.

Prior to the 26th day of December, 1907, Rowe and one W. P. McFaul, claiming to be the authorized agents of the Howard Creek Lumber Company, a corporation, were endeavoring to sell to Golden a tract of timber land in Mendocino county together with a sawmill thereon. They represented that this land was thickly covered with practically virgin timber, mostly redwood; that the mill was in first-class condition, and capable of producing from 20,000 to 25,000 feet of lumber daily. Rowe also represented that he was on a sound financial basis, and responsible for any paper he might sign. He referred Golden to Bradstreet's Book, wherein it was estimated that Rowe's resources were about $35,000. On the strength of these representations, and also believing, as he had been told by Rowe, that some one else was likely to purchase the land, Golden, at the suggestion of Rowe, consented to make a payment of $1,000 on the land and mill, with the understanding that he was to have 10 days to decide whether he would purchase the property; that if he decided not to proceed with the transaction the $1,000 was to be repaid to him within 60 days. This contract was reduced to writing December 27th, and on the following morning Rowe and Golden met to arrange for this conditional payment. At that time Rowe remarked to Golden that he had a slight overdraft at the bank of plaintiff, and desired "to make a deposit to show that everything was coming out all right—that he was doing business." Arriving at the bank, Golden made the check or order on the Hibernia Society to which reference has already been made and under the circumstances described.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On the afternoon of the same day Golden went to Mendocino county to inspect the property forming the subject of the negotiation, and found that it had been misrepresented to him in material respects. Within the 10 days he gave notice to Rowe that the proposition was rejected, and, having learned that Rowe had filed a petition in bankruptcy, he stopped the payment of the order on the Hibernia Society and notified plaintiff that he had done so. January 30, 1908, payment of the draft was refused accordingly, and written notice of protest was served on the parties thereto. August 18, 1908, the plaintiff filed a claim against the bankrupt estate of Rowe for the full amount of the indebtedness, to wit, $3,825, not waiving, however, any of its rights under the draft on the Hibernia Society.

A stipulation has been entered into by the parties to this action, under which, if it shall be decided that either the Hibernia Savings & Loan Society or Golden is liable on the check, judgment shall go against Golden. The trial court filed its findings of fact and conclusions of law, and caused judgment to be entered in favor of Golden and against plaintiff, from which judgment, and an order denying plaintiff's motion for a new trial, this appeal is prosecuted.

A witness for the plaintiff testified that it would not have accepted the Golden check for collection, and from other circumstances in the case it is clear that the plaintiff did not receive it merely for that purpose. Nor is it seriously claimed that the check was accepted by the plaintiff as a payment on account of Rowe's indebtedness. The worthless check on the Bank of Commerce was not turned over to Rowe or Golden. No entry in the books of the plaintiff, or act of its officers, indicates that it was so accepted. It was apparently taken by the plaintiff to be applied in reduction of Rowe's indebtedness when collected. Doubtless, if this check had been paid, the amount thereof would have been indorsed on the instrument evidencing Rowe's indebtedness to the bank and treated as payment, but not otherwise.

[1] This order on the Hibernia Society was not unconditional and free from any other contract. It follows that it was not negotiable. While upon its face it was payable upon demand, it was in fact not to be paid until 30 days' notice was given to the drawee, and its payment was also conditional upon its being accompanied by the drawer's passbook. In view of these conditions—notice of which was brought home to the plaintiff—it cannot be held, as asserted by plaintiff, that the draft was negotiable. Civ. Code, §§ 3087, 3088, 3090, 3093. In the case of White v. Cushing, 88 Me. 339, 34 Atl. 164, 32 L. R. A. 590, 51 Am. St. Rep. 402, the court, in passing upon the effect of an order containing the words, "The bank book of the depositor must accompany this order," held that without these words the order was payable absolutely and was negotiable; that with those words it was payable only upon the condition of the production of the drawer's bank book. "It must, therefore," says the court, "be held that the contingency embarrasses and obstructs the free circulation of the order for commercial purposes, rendering it not negotiable." See, also, Yeaton v. Bank of Alexandria, 5 Cranch, 51, 3 L. Ed. 33; Davis v. Bank, 118 Cal. 600, 50 Pac. 666; Union Ins. Co. v. American F. Ins. Co., 107 Cal. 327, 40 Pac. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; Auzerais v. Naglee, 74 Cal. 60, 15 Pac. 371; Burns v. Sennett, 99 Cal. 363, 33 Pac. 916; Hostetter v. Park, 137 U. S. 30, 11 Sup. Ct. 1, 34 L. Ed. 568; Lillard v. Kentucky, 134 Fed. 168, 67 C. C. A. 74; Mills v. Bank of U. S., 11 Wheat. 431, 6 L. Ed. 512; Bank of Washington v. Triplett, 1 Pet. 25, 7 L. Ed. 37; Iron City Nat. Bank v. McCord, 139 Pa. 52, 21 Atl. 143, 11 L. R. A. 559, 23 Am. St. Rep. 166.

[2] It appears to us to be clear that the Golden draft was a nonnegotiable chose in action, and that, owing to the fraudulent representation of Rowe, it was given by him without consideration as between him and Golden. We are also of the opinion that plaintiff took it with the equities charged against it in the hands of Rowe (Civ. Code, §§ 1083, 1459; Wright v. Levy, 12 Cal. 257; Mohr v. Byrne, 135 Cal. 87, 67 Pac. 11), unless Golden, on some application of the principle of estoppel, is prevented from setting up those equities.

[3] It is true that where one purchases in good faith and for value a chose in action, not negotiable, from one to whom the owner has transferred the apparent ownership, he obtains a valid title against such owner, even though the person from whom he so obtained it had no title. In Thompson v.

Toland, 48 Cal. 99, it was held that the owner of mining stock, who allowed his broker to hold the certificates therefor in his own name as security for the balance due thereon—nothing appearing on the face of the certificates to indicate that the real owner had any interest therein—would be estopped from asserting his title against a purchaser in good faith and without notice. "Under such circumstances," says the court, at page 112, "the party who places another in a position to enable him to practice the fraud should suffer the loss, rather than an innocent person who deals with him on the faith of the usual indicia of ownership with which the true owner has vested him." But the circumstances of this case hardly bring it within the rule declared in those decisions. Here the plaintiff took without notice of the fraud perpetrated on Golden by Rowe; and notwithstanding the uncontradicted evidence of Golden to the contrary, the court found that the plaintiff had no actual notice that the payment by Golden was conditional. But, we think, that plaintiff parted with no value when it took the draft.

Appellant, however, contends to the contrary, and argues that by the mere receipt of the order drawn by Golden on the Hibernia Savings & Loan Society the appellant extended the time to pay Rowe's debt to it, and thereby parted with value and placed itself at a disadvantage. This contention is rested upon a long line of cases in this state holding that, where a creditor receives upon an antecedent debt already matured the note of a debtor or of a third person, payable at a future date, although the debt is not thereby extinguished, the acceptance of the new obligation payable in futuro operates as an implied extension of the time of payment of the original debt. "It extends the time for payment until the maturing of the new note, or, as it is said, 'suspends' the remedy upon the old note, but does not extinguish it." Tolman v. Smith, 85 Cal. 280, 287, 24 Pac. 743, 745, and cases cited.

But this rule applies only to that class of cases in which the new obligation is accepted by the creditor as conditional payment of the original debt, or in which the new obligation, "for the time being, at least, is to take the place of and represent the original debt. That class is distinguishable from, and not to be confounded with, the class where the creditor has accepted simply a new additional or collateral security for an antecedent debt. In the former transaction an agreement to give time may be implied, but not out of the latter transaction." Austin v. Curtis, 31 Vt. 64, 76. In the case just cited the authorities which make and illustrate the distinction between the two classes of cases are discussed at length. The distinction, however, is apparent, and based upon obvious grounds of difference. If a creditor holds a note of his debtor which has already matured, and accepts in lieu thereof a new note payable a year later, it is plain that the new note is a substitution for the old obligation, and the reasonable implication from its acceptance is that the creditor has extended the time of payment of the debt. If, on the other hand, without any idea of substituting it for the old debt, or of treating it as a payment, conditional or otherwise, until collected, a creditor accepts from his debtor the check or order of a third person, payable in futuro, or any instrument offered and received merely to further assure or secure payment of the debt, it would do violence to the intent of the parties to hold that, by the acceptance of such additional security, the creditor has extended the primary debt, and cannot collect from his debtor until his security has matured.

A class of cases in which this distinction is frequently drawn is that in which a surety contends that he has been released by the extension of the debt without his consent. In those cases it is held that there is no extension of time to the principal to be implied "merely by the creditor taking a new security maturing after the debt becomes due, such as a mortgage, a guaranty, a warrant of attorney to confess judgment, or an order of a third person; nor is an extension effected by taking a bond or note of the principal as collateral security, or a note or bill of exchange of the principal for the purpose of having the proceeds thereof, when obtained, applied on the original indebtedness, although such action has been taken by the principal with the expectation that the creditor will refrain from pressing him for immediate payment." 32 Cyc. 211, and numerous cases cited.

As already said, the facts of the present case show plainly that the order of Golden on the Hibernia Bank was not received by plaintiff from Rowe as in any way substitutional for the original debt, or as anything but additional security, the proceeds of which, when collected, were to be applied on the debt. No credit was allowed by the bank to Rowe at the time it received the order and passbook of Golden. It intended to apply the money on the debt when collected, and not before. Collection of the order could not be enforced for 30 days, but not because any of the parties desired to postpone its payment for that time, nor because it was made in pursuance of any agreement for a 30 days' extension of time. The sole reason was that the savings bank had availed itself of the right to require 30 days' notice of withdrawals. Under these circumstances we do not think that from the mere receipt of the order any agreement to extend the time of payment can be implied, and we are of the opinion that no such extension resulted as a matter of law from the transaction.

Even, however, if it could be held that, regardless of the intention of the parties, such an extension resulted as a matter of law, we would, nevertheless, be inclined to hold that this would not suffice to show that plaintiff has suffered any prejudice which would entitle it to rely upon the rule protecting that one of two innocent parties who had suffered through the fraud of a third person clothed with the apparent ownership by the other innocent party. A similar question was presented in Ingenhuett v. Hunt, 15 Tex. Civ. App. 248, 39 S. W. 310. In that case Hunt owed the plaintiff a certain sum, which was overdue, and Hunt and his sister executed a note payable three years after date for the amount of the debt. To secure this new note, the sister executed a mortgage on certain land, which it was claimed by the intervener was held by her as trustee for him. The court, after holding that the trust in the land had been shown, next considered whether the plaintiff could be protected as a lienholder without notice, who had parted with value. After observing that the note extended the time of payment for three years on its face, the court conceded that "where a mortgage is given to secure a past-due indebtedness, and as a consideration entering into the transaction the time of payment is extended, the lienholder is protected against unknown equities for the reason that he has, by contract, parted with a valuable right" (citing cases). The opinion, however, continues: "An extension may not be contracted for, and yet given. According to the testimony of S. P. Hunt and Mrs. Hunt, nothing was said about an extension, and the note and mortgage were signed as presented to them by appellant's agent, and there was no other consideration for the note and deed of trust than the past indebtedness, and the sole purpose of the transaction was to secure appellant's demand. In other words, the fair inference from this testimony is that the note and mortgage were executed without reference to further time. If this were so, we believe the case would not come within the rule above expressed. If, without any arrangement or stipulation for that purpose, the giving of time by drawing the note payable at three years was the gratuitous act of the appellant, not induced or asked by defendants, he could not say that he had, through contract, suspended or surrendered his right to enforce payment of the account."

The facts of this case are even stronger. Here the order on its face was payable at once. If collection could not be at once enforced, it was not because any of the parties desired to postpone its maturity, but because, under unusual circumstances, the Hibernia Savings & Loan Society had availed itself of its right to require notice of withdrawals. As in the Texas case, therefore, the order was accepted "without reference to further time," and under circumstances from which no agreement for the extension of time of the principal debt can be implied, or from which equity would raise an estoppel. It may well be that the practical effect of the transaction was to assure Rowe that the bank would not press him for an immediate payment, but this was not because of any agreement for extension, nor because the bank, by receiving the order, had "suspended" its remedy on his debt. "If the new security is but additional and collateral to the old, I think it may well be said that the effect of taking the new security on time does not prove a promise to give time, but doubtless may furnish ground for an expected indulgence which the principal debtor is bound to treat as being at all times countermandable at the will of the creditor." Austin v. Curtis, supra.

Indeed, in every case where a new source of payment is given to a creditor, "not in lieu of or suspension of the old notes, but in addition to them, as a further security," the debtor may reasonably expect not to be pressed for payment until the security is realized upon; but in such case he trusts, "not to any legal change in the rights and remedies of the plaintiff's on the old notes, but to such indulgence as creditors are likely to grant when they feel assured of ultimate payment." Dodson v. Taylor, 56 N. J. Law, 11, 28 Atl. 316. The evidence supports the findings, and the findings, in turn, sustain the judgment.

The judgment and order are therefore affirmed.

We concur: LENNON, P. J.; HALL, J.

(19 Cal. App. 548)

GARDNER et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

(Civ. 1,194.)

(District Court of Appeal, Second District, California. July 23, 1912.)

1. Indictment and Information (§ 3*)—Offenses Under Juvenile Court Act—Practice.

Pen. Code, § 682, providing "every public offense must be prosecuted by indictment or information, except * * * 4. All misdemeanors of which jurisdiction has been conferred on superior courts sitting as juvenile courts"—but not providing any mode of procedure as to the excepted cases, does authorize trial by the superior court, sitting as a juvenile court, on a complaint filed in such court, for the misdemeanor which Juvenile Court Act (St. 1911, p. 672) § 26 defines and provides that the juvenile court shall have jurisdiction of, as, even if Code Civ. Proc. § 187, providing that a court having jurisdiction to try a case may adopt any suitable mode therefor conformable to the spirit of the Code, applies, such provision is limited to those cases where no course of procedure is pointed out by the Code or some statute; and Pen. Code, § 888, designates a complete mode of procedure by providing that all public offenses triable in the superior court must be prosecuted by indictment or information, except as provided in section 889, which refers only to accusations filed in the superior court for removal of officers.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 9–23; Dec. Dig. § 3.*]

2. STATUTES (§§ 76, 98*)—SPECIAL LAWS—PRACTICE OF COURTS.

Pen. Code, § 682, subd. 4, added by St. 1911, p. 68, if construed as authorizing prosecutions on a complaint filed in the superior court of misdemeanors of which jurisdiction has been conferred on superior courts, sitting as juvenile courts, while a general law (section 888) provides for all prosecutions in the superior court being on indictment or information, contravenes Const. art. 4, § 25, subd. 3, prohibiting special laws regulating the practice of courts of justice, and also subdivision 33, prohibiting special laws when a general law can be made applicable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½, 78½, 110, 111; Dec. Dig. §§ 76, 98.*]

3. PROHIBITION (§ 3*)—REMEDY BY APPEAL.

Though a trial for a misdemeanor on a complaint filed in the superior court would be beyond its jurisdiction, prohibition will not lie; there being an adequate remedy by appeal from any adverse judgment on the prosecution.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4–19; Dec. Dig. § 3.*]

Petition by John D. Gardner and another for writ of prohibition to the Superior Court of Los Angeles County and Curtis D. Wilbur, Judge. Writ denied.

Charles S. McKelvey, of Los Angeles, for petitioners. J. D. Fredericks, Dist. Atty., and H. S. G. McCartney, Deputy Dist. Atty., both of Los Angeles, for respondents.

SHAW, J. [1] This is an application for a writ of prohibition to prevent the superior court, sitting as a juvenile court of Los Angeles county, from proceeding further in the trial of an action wherein the people of the state constitute the plaintiff, and the petitioners are defendants. The action was instituted by filing a verified complaint in said court, charging petitioners with the commission of the misdemeanor defined by section 26 of the juvenile court act. Stats. 1911, p. 672. The right to the writ is based upon the claim that the verified complaint filed in the superior court was insufficient to give the court jurisdiction to try petitioners for the offense charged therein.

Section 26 of the juvenile court act, which defines the misdemeanor in question, provides that "the juvenile court shall have jurisdiction of all such misdemeanors." Section 682 of the Penal Code provides: "Every public offense must be prosecuted by indictment or information, except: 1. Where proceedings are had for the removal of civil officers of the state. 2. Offenses arising in the militia when in actual service, and in the land and naval forces in time of war, or which the state may keep, with the consent of Congress, in time of peace. 3. Offenses tried in justices and police courts. 4. All misdemeanors of which jurisdiction has been conferred upon superior courts sitting as juvenile courts." Subdivision 4 was added by the amendment of 1911. St. 1911, p. 68. It is under and by virtue of this last subdivision of section 682 that respondents claim the right to prosecute petitioners upon the complaint filed in the superior court. Petitioners, however, contend that the exception provided by subdivision 4 is unconstitutional, in that it is repugnant to subdivisions 3 and 33 of section 25, art. 4, of the Constitution, which provide: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Third. Regulating the practice of courts of justice. * * * Thirty-third. In all other cases where a general law can be made applicable." While section 682 provides that every public offense, except those enumerated in subdivisions 1, 2, 3, and 4, must be prosecuted by indictment or information, it does not make, or purport to make, any provision for the prosecution of cases falling within the enumerated exceptions. The section is permissive in declaring that such prosecutions need not be by indictment or information; but it does not in terms forbid the same, or define any other mode of practice for the cases so excepted. Other sections of the Code, however, prescribe the pleadings and procedure to be followed in cases classed as 1, 2, and 3; but nothing in the juvenile act, nor in the Penal Code, other than section 888 thereof, purports to provide a procedure for the prosecution of the misdemeanor with which petitioners are charged. While section 1426, Penal Code, authorizes the prosecution of misdemeanors in justices' courts upon a verified complaint, we find no like provision which in terms authorizes a prosecution in the superior court upon such pleading. Hence it follows that if it cannot be prosecuted by indictment or information, as provided by section 888, the law in terms makes no provision for the trial of such cases. Assuming that section 187, Code of Civil Procedure, applies, which application may be doubted under section 31, Code of Civil Procedure, nevertheless the provision therein, that a court vested with jurisdiction to try a case may adopt any suitable mode therefor conformable to the spirit of the Code, is limited to those cases where no course of procedure is pointed out by the Code or some statute. Section 888 specifically points out and designates a complete mode of procedure. It expressly provides that "all public offenses triable in the superior courts must be prosecuted by indictment or information, except as provided in the next section," which next section refers to accusations filed in the superior court for the removal of officers in accordance with sections 758 and 759, Penal Code.

[2] In our opinion, subdivision 4 of section 682 cannot be construed as authorizing the

prosecution and trial of petitioners on a verified complaint filed in the superior court. Moreover, such interpretation given the section would, in our judgment, render it repugnant to subdivision 3 of section 25, art. 4, of the Constitution, prohibiting the Legislature from passing special laws "regulating the practice of courts of justice," as well as render it obnoxious to subdivision 33 of said section, which prohibits the passage of a special law "where a general law can be made applicable." Not only does a general law exist (section 888) which is applicable to the prosecution of all misdemeanors, jurisdiction of which is vested in the superior courts, but the provision accepting the interpretation of subdivision 4, § 682, as construed by respondents to authorize a prosecution of misdemeanors arising under section 26 of the juvenile act by complaint, is an attempt to provide and apply to such cases a special and different procedure than that prescribed by general law for the prosecution of like misdemeanors triable in the superior court. In the present case there is no conceivable reason why the prosecution of the misdemeanor in question should not be subject to the general rules in regard to pleadings and procedure made applicable to all misdemeanors triable in the superior court. City of Tulare v. Hevren, 126 Cal. 226, 58 Pac. 530, and cases cited. In the case of Edgington v. Superior Court, 124 Pac. 450, the petitioner was charged with a like misdemeanor as that here involved, and prosecuted under an information filed after a preliminary examination was accorded him. He asked for a writ of prohibition, upon the ground that the filing of the information was insufficient to give the court jurisdiction to try the case, claiming that the action should be commenced by the filing of a verified complaint. The court denied the writ and, for reasons other than those which appeal to us, held that the filing of the information was sufficient to vest the court with jurisdiction to try the case. In the Mills Sing Case, 13 Cal. App. 740, 110 Pac. 694, this court said: "The juvenile act making the offense under consideration triable in the superior court, section 888 of the Penal Code applies, which provides that all public offenses triable in the superior court must be prosecuted by indictment or information, except as to accusations for the removal of certain officers. Section 809 of the Penal Code directs the filing of an information after commitment by a magistrate; and section 950, Penal Code, specifies what such information must contain. It follows, therefore, that the preliminary examination and commitment are precedent conditions to the information upon which, and upon which only, can the superior court proceed to try one charged with a public offense, even though it be a misdemeanor." In our judgment, the verified complaint filed in the superior court is insufficient to give the court jurisdiction to try petitioners for the offense charged. The prosecution in such case must, as required by section 888, Penal Code, if not by indictment, be conducted under an information, as a prerequisite to the issuance of which the accused is entitled (section 8, art. 1, of the Constitution) to a preliminary examination and commitment, provision for which is made in sections 858 and 883 of the Penal Code, and which is applicable alike to the misdemeanor with which petitioners are charged, as well as to all others, jurisdiction to try which is vested in the superior court.

[3] The writ of prohibition, however, will not issue for want of jurisdiction alone. It must be made to appear that the petitioner applying therefor is without any "plain, speedy and adequate remedy in the ordinary course of law." Section 1103, Code Civ. Proc. Conceding, therefore, that a trial of petitioners, if had upon the verified complaint filed in the superior court, would be in excess of the court's jurisdiction, it does not follow that they would be entitled to the writ prayed for. They would have an adequate remedy by appeal from any adverse judgment rendered against them. This being true, the want of jurisdiction, in the absence of facts or circumstances showing the inadequacy of the remedy by appeal (Ophir Silver Min. Co. v. Superior Court, 147 Cal. 478, 82 Pac. 70; Craycroft v. Superior Court, 124 Pac. 1042), does not entitle them to the writ. Lindley v. Superior Court, 141 Cal. 220, 74 Pac. 765.

The writ is, therefore, denied.

We concur: ALLEN, P. J.; JAMES, J.

19 Cal. App. 562

SACRAMENTO TERMINAL CO. v. McDOUGALL. (Civ. 984.)

(District Court of Appeal, Third District, California. July 29, 1912. Rehearing Denied by Supreme Court Sept. 27, 1912.)

1. EMINENT DOMAIN (§ 124*)—DAMAGES—ACCRUAL — TIME — STATUTES — APPEAL —"AFFECT."

Code Civ. Proc. § 1249, prior to the amendment of April 10, 1911, provided that in condemnation proceedings the right to damages should be deemed to have accrued at the date of the summons, and the actual value at that date should be the measure of compensation. By St. 1911, p. 842, the section was amended by adding a proviso that if the issue is not tried within one year after the commencement of the action, unless the delay is caused by defendant, the compensation and damages shall be deemed to have accrued at the date of the trial, but that nothing in the section contained should be construed to affect pending litigation. *Held*, that the word "affect" was used in the proviso in its ordinary significance as meaning "to influence," "to produce an effect upon," "to act upon," and hence the amendment did not repeal the section as it previously existed with reference to pending litigation, so that in such a proceeding in which the trial was had within a year from the time of the filing of the complaint the damages were properly assessed as of the date of the summons.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332–344; Dec. Dig. § 124.*

For other definitions, see Words and Phrases, vol. 1, pp. 238, 239.]

2. EMINENT DOMAIN (§ 71*)—STATUTES—VALUE OF PROPERTY—DATE.

Code Civ. Proc. § 1249, as amended by St. 1911, p. 842, in so far as it authorizes the fixing of compensation or damages in condemnation proceedings as of the date of the summons, is not unconstitutional.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 180–187; Dec. Dig. § 71.*]

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Condemnation proceedings by the Sacramento Terminal Company against D. McDougall, as administrator, etc. Judgment for plaintiff, and defendant appeals. Affirmed.

H. B. Bradford, B. F. Driver, and White, Miller & McLaughlin, all of Sacramento, for appellant. Chas. W. Slack, of San Francisco, and Arthur Seymour, of Sacramento, for respondent.

BURNETT, J. The action is in eminent domain. The complaint was filed and summons issued on October 21, 1910, and the action was tried before a jury September 21, 1911, resulting favorably to plaintiff. The only question involved on the appeal is as to the date at which the value of the property was to be determined. Defendant sought to interrogate witnesses as to the value of the property at the time of the trial, and requested the court to instruct the jury that they should find its value at that time as damages to be allowed the defendant, but the court adopted the theory that the law fixed the date of the issuance of the summons as the time to which the inquiry should be directed. The contention of appellant grows out of the consideration that section 1249 of the Code of Civil Procedure was amended on April 10, 1911, while the present action was pending. Prior to said amendment the section read: "For the purpose of ascertaining compensation and damages the right thereto shall be deemed to have accrued at the date of the summons, and the actual value at that date shall be the measure of compensation." The section as amended (Stats. 1911, p. 842) provides that: "Section twelve hundred and forty-nine of the Code of Civil Procedure is hereby amended to read as follows: For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be deemed the measure of compensation for all property to be actually taken * * * Provided, that in any case in which the issue is not tried within one year after the date of the commencement of the action, unless the delay is caused by the defendant, the compensation and damages shall be deemed to have accrued at the date of the trial. Nothing in this section contained shall be construed or held to affect pending litigation." It is to be observed that, under the operation of said amended statute, the rule still applies requiring the determination of the value as of the date of the summons except where the action is not tried within one year. The present action is not within the exception since the trial was had within one year from the time of the filing of the complaint. It is therefore clear that, under the application of said section 1249, as it was either prior or subsequent to said amendment, the position taken by the court below must be sustained. It is urged, however, by appellant, that since the Legislature repealed the old section 1249 and substituted the new section 1249 and therein excepted from its operation pending actions, as to such actions there is no statutory rule, and that, under a fair construction of the constitutional provision that "private property shall not be taken or damaged for public use, without just compensation having first been made to or paid into court for the owner," it should be held that "just compensation means value at the time when right to take and quantity to be taken is determined by trial on issues tendered, and not fictional arbitrary time when nothing is or can be taken, and the right to take lies in mere assertion, the action betimes being dismissable according to the caprice of plaintiff."

[1] It must be admitted that counsel for appellant in arguing for their contention have displayed no little industry and ingenuity. We are however convinced that the legislative intent, as manifested in said amended section 1249, was not to disturb the law of damages as it had theretofore existed as far as "pending" actions are concerned. It may be conceded that such legislative intent could have been more aptly expressed, but it is believed that the only reasonable construction of the section is as contended for by respondent. In other words, the clause in controversy operates as a "saving clause." The effect of it is to preserve in force the previous statute as far as pending litigation is concerned. It prevents the law from being retroactive. When the Legislature declared that "nothing in this section contained shall be construed or held to affect pending litigation," it simply meant that the section was not designed to change the existing order of things as to such cases. Appellant's construction of the word "affect," as pointed out by respondent, would attribute to it the meaning, "to lay down the law for" or "to establish rules applicable to." Hence, the clause is interpreted as though it meant: "Nothing in this section shall be construed as laying down the law for or establishing

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rules applicable to pending litigation." But we must assume that the word was used in its ordinary signification, "to influence," "to produce an effect upon," "to act upon." But it is obvious that in this sense of the term the section would "affect" pending litigation if it operated to change the law of damages in force at the time said amendment went into effect. It is equally clear that the new section would not affect "pending" litigation if the old law is applied to such litigation. It is apparent, in this connection, that the amended section would affect pending litigation whether it simply repealed the existing law in relation thereto or provided another law for the control of such litigation. An illustration of the extremity to which appellant's contention would lead is furnished by respondent as follows: "Section 8 of the Code of Civil Procedure prescribes that 'no action or proceeding commenced before this Code takes effect, and no right accrued, is affected by its provisions.'" Section 6 of the Civil Code is of the same import. "According to the owner's contention, if an action had been started before the Civil Code took effect on a right theretofore given by statute and the statute had been superseded by the provisions of the Code which had made no changes in the law, the right of the plaintiff would have been destroyed, because the statute upon which his right was founded has been repealed and section 6 of the Civil Code provided that 'no action or proceeding commenced before this Code takes effect, and no right accrued is affected by its provisions.' There was, therefore, no law under which the plaintiff could have proceeded. The fallacy of such a construction and course of reasoning is apparent. What purpose would section 6 of the Civil Code fill if construed according to the owner's theory? The result of giving the section such a construction would have been to destroy utterly all rights and proceedings pending at the time of the adoption of the Code, although it is plain that the Legislature intended by this very section to save them all."

It would seem that the citation of any authority is hardly needed in support of respondent's position. We may refer, though, to two cases to which attention is directed in the brief. In Commonwealth v. Bennett, 108 Mass. 30, 11 Am. Rep. 304, the repealing statute provided that "nothing contained in this act shall affect any prosecution now pending or any penalty or forfeiture already incurred under the provisions of any law in force prior to the passage of this act." The court held that the repealing statute contained a saving clause which prevented the operation of the repeal and continued the repealed law in force as to all cases to which it referred. The same result is reached, though by a somewhat different train of reasoning, in the case of People v. Sutter Street Ry. Co., 117 Cal. 604, 49 Pac. 736. There the saving clause in the amendatory act was: "Provided further that this act shall not affect any franchise or right of way granted before its passage." In the opinion it is declared that "the effect, then, of the provision above quoted is that the new provisions do not affect existing franchises; that as to them the board cannot extend the time for completion. But the clause declaring the forfeiture has not been repealed." It can obviously make no possible difference here whether we accept as technically sound the statement of the court in said case, quoting from Ely v. Holton, 15 N. Y. 598, that "the portions of the amended section which are copied without change are not to be considered as repealed and re-enacted, but to have been the law all along." In that view, as we have seen from a comparison of the old section and the new, the law governing the present case was correctly declared by the lower court. But, accepting the principle of a repeal and re-enactment, it is clear from the saving clause that there was no repeal as to pending litigation.

We need not consider the further contention of respondent that, "even if there were no statute applicable at all the rule applied is the general rule existing in the absence of statute."

[2] The interesting argument of appellant to the point that a statute fixing the date of the issuance of the summons as the time for the determination of the value of the property is unconstitutional we may also pass by for the reason stated in Los Angeles v. Gager, 10 Cal. App. 378, 102 Pac. 17, that "the Supreme Court of this state has, since 1882, repeatedly and uniformly held to the contrary. California Southern R. Co. v. Kimball, 61 Cal. 90; Tehama v. Bryan, 68 Cal. 57 [8 Pac. 673]; San Jose, etc., Ry. Co. v. Mayne, 83 Cal. 566 [23 Pac. 522]; City of Santa Ana v. Brunner, 132 Cal. 234 [64 Pac. 287]; Pacific Coast Ry. Co. v. Porter, 74 Cal. 261 [15 Pac. 774]; Los Angeles v. Pomeroy, 124 Cal. 597 [57 Pac. 585]."

We think the ruling of the lower court was clearly correct, and the judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

19 Cal. App. 555

PEOPLE v. WHITE. (Cr. 247.)

(District Court of Appeal, Second District, California. July 25, 1912. Rehearing Denied Aug. 24, 1912; Denied by Supreme Court Sept. 23, 1912.)

1. Arson (§ 37*)—Evidence—Sufficiency.

Evidence *held* to justify a conviction of arson.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 71–73; Dec. Dig. § 37.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

2. Criminal Law (§ 478*)—Evidence—Expert Testimony.

A dealer in new and secondhand furniture is competent to testify to the fair cash market value of furniture installed in a house; and the mere fact that his examination of the furniture was limited goes to the weight of his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 478.*]

3. Arson (§ 34*)—Evidence—Admissibility.

Where, on a trial for arson, the evidence showed that accused took out fire policies on his furniture for $1,500, while the market value thereof was only $275, and there was nothing to show that the property possessed a special value by reason of being installed in his home, the market value was a circumstance bearing on his guilt.

[Ed. Note.—For other cases, see Arson, Cent. Dig. §§ 59–69; Dec. Dig. § 34.*]

4. Criminal Law (§ 1172*)—Harmless Error—Erroneous Instructions.

Where, on a trial for arson, the evidence conclusively showed that the fire was of incendiary origin, a charge that, to constitute a burning, it was not necessary that the building set on fire should be destroyed, but it was sufficient that the fire was applied so as to take effect on any part of the substance of the building, was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154–3136, 3169; Dec. Dig. § 1172.*]

5. Witnesses (§ 268*)—Cross-Examination—Scope.

Where, on a trial for arson, a witness testified that a day or two before the fire she loaned accused coal oil, an objection to a question on cross-examination, as to whether she had any vinegar in the house, was properly sustained, though accused could show, on cross-examination, that the witness was mistaken in loaning coal oil instead of vinegar.

. [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948; Dec. Dig. § 268.*]

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Robert F. White was convicted of arson, and he appeals. Affirmed.

Paul W. Schenck, Roland G. Swaffield, and John G. Munholland, all of Los Angeles, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

SHAW, J. Defendant was convicted of the crime of arson. He appeals from the judgment and an order of court denying his motion for a new trial.

[1] Appellant's chief contention is that the evidence is insufficient to justify the verdict. That the fire was of incendiary origin is not controverted. The evidence connecting defendant with the crime is almost wholly of a circumstantial nature. It tends to establish the following facts: That in September preceding the fire, which occurred on the night of November 30, 1911, defendant, by an assignment, acquired the lease of certain premises conducted as an apartment and lodging house, for which he agreed to pay $60 per month; that he bought from the prior occupant thereof the furniture contained therein, the market value of which was $275; that on October 19th he took out a fire insurance policy on the furniture for $1,000, and on November 15th caused another policy thereon to be issued in the sum of $500; that on the night of the fire the apartment in which it was started by breaking a hole in the plaster and inserting paper saturated with coal oil was unoccupied; that the prior occupant thereof had rented it for seven months from October 1st at $27.50 per month, but at the repeated request of defendant surrendered possession thereof to defendant on November 28th; that defendant claimed that he had rented the apartment to a man named Collins at $50 per month; that Collins paid one month's rent in advance, but never took possession of the house, nor called for a return of the payment; that defendant never saw Collins after he made the payment. These and numerous other circumstances, amoung them being the conflicting stories concerning his transaction with Collins, the fact that the business was not profitable, and that defendant, a day or two before the fire, borrowed a cup of coal oil from a neighbor, all tended to establish facts from which the jury were justified in concluding that defendant committed the crime.

[2, 3] A dealer in both new and secondhand furniture, called as a witness on behalf of the people, after stating that he knew the fair cash market value of the property which defendant had in the apartment, was asked to state such value. Defendant's objection to this question, upon the ground that it was incompetent and irrelevant, was overruled. Appellant claims that the cross-examination of the witness showed that he was not sufficiently acquainted with the various articles of furniture to testify as to their value; and, further, that the question should have been directed to the value of the property as a whole installed as an equipment of the house. The limited examination of the property made by the witness, as shown by the cross-examination, and upon which he based his opinion, went to the weight rather than to the competency of his evidence. In the absence of evidence that the property possessed a different or special value by reason of being installed in the house, the market value thereof, in view of the insurance obtained thereon by defendant, was a circumstance which the jury was entitled to consider in reaching their verdict. We perceive no error in the action of the court in overruling the objection.

[4] Appellant also predicates error upon the giving of an instruction as follows: "To constitute a burning, it is not necessary that the building set on fire should have been destroyed. It is sufficient that fire is applied so as to take effect upon any part of the sub-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stance of the building." It is claimed that this instruction assumes a fact the existence of which was a question for the jury to determine. We do not think the instruction open to such contention; but, however that may be, since the evidence conclusively shows that the fire was of incendiary origin, which fact is conceded by appellant, no prejudice could result from the giving of the instruction. People v. Besold, 154 Cal. 363, 97 Pac. 871.

[5] A neighbor of defendant, called as a witness, stated that a day or two before the fire she loaned defendant coal oil. On cross-examination she was asked, "Did you have any vinegar in the house?" to which an objection interposed by the people was sustained. While the defendant, on cross-examination, was entitled to show that the witness was mistaken in loaning coal oil to defendant, and that instead of coal oil he obtained vinegar, it would by no means follow that because she had vinegar in the house she did not loan him coal oil as stated.

Other alleged errors are equally without merit as those to which we have adverted.

The record discloses no prejudicial error, and the judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

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19 Cal. App. 559

WICKLAND v. WICKLAND (two cases).

(Civ. 1,172, 1,173.)

(District Court of Appeal, Second District, California. July 25, 1912. Rehearing Denied Aug. 24, 1912; Denied by Supreme Court Sept. 23, 1912.)

1. Divorce (§ 27*)—Misconduct of Husband.

Where a husband threatened to kill his wife, and without reason accused her of infidelity and thereby inflicted on her grievous mental suffering, and by fraud and duress induced her to convey to him her separate property without any consideration, the court properly granted to her a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 62–83; Dec. Dig. § 27.*]

2. Deeds (§ 70*)—Fraud—Duress.

Where a wife was induced by fraud and threats to convey her separate property to her husband without consideration, and without anything to indicate any intention to change the separate character of the property, the court, at the suit of the wife, would set aside the conveyance.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165–182; Dec. Dig. § 70.*]

3. Cancellation of Instruments (§ 59*)—Conditions Precedent.

Where it affirmatively appeared that there was nothing due a husband, obtaining by fraud and duress a conveyance of his wife's separate property, to place him in the condition in which he was at the time of the execution of the conveyance, and any money obtained and paid out by him was obtained by mortgages on the property, the amount of which mortgages was less than the value of the property, and no personal liability attached to the husband, save for a deficiency judgment, the court setting aside the conveyance did not abuse its discretion in refusing a compensatory order under Civ. Code, § 3408, authorizing the court on rescinding a contract to require the party to whom the relief is granted to make any compensation to the other which justice requires.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 119–125; Dec. Dig. § 59.*]

4. Divorce (§ 222*)—Fees for Counsel of Wife—Allowance in Judgment.

An allowance of fees for counsel of the wife suing for a divorce cannot be made in the judgment granting a divorce.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 644; Dec. Dig. § 222.*]

Appeals from Superior Court, Los Angeles County; George E. Church, Judge.

Actions by M. Blanche Wickland against John W. Wickland for a divorce and for the cancellation of a conveyance of her separate property. From judgments for plaintiff in each action, defendant appeals. Modified and affirmed.

Wilbur Bassett, of Los Angeles, for appellant. John M. York, and Hammack & Hammack, all of Los Angeles, for respondent.

ALLEN, P. J. In both of these cases defendant appeals from the judgment rendered in plaintiff's favor, and from an order in each case denying a new trial. The first action was one for divorce and decree as to the separate character of certain property; the second was one to have such property standing in the name of defendant declared to be the separate property of plaintiff, and for the cancellation of a certain written agreement theretofore entered into between the parties with reference to a conveyance of said property. By stipulation, both of these appeals are to be heard and determined upon a single bill of exceptions.

[1, 2] The court in the divorce case found in favor of plaintiff, and found that defendant had threatened to kill plaintiff, had accused her of infidelity, which last accusation the court finds to have been without reason or cause, and that he had thereby inflicted upon plaintiff grievous mental suffering. The court further found that all of the property owned by both parties on the 24th day of March, 1910, was the sole and separate property of plaintiff; that on said date the defendant procured the signature of plaintiff to an agreement to convey all of this property to defendant, without any consideration and by duress and threats, and the court rendered its interlocutory decree granting plaintiff a divorce, with $100 attorney's fees, and finding that all of the property described in that certain agreement appearing in the bill of exceptions was the separate property of plaintiff, and that defendant had no interest therein. The second action was an independent action to cancel a certain agreement set forth in the complaint, in which certain real and personal property

was described, and for a judgment declaring all of the property therein described to be the separate property of plaintiff. Upon a trial of the action, the court found that on the 24th day of March, 1910, defendant obtained plaintiff's signature to an agreement, which was of record, without consideration and by means of threats that, unless she would sign such agreement, defendant would defame her character. The court further found that all of said property was purchased with funds which were the separate property and estate of plaintiff, that defendant had no interest therein, and rendered judgment accordingly, canceling the deed and agreement.

There is evidence in the bill of exceptions tending to establish the following facts: That plaintiff and defendant intermarried in 1894; that seven children had been born of the marriage, three of whom were living; that all of the property possessed by the parties was the fruits of certain moneys inherited by plaintiff from her father's estate; that these moneys were employed in the purchase of certain real property described in the agreement and deed; that a portion, if not all, of this property was mortgaged, the mortgages, however, being for far less than the real value of the property; that defendant became jealous of plaintiff, accused her of infidelity, made threats against her, refused to contribute anything to her support, and demanded that the ranch property be put in his name for business reasons; that plaintiff was sick, and defendant promised that if she would sign the agreement he would execute an instrument exonerating her from all charges of infidelity; that she signed the agreement, conveyed the property to him, and he thereafter placed mortgages upon the property, part of which money was paid over to plaintiff and used by her in support and maintenance and for other legitimate purposes. Defendant had no interest in any of the property in controversy, except such as he acquired by plaintiff's conveyance, and there is evidence tending to show that this was never intended to be other than placing the same in his name for business reasons, upon the theory that he could better borrow money than plaintiff could; but nothing would indicate any intention to change the separate character of the property, unless it be certain expressions in the agreement, which agreement the court finds to have been procured by fraud and duress.

[3, 4] There is ample evidence in the record justifying every finding made by the court and establishing the righteousness of the judgment in both cases. There was no error in the court failing to make an order with reference to compensation, as authorized by section 3408 of the Civil Code, for the reason that it affirmatively appears that there was nothing due him to place him in the condition in which he was at the time of the execution of the instruments. Any money obtained by him and paid out by him was obtained by mortgages upon the property, the amount of which mortgages was less than its value, and which property belonged to plaintiff and not to defendant; and no personal liability attached to him, save for a deficiency judgment, a remote possibility of which is not suggested by the record. We see no abuse of discretion in the action of the court in refusing a compensatory order. The allowance for attorney's fees was unauthorized. Lacey v. Lacey, 108 Cal. 45, 40 Pac. 1056.

We find no error in the record, and see no merit in either appeal, except as to the allowance of attorney's fees. The judgment in No. 1,172 is modified by striking therefrom the allowance of $100 attorney's fees. In all other respects the judgment and order in both cases are affirmed.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 552

Ex parte NAKANISHI. (Cr. 258.)

(District Court of Appeal, Second District, California. July 24, 1912.)

1. HABEAS CORPUS (§ 30*)—POLICE COURTS—IMPRISONMENT—AUTHORITY OF OFFICER—COPY OF JUDGMENT—TIME.

Penal Code, § 1455, relating to proceedings in justice and police courts, provides that when a judgment of imprisonment is entered a certified copy must be delivered to the sheriff, marshall, or other officer, which is a sufficient warrant for its execution. *Held* that, where a judgment of imprisonment for a misdemeanor was duly entered against defendant in a police court where he was tried, it was sufficient to justify his imprisonment; the time of the delivery of a certified copy to the officer being immaterial.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

2. CRIMINAL LAW (§ 259*)—IMPRISONMENT—JUDGMENT—CERTIFIED COPY.

St. 1901, p. 95, amended by St. 1907, p. 136, provides for a clerk in police courts in cities, who is required to keep a record of the proceedings and to issue all processes. It also declares that certified transcripts of the dockets or files of the court, certified by the clerk under the seal of the court, shall be evidence in any court of the state of the contents of such docket or files. *Held* that, under Penal Code, § 1455, providing that when a judgment of a police court directs the imprisonment of a person convicted of an offense a certified copy shall be delivered to the officer, and shall be a warrant for its execution, it is the duty of the clerk of a police court, when judgment of imprisonment has been regularly entered, unless directed by the police justice to the contrary, to forthwith make a certified copy and deliver the same to the proper officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 562–566; Dec. Dig. § 259.*]

Application of M. Nakanishi for a writ of habeas corpus. Writ discharged. Petitioner remanded.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Chas. S. McKelvey and W. H. Stevens, of Los Angeles, for petitioner. Guy Eddie, of Los Angeles, City Prosecutor, and Frank W. Stafford, of Los Angeles, Deputy City Prosecutor, for respondent.

JAMES, J. Petitioner by this proceeding seeks to secure his discharge from the custody of the chief of police of the City of Los Angeles. In his petition for the writ issued herein, he set out as ground therefor that no warrant or commitment of any kind had been issued to the chief of police directing his imprisonment, and that he was not held on any warrant of arrest, nor upon suspicion of having committed any public offense. The chief of police made return to the writ, showing that on the 19th day of June, 1912, in the police court of the city of Los Angeles, petitioner was adjudged guilty of a misdemeanor and ordered to be imprisoned in the city jail of said city for the term of 180 days. The return then recites as follows: "That at said time a representative of your petitioner was present in said court; and under the said order so made, and authority of the judgment entered by the said court, your respondent took the body of the petitioner and imprisoned him under the judgment and order of said court. A copy of which said judgment is hereto annexed." Attached to the return, and over the certificate of the clerk of the police court and the seal of said court, is a copy of the docket record made in the case in which petitioner was charged with the crime of vagrancy. This record recites that petitioner pleaded guilty to the offense charged and waived time for sentence; "whereupon it was ordered and adjudged by the court, this 19th day of June, 1912, that for said offense the said M. Nakanishi be imprisoned in the city jail of Los Angeles city for the term of 180 days, and that said defendant be discharged at the expiration of said term. H. H. Rose, Police Judge."

[1] Section 1455 of the Penal Code, referring to proceedings in justice and police courts, provides as follows: "When a judgment of imprisonment is entered, a certified copy thereof must be delivered to the sheriff, marshal, or other officer, which is a sufficient warrant for its execution." It appears by the return of the chief of police that a judgment has been regularly entered, directing the imprisonment of the petitioner in the city jail, and respondent exhibits in this court a certified copy of the complete record, including the judgment. If this judgment, as here exhibited, is sufficient as to its certification to satisfy the requirement of section 1455 of the Penal Code, above cited, then the petitioner must be remanded, because the officer has received from the court sufficient authority, evidenced in writing, to justify the detention of petitioner. It matters not when this certified record, or certified copy of the judgment, was delivered to him; for, it having been made to appear that a valid judgment was entered against petitioner, in order to authorize his imprisonment thereunder, it was only necessary for the officer to possess duly authenticated evidence of the existence of the judgment.

[2] The certified copy of the record and judgment of the police court is made by the clerk of said court; and we are satisfied that it is regular in form and altogether sufficient. The act of the Legislature providing for police courts in cities of the first and one-half class, and for officers thereof, makes provision for a clerk to serve in each department of that court, and provides that said clerks "shall keep a record of the proceedings of, and issue all processes ordered by, the city justices, or either of them, or by said police court; * * *" and further provides that "certified transcripts of the dockets or files of said court, certified by the clerk of said court under the seal of said court, shall be evidence in any court of this state of the contents of said docket or of said files, as the case may be." Stats. 1901, p. 95, Amended by Stats. 1907, p. 136. Under the provisions of the act of the Legislature referred to, the clerk of the police court, in our opinion, has authority to make a certified copy of the judgment of said court and deliver it to the officer whose duty it is to take the custody of a defendant ordered to be imprisoned. And, in our opinion, it became the clerk's duty, when a judgment of imprisonment was regularly entered, unless otherwise directed by the police judge (and no such direction appears in this record), to forthwith make a certified copy of the judgment and deliver it to the proper officer. Such a certified copy of the judgment of imprisonment entered against the petitioner herein has been made, and has been delivered to respondent, the chief of police. These facts appearing, the contention made by petitioner that he is illegally detained is completely answered.

The writ is discharged, and the petitioner remanded.

We concur: ALLEN, P. J.; SHAW, J.

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19 Cal. App. 529

PROULX et al. v. SACRAMENTO VALLEY LAND CO. et al. (Civ. 1,013.)

(District Court of Appeal, First District, California. July 22, 1912.)

1. Brokers (§ 43*)—Employment to Sell Land—Writing—Parol Evidence.

It being necessary, under Civ. Code, § 1624, declaring invalid a contract of employment to sell land, unless it be in writing, that it contain a description of the land, and parol evidence, while admissible to cure such a description therein, not being admissible to create a description not existing in it, and it being manifest, construing as a whole the letters claimed to constitute such a hiring, that they referred

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only to sales of the "G" tract, parol evidence that the employers, when using in one of the letters the phrase "a fair commission for the sale of lands which we will now take up vigorously," had in mind and intended to describe and designate the "P" tract is not admissible.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

2. BROKERS (§ 43*) — EMPLOYMENT TO SELL LAND—INVALID CONTRACT — RECOVERY ON QUANTUM MERUIT.

A contract of employment to sell real estate being declared by Civ. Code, § 1624, invalid, unless in writing, recovery on quantum meruit of the reasonable value of services in making such a sale cannot be had, in the absence of such a valid contract of employment.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 44; Dec. Dig. § 43.*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Isidore J. Proulx and another, partners as Eibe & Proulx, against the Sacramento Valley Land Company and others. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Ben F. Geis, of Willows, and Mastick & Partridge, of San Francisco, for appellants. Frank H. Gould, of San Francisco, and Frank Freeman and Charles L. Donohue, both of Willows, for respondents.

LENNON, P. J. This is an action for the recovery of a realty brokers' commission, alleged to be due under a contract whereby the plaintiffs were employed to assist in the sale of certain real estate. The case, which was tried with a jury, resulted in a judgment of nonsuit, from which the appeal is taken.

Plaintiffs' complaint, in substance, alleges that the defendants were the owners of or had options upon certain several and separate parcels of agricultural land situate in Glenn and Colusa counties, in the state of California, known as "Glenn Rancho Lands," "Packer Tract," and "Boggs Ranch Lands"; that the plaintiffs and defendants entered into a contract by the terms of which the plaintiffs, as copartners, were employed to assist in the sale of the designated lands for the agreed compensation of 2½ per cent. of all sums for which said lands, or any part thereof, might be sold with the assistance of the plaintiffs; that in accordance with such agreement the plaintiffs proceeded to and did assist the defendants in the sale of 2,000 acres of the lands mentioned at the price of $62.57 per acre, or in all the sum of $125,140; that there is due to the plaintiffs, under the terms of the contract, the sum of $3,128.50 as commissions, which the defendants refuse to pay.

The defendant the Sacramento Valley Land Company by its separate answer admitted the ownership of the lands described in the plaintiffs' complaint, but denied that there was any employment of plaintiffs to sell said lands, or that they had sold or assisted in the sale of the same.

The defendants C. M. Wooster Company and C. M. Wooster, answering for themselves denied that they owned any of the lands described in the complaint, and, while denying the execution of the precise contract pleaded admitted that they had agreed with the plaintiffs to pay them 2½ per cent. on any lands that the plaintiffs would sell for the C. M. Wooster Company, as the agent of the Sacramento Valley Land Company, which formed a part of and were included within the tract of land owned by the Sacramento Valley Land Company in Glenn county, known as "the Glenn Tract of the Sacramento Valley Land Co." The Wooster defendants denied, however that the plaintiffs, in accordance with the admitted agreement or otherwise, sold or assisted in the sale of any lands in the Glenn Rancho tract, or any other of the lands belonging to the Sacramento Valley Land Company.

It was admitted upon the trial of the case that the defendant C. M. Wooster Company was the authorized agent of the Sacramento Valley Land Company for the sale of its lands, and as such agent was duly authorized to and did contract in writing with the plaintiffs for the sale of lands in the tract of land belonging to the Sacramento Valley Land Company known and designated as the "Glenn Rancho Lands." This tract of land, however, is located exclusively in Glenn county, and is a piece or parcel of land entirely separate and distinct from the tract of land known as the "Packer Tract"; and no claim is made in this action that there is anything due to the plaintiffs from the defendants for or on account of any sale of land lying within the tract known as the "Glenn Rancho Lands."

There was some evidence offered and received at the trial in support of plaintiffs' case which tended to show that through the efforts of the plaintiffs one S. W. Funk, as the representative of the "Church of the Brethren, commonly known as the Dunkers," was induced to and did enter into a contract with the Sacramento Valley Land Company for the purchase of 2,000 acres, at the price of $62.57 per acre, of the lands known as the "Packer Tract," one portion of which tract was located in Glenn county, and the other in Colusa county. It was for the sale of these lands that commissions are claimed and sued for in this case by the plaintiffs.

The trial court granted the nonsuit upon the sole ground that the evidence adduced in support of the plaintiffs' case did not show the execution of a written contract, as required by section 1624 of the Civil Code, between the plaintiffs and the defendants for the sale of the 2,000 acres in the Packer tract, which, it is claimed, the evidence shows was brought about by the efforts of the plaintiffs.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The plaintiffs, in order to show the making and executing of a contract with the defendant Wooster Company for the sale of lands in the Packer tract introduced in evidence and relied largely, if not entirely, upon certain written correspondence which passed between plaintiffs and the Wooster Company, as agent of the Sacramento Valley Land Company.

Numerous letters, some of which were admitted in evidence and others rejected, were shown to have passed between the parties at different times; but the letter of January 18, 1905, from the Wooster Company to plaintiffs was the only one wherein the subject of employment and compensation is mentioned. This letter, it appears, was written in response to a written request made upon the Wooster Company for the payment of commissions claimed to be due the plaintiffs for past services rendered in inducing sales and procuring purchasers of lands lying in the Glenn Rancho tract. No reference was made, directly or indirectly, in the letter to the Packer tract; but after a general discussion of an apparent misunderstanding between the plaintiffs and the Wooster Company as to the exact amount of commissions previously agreed to be paid to plaintiffs for past services in inducing sales in the Glenn Rancho tract, the writer stated, in substance, that in his opinion it was but fair and right that the plaintiffs, for such sales as they had already made, should be paid a commission of 5 per cent., and then proceeded to say that "a fair commission agreement *for the sale of lands which we will now take up vigorously*, same as we have the Boggs ranch, is that sales made by you [the plaintiffs] to your own customers, that you get 5 per cent.; and when you sell to customers that we send to you, or any agents whom we have to pay, that the commission be 2½ per cent."

In reply to this letter, the plaintiffs wrote as follows: "We have carefully considered your proposition of the 18th inst. about our commissions in future and so that there will be no misunderstanding hereafter we have consented to accept your proposition of 5 per cent. and 2½ per cent. commission. There is considerable inquiry now for lands here and your land will sell readily. We will do our best for you in every instance."

Notwithstanding that neither of these letters made any reference to the Packer tract, it is claimed that the correspondence between the parties constituted a memorandum of plaintiffs' alleged contract with the Wooster Company for the sale of lands in the Packer tract sufficient to satisfy the statute of frauds.

Plaintiffs concede, as, of course, they must, that a contract of employment for the sale of real estate, to be valid, must be expressed in writing; but they insist, as we understand them, that the only essential of such a contract, aside from its formal parts, which need necessarily be expressed in writing, is the fact of employment generally for the purpose of selling real estate, and that no particular piece or parcel of land to be sold need be specifically designated or described, if the subject-matter of the contract can be ascertained by a resort to parol evidence.

[1] From this it is, in effect, argued that the clause contained in the Wooster Company letter of January 18, 1905, fixing "a fair commission for the sale of lands which we will now take up vigorously," coupled with the plaintiffs' letter of acceptance, constituted a complete and enforceable contract for the employment of the plaintiffs in the sale of any and all lands belonging to the Sacramento Valley Land Company, including the Packer tract; and that therefore the plaintiffs should have been permitted to show by parol evidence that at the time of the making of the contract the parties thereto had in mind and contemplated the sale of lands in the Packer tract.

This contention is untenable. Contracts authorizing or employing an agent or broker to sell real estate for a commission must not only be in writing and subscribed by the party to be charged (Civ. Code, § 1624), but they must also contain a description of the property to be sold, sufficient in itself, or by reference, to identify the same without the aid of parol evidence. Craig v. Zelian, 137 Cal. 105, 69 Pac. 853. While it is true generally that a contract to employ a broker to sell real estate will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold when such defect, uncertainty, or ambiguity can be cured by the allegation and proof of extrinsic facts and circumstances (Maze v. Gordon, 96 Cal. 61, 30 Pac. 962), nevertheless parol evidence cannot be resorted to for the purpose of creating a description which does not exist in the contract itself. In short, a description of land sought to be sold under a broker's contract can be cured, but not created, by parol evidence. Mendenhall v. Rose (Cal.) 33 Pac. 884; Marriner v. Dennison, 78 Cal. 202, 20 Pac. 386; Craig v. Zelian, 137 Cal. 105, 69 Pac. 853.

An apt illustration and application of the rule in this behalf is to be found in Marriner v. Dennison, supra, where it is said: "Parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus, if the description were 'my' farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were 'a' farm in Los Angeles county, it could not be rendered certain by the allegation of such extrinsic matter."

It will thus be seen that even if it be conceded that the two letters immediately under discussion may be considered and construed as a completed contract, in so far as the mere matter of the employment of the plaintiffs is concerned, nevertheless such contract was fatally defective in not describing, or at least in not attempting to describe, the particular lands which it is claimed the parties intended to be the subject-matter of the contract. It is but grasping at a straw to say, as do the plaintiffs, that the single sentence in the Wooster Company letter, which refers to "the sale of lands which we will now take up vigorously," should be isolated from its context, and that when so isolated and read in conjunction with the plaintiffs' letter it must be construed as an accepted offer to employ the plaintiffs in making sales of any and all lands, including the Packer tract, then owned by the Sacramento Valley Land Company.

The letters in question must be read and construed as a whole, and when so read and construed it is manifest that they had reference only to past and possible future sales of land in the Glenn Rancho tract; and therefore the contract, if any, arising therefrom must be limited in its scope and effect to such sales of land as were made from the Glenn Rancho tract.

In any event, it is certain that the letters here relied upon to constitute a completed contract of employment for the sale of lands in the Packer tract do not contain a reference to that tract, or attempt to designate and describe, as the subject-matter of a contract, any other lands belonging to the Sacramento Valley Land Company. As a consequence, those letters cannot be held to constitute such a contract as will satisfy the statute of frauds.

It follows from what has been said that the trial court did not err in refusing plaintiffs permission to show by parol evidence that when the Wooster Company employed the phrase "a fair commission for the sale of lands which we will not take up vigorously" they had in mind and intended to describe and designate the Packer tract.

The trial court did not err in refusing to admit in evidence the several supplementary letters between the plaintiffs and the Wooster Company, which were offered to support the claim that the letter of January 18, 1905, referred to and was intended to describe the Packer tract. None of these letters, singly or all together, or when read in connection with the initial letters of the parties, indicated or tended to make a written contract of employment to sell the Packer tract of land; and therefore they were rightly rejected.

[2] The conclusion which we have reached as to the principal point in the case necessarily disposes of the discussion found in the briefs of the parties as to whether or not, assuming the existence of a valid contract, the plaintiffs earned the commission sued for. Incidentally it may be stated that the second count of the plaintiffs' complaint is founded upon quantum meruit; but, as there was no valid contract of employment in writing, it is clear that the plaintiff is not entitled to recover the reasonable value of his services, and this phase of the case need not be further discussed or considered. McCarthy v. Loupe, 62 Cal. 299; Myres v. Surryhne, 67 Cal. 657, 8 Pac. 523; McGeary v. Satchwell, 129 Cal. 389, 62 Pac. 58; McPail v. Buell, 87 Cal. 115, 25 Pac. 266.

It seems clear to us upon the whole case that none of the evidence, admitted or rejected, which was offered in support of the plaintiffs' pleaded cause of action was sufficient to show a valid contract of employment for the sale of lands in the Packer tract, and this being so the motion for a nonsuit was properly granted.

The judgment appealed from is affirmed.

We concur: KERRIGAN, J.; HALL, J.

(19 Cal. App. 518)

KNIGHT v. BLACK et al. (Civ. 1,010.)

(District Court of Appeal, First District, California. July 22, 1912. Rehearing Denied Aug. 16, 1912; Denied by Supreme Court Sept. 20, 1912.)

1. LANDLORD AND TENANT (§ 290*)—UNLAWFUL DETAINER — RIGHT TO HAVE FOR BREACH OF COLLATERAL COVENANT.

An action in unlawful detainer will lie for a breach of collateral covenants, as well as for a breach of those which run with the land.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207-1216; Dec. Dig. § 290.*]

2. LANDLORD AND TENANT (§ 44*)—CONTRACT —"CONDITION"—"COVENANT" — CONSTRUCTION OF LEASE.

An agreement in a lease to give a chattel mortgage on personalty as security for future payments of rent is a "condition," which as a mutual agreement is binding on both parties, and a breach of which will work a forfeiture of the estate, rather than a "covenant," which binds only the covenantor, and whose breach only warrants the recovery of damages.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108-110; Dec. Dig. § 44.*

For other definitions, see Words and Phrases, vol. 2, pp. 1394-1400, 1691-1693.]

3. LANDLORD AND TENANT (§ 44*)—CONSTRUCTION OF LEASE — CONDITIONS AND COVENANTS.

Conditions in a contract of lease will be construed as covenants to avoid a forfeiture, when it can be reasonably done; but such a construction will never be indulged in, contrary to the clear intent of the parties.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 108-110; Dec. Dig. § 44.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

4. LANDLORD AND TENANT (§ 103*)—FORFEITURE OF LEASE—PROVISION OF SECURITY—SUBSTANTIAL PERFORMANCE.

Under Civ. Code, § 3275, which provides for relief from a forfeiture upon the making of full compensation, except where the party has been guilty of a grossly negligent, willful, or fraudulent breach of duty, no forfeiture of a lease may be had for the lessee's failure to comply with a provision which required the securing of future payments of rent by the execution of a chattel mortgage, where he was in good faith endeavoring to substantially perform, and offered to make a deposit of gold coin sufficient to secure, to execute a promissory note secured by a mortgage on realty, or to deliver such realty in trust, as security.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 321-327, 337-342; Dec. Dig. § 103.*]

5. LANDLORD AND TENANT (§ 290*)—NATURE OF REMEDY—RIGHT TO COUNTERCLAIM—"UNLAWFUL DETAINER."

As "unlawful detainer" is a summary remedy for the restitution of the possession of premises withheld by a tenant in violation of the covenants of his lease, and would be rendered inadequate by the interposition of the defenses usually permitted in cases at law, a defendant could not have a counterclaim or cross-action for damages for a constructive eviction.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 1207-1216; Dec. Dig. § 290.*

For other definitions, see Words and Phrases, vol. 8, p. 7189.]

6. APPEAL AND ERROR (§ 843*)—REVIEW—DETERMINING UNNECESSARY QUESTIONS.

The court, on review, will not determine the sufficiency of the evidence to support the judgment, in so far as it relates to the damages awarded, where the judgment must be reversed because of the error of the trial court in striking out an equitable defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.*]

Appeal from Superior Court, City and County of San Francisco; E. P. Mogan, Judge.

Unlawful detainer by Robert S. Knight against Henry Black and another. From a judgment for plaintiff, Henry Black appeals. Reversed and remanded.

Arthur H. Barendt, of San Francisco (Maurice Gradwohl, of San Francisco, of counsel), for appellant. Page, McCutchen & Knight, of San Francisco, for respondent.

LENNON, P. J. Respondent had judgment in the lower court as the plaintiff in an action in unlawful detainer. The defendant Henry Black has appealed from the judgment and from an order denying him a new trial. The points presented upon the appeal relate mainly to the overruling of the defendants' demurrer to the plaintiff's complaint, the sustaining of the plaintiff's demurrer to the defendants' cross-complaint, and the granting of plaintiff's motion to strike out parts of the defendants' answer.

The plaintiff's cause of action is founded substantially upon the following facts: On November 23, 1908, plaintiff leased to the defendant certain premises in the city and county of San Francisco for a period of 10 years from and after the completion of a building which plaintiff agreed to erect upon the premises. The building was completed on the 25th day of June, 1909, whereupon defendant went into possession under the terms of the lease. The lease contained some 16 covenants. Of these an alleged breach of the fourteenth, taken in connection with the sixteenth, was the basis of the plaintiff's cause of action. The fourteenth covenant of the lease reads as follows: "Fourteenth. It is further understood and agreed by and between the parties hereto that the lessee shall, immediately upon completion of the building, furnish the same with suitable furniture, bedding, and carpets that shall have a cash value of not less than three thousand ($3,000) dollars, and shall be owned by the said lessee free from all liens and incumbrances, and upon the completion of said furnishing, and within thirty (30) days after the completion of the demised premises, the said lessee shall execute to the said lessor a note and first chattel mortgage on all said furniture, bedding, and carpets for the full sum of three thousand ($3,000) dollars, to secure to said lessor the payment of all rents or other claims arising in favor of said lessor under this lease and during the entire term of same, which chattel mortgage shall be in legal form and shall contain an express covenant that none of said furniture, bedding, and carpets shall be removed from said premises during the continuance of this lease, and that the said lessee shall at all times keep the same in good order, repair, and condition." The sixteenth covenant of the lease reads as follows: "Sixteenth. It is further understood and agreed that all the covenants and agreements of the said lessee herein contained are conditions, and that in default of the lessee fulfilling any of same the said lessor may at any time thereafter at his option forfeit this lease, and that in that event any holding thereafter of the said lessee shall be construed to be a tenancy from month to month only, for the same rental payable in the same manner as hereinbefore stated." The plaintiff on August 25, 1909, gave the defendant three days' notice in writing in the alternative form, as required by subdivision 3 of section 1161 of the Code of Civil Procedure; but the defendant failed either to perform the covenant or to deliver up the possession of the property.

[1] In support of his demurrer, it is the defendant's contention that a covenant to give security for the payment of rent is collateral to the lease it accompanies, and does not run with the land, and that an action in unlawful detainer will not lie for a breach of any covenant which does not come within the technical definition of "covenants running with the land." No authority from this

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

state has been cited to us by the defendant in support of his attempted limitation of the scope and effect of the Code section under consideration, and we shall not attempt to follow counsel for the defendant in his discussion of the legal niceties and refinements which distinguish "covenants running with the land" from those that do not, but will content ourselves with saying that to hold as he contends would not only be a manifest violation of the plain purpose of the unlawful detainer act of this state, but would not accord with the views of our Supreme Court as expressed in several actions of unlawful detainer, which were sustained solely because of breaches of purely collateral covenants. Thus in the case of Silva v. Campbell, 84 Cal. 420, 24 Pac. 316, it was said, in effect, that upon the giving of the three days' notice required by subdivisions 2 and 3 of section 1161 of the Code of Civil Procedure, the summary process provided by that section will lie for a failure to perform *any condition* or covenant of the lease or agreement under which the property is held. In the case of Kelly v. Teague, 63 Cal. 68, it was expressly held in construing a statute substantially, if not entirely similar to our present unlawful detainer act, that "the right of action by a landlord against a tenant accrues upon the latter continuing in possession of the demised premises in person or by his subtenant for a neglect or failure to perform *any condition* or covenant of the lease." To the same effect is the decision in the case of Schnittger v. Rose, 139 Cal. 656, 73 Pac. 449, which involved the violation of a covenant to manufacture wine upon the demised premises from grapes raised upon the adjoining ranch of the lessor.

[2] The agreement in the present case to provide security for the payment of the rent stipulated in the lease is a condition, and not a covenant. There is a decided distinction between the creation and effect of a condition and a covenant. A condition is a qualification annexed to an estate by the grantor, upon the happening of which the estate granted is enlarged or defeated; and it differs from a covenant in this: That it is created by the mutual agreement of the parties, and is binding upon both, whereas a covenant is an agreement of the covenantor only. A breach of a condition upon which an estate is granted works a forfeiture of the estate, while a breach of a covenant is merely ground for the recovery of damages. Brown v. Chicago & N. W. R. R. Co. (Iowa) 82 N. W. 1003; Langley v. Ross, 55 Mich. 163, 20 N. W. 886. Ordinarily, in order to avoid a forfeiture, conditions in a conveyance will be construed as covenants when this can be reasonably done; but a covenant, instead of a condition, will never be implied contrary to the clear intent of the parties. Although designated in the lease as a covenant, the agreement in the present case to give security for the payment of rent must, in accordance with the express intention of the parties, be construed and considered as a condition, rather than a covenant (Kew v. Trainor, 150 Ill. 150, 37 N. E. 223), and as the language of the statute plainly includes and applies to any and every condition embodied in a lease, the question as to what is or what is not "a covenant" running with the land is not involved in the case at bar and need not now be considered. The demurrer to the complaint was properly overruled.

[3] The defendant by his answer admitted his failure, as charged in the plaintiff's complaint, to comply with the condition of the lease relating to security for the payment of the rent, but set up by way of an equitable defense facts which, if true, tend to show that, by reason of circumstances over which the defendant had no control, literal compliance with the condition was temporarily impossible. In addition, the defendant, upon this phase of the case, pleaded in his answer a tender to plaintiff of other security substantially the same to all intents and purposes as that called for in the lease, and which would have been amply sufficient, if accepted, to protect the plaintiff against any possible loss for nonpayment of rent until such time as the defendant could furnish the identical security called for by the condition of the lease.

In this behalf the defendant's answer in part alleges: "That defendant, by and with the knowledge and consent of plaintiff, entered into a contract, on or about the 12th day of July, 1909, for a lease of the premises described in plaintiff's complaint with one Ida Quinn, codefendant herein. That pursuant to said contract said Ida Quinn entered into possession and occupation of said premises on or about the 12th day of July, 1909, and ever since has been and now is in the actual possession and occupation thereof; that immediately thereupon said Ida Quinn purchased carpets and furniture of a cash value of forty-five hundred ($4,500) dollars, or thereabouts, and installed all of said carpets and furniture in said premises; and it was then and there mutually agreed by and between plaintiff and this defendant that the latter should assign to plaintiff the promissory note and chattel mortgage on said furniture and carpets given to secure said note, which the said Ida Quinn had agreed to execute in favor of defendant, and plaintiff agreed to accept the assignment of said note and mortgage in lieu of the note and mortgage as provided in the lease of said premises from plaintiff to defendant in paragraph I of this answer referred to, and the said Ida Quinn promised to execute said note and chattel mortgage in favor of this defendant, as more fully appears by the said contract of lease with her, copy of which is attached to this amended answer, marked 'Exhibit A,' and made a part hereof; that ever since the said 12th day of July, 1909, this defendant has made repeated demands upon said Ida Quinn to carry out the terms of said contract of lease, and to execute the promissory note and chattel mortgage in favor of this defendant as therein provided; but said Ida Quinn has willfully and persistently refused to perform any of the terms and conditions of said lease, and has persistently refused, though having the ability so to do, to execute in favor of this defendant the said promissory note and chattel mortgage on the carpets and furniture installed by her in said premises and hereinbefore referred to; that defendant has been obliged to commence and did commence, and there is now pending in the superior court of the state of California in and for the city and county of San Francisco, an action in unlawful detainer, in which this defendant is plaintiff and the said Ida Quinn is defendant, and said action is numbered 27,084; that the object of said action is to recover from her the possession of said premises, so that this defendant may, immediately upon his re-entry into the possession of said premises, fulfill literally the terms of the covenant referred to in plaintiff's complaint; that pending the recovery of judgment in said action against said Ida Quinn, and for the purpose of protecting plaintiff from loss by reason of the nonfulfillment of the covenant last herein mentioned and compensating him, this defendant heretofore, to wit, on or about the 28th day of August, 1909, that is to say, within three (3) days after the service on him of the notice in paragraph V of plaintiff's complaint mentioned (a copy of which, marked 'Exhibit B,' is attached to said complaint), made, executed, and delivered to plaintiff a promissory note in the sum of three thousand ($3,000) dollars, secured by a duly executed and acknowledged first mortgage on real estate of a reasonable value in excess of $6,000, lying, being, and situate in the said city and county of San Francisco, and this defendant then and there offered, if said security were not sufficient or in form agreeable to plaintiff, he would make any reasonable change or would execute in lieu thereof a deed of trust to said property, the condition of said trust being that, if this defendant failed to pay all rents or other claims arising in favor of the plaintiff under said lease, then the trustee in such deed named should convey to the plaintiff, cestui que trust in said deed named, the said property of the reasonable value of upwards of $6,000, hereinbefore referred to; that thereafter, plaintiff having refused to accept either said mortgage or said deed of trust, defendant offered, in lieu of the note and chattel mortgage in said lease prescribed, to deposit gold coin of the United States to the amount of $3,000 in any bank of the said city and county of San Francisco selected by plaintiff, there to remain as security for the purposes hereinbefore mentioned, and defendant herein, hereby expressly tenders the sum of $3,000 gold coin of the United States to plaintiff as security for the performance of the covenant herein referred to, and alleges that he has been ever since the 28th day of August, 1909, ready, and now is ready, to make said deposit."

The trial court granted plaintiff's motion to strike out the essential parts of the quoted portion of the defendant's answer upon the theory, apparently, that a literal compliance with the condition of the lease, notwithstanding that its breach involved a forfeiture, was absolutely essential to the life of the lease and the estate granted thereunder, and that a substantial compliance with the condition could not be pleaded or considered as a valid defense to the action. This, we think, was error, which subsequently and necessarily resulted in prejudice to the defendant by the exclusion of proffered testimony which would have been material and relevant to the issue presented by this defense.

[4] By this action the plaintiff is seeking to have a forfeiture declared because of the alleged default in a condition of the lease, and although the remedy provided by law for the breach of such a condition is summary in principle and process, nevertheless the very nature of the action, involving, as it does, a forfeiture, appeals to the equity side of the court, and in turn requires "a full examination of all of the equities involved to the end that exact justice be done." Gray v. Maier, etc., Brewery, 2 Cal. App. 653, 84 Pac. 280. The law abhors a forfeiture, and therefore will ordinarily be satisfied with a substantial compliance of a condition involving a forfeiture, when its literal fulfillment is prevented by uncontrollable circumstances. Civ. Code, § 3275; Oil Creek Co. v. Atlantic, etc., Ry. Co., 57 Pa. 65; Steele v. Branch, 40 Cal. 3; Taylor on Landlord and Tenant, § 289, p. 355. Clearly the proffered substitution of gold coin equal in amount to the value of the furniture required to be installed by the condition of the lease would have been, not only a substantial compliance with the condition, but would have afforded plaintiff security for his rent equal to, if not greater than, that which would have resulted from a literal compliance with the condition as it was written. United States gold coin is not very likely to depreciate in value—at least not from ordinary wear and tear, as would the furniture of an apartment house, even though repaired and replenished from time to time.

Time evidently was not intended by the parties to be the essence of the obligation in suit, and, notwithstanding the delay in its literal performance, it is apparent that it was capable of exact and entire compensation. Defendant's offer of substantial performance presumably was made in good faith and apparently in such a manner as was most likely under the circumstances to benefit the plaintiff, and inasmuch as the defendant endeavored by every means within his power to give the exact security called for, and in addition offered, in apparent good faith, to protect the payment of the rent due or to become due under the lease, by giving security therefor equal to, if not better than, that originally contracted for, equity should not and will not permit a forfeiture. Jones on Landlord and Tenant, p. 569, § 491; Steele v. Branch, supra; Civ. Code, §§ 1492–1495.

The case of Lundin v. Schoeffel, 167 Mass. 465, 45 N. E. 933, is akin to and very nearly supposes the facts in the case at bar. There, as here, the lessee had failed to give security for the future payment of rent, and in that case the court said: "If the lessee's failure had been an omission to pay rent promptly as it became due, it is plain that a court of equity might relieve against a forfeiture on this ground, though the omission was even willful. But lessee's failure in this case was merely an omission to pay promptly something which was only useful to the lessor by way of security for the future payment of rent. It was not like a case where the omission caused a person injury or increased the risk to the lessors, as in the case of waste, nonrepair, or noninsurance. In such a case a court of equity is not required to refuse relief against a forfeiture, but may look into the circumstances and determine whether, on the whole, it is just and right that such relief should be granted." The reasoning of this case applies with equal force and aptness to the facts pleaded by way of an equitable defense in the present case, and it is in line generally with the weight of authority bearing upon the subject under discussion.

[5] The defendant by way of cross-complaint sought to recover damages against the plaintiff for an alleged constructive eviction. The trial court sustained plaintiff's demurrer thereto upon the theory that a counterclaim or cross-complaint was not permissible in an action in unlawful detainer. This demurrer, we think, was properly sustained. It is the law in this state, and also in other jurisdictions where unlawful detainer statutes are in terms or essentially similar to our own, that a counterclaim or cross-complaint of any kind or character is neither proper nor permissible in actions in unlawful detainer. Warburton v. Doble, 38 Cal. 619; Kelly v. Teague, supra; Moroney v. Hellings, 110 Cal. 219, 42 Pac. 560; Ralph v. Lomer, 3 Wash. 401, 28 Pac. 760; Phillips v. Lodge, 8 Wash. 529, 36 Pac. 476; Owens v. Swanton, 25 Wash. 112, 64 Pac. 921; Peterson v. Kreuger, 67 Minn. 449, 70 N. W. 567; Abrams v. Watson, 59 Ala. 524; McSloy v. Ryan, 27 Mich. 110; Borden v. Sackett, 113 Mass. 214. The California cases here cited upon the subject of a counterclaim or cross-complaint in unlawful detainer actions in each instance rest the decision upon the mere statement of the rule in this behalf, without pretending to give the reason for its creation and application. The reason, however, is obviously to be found in the fact that the unlawful detainer act was intended to provide a summary remedy for the restitution of the possession of premises withheld by tenants in violation of the covenants of their lease, which remedy would be frustrated and rendered wholly inadequate by the interposition of the defenses usually permitted in ordinary cases at law. Phillips v. Lodge, supra.

[6] It follows from what has been said that the trial court did not err in sustaining the demurrer to the cross-complaint, or in refusing to permit the introduction of testimony to support the allegations of the same. Inasmuch as the judgment must be reversed and the cause sent back for a new trial, because of the error of the trial court in striking out the equitable defense pleaded by the answer of the defendant, it is neither necessary nor proper for us to review the evidence and express an opinion as to its sufficiency to support the judgment in so far as it relates to the damages awarded to the plaintiff. The rulings of the trial court rejecting evidence bearing upon the issue of the defendant's offer of a substantial compliance with the condition of the lease are complained of; but as they were made and based upon the erroneous assumption that such a defense could not be properly pleaded and proven, what we have said with reference to the order of the court striking out parts of the defendant's answer applies with equal force to the rulings complained of, and doubtless they will not be repeated upon another trial, with the pleadings restored to their normal condition.

For the reasons stated, the judgment and order appealed from are reversed, and the cause remanded to the lower court for a new trial.

We concur: KERRIGAN, J.; HALL, J.

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19 Cal. App. 414

PEOPLE v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (Civ. 995.)

(District Court of Appeal, First District, California. July 12, 1912. Rehearing Denied by Supreme Court Sept. 10, 1912.)

1. CORPORATIONS (§ 80*)—SUBSCRIPTIONS OBTAINED BY FRAUD—STOCKHOLDERS' REMEDIES.

A person induced to purchase stock from a corporation by fraud is not prevented from rescinding the contract by the subsequent insolvency of the corporation and the appointment of a receiver, where creditors have not given credit to the corporation on the faith of that sale.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244–265; Dec. Dig. § 80.*]

2. CORPORATIONS (§ 80*)—SUBSCRIPTIONS OBTAINED BY FRAUD — STOCKHOLDERS' REMEDIES.

If a person, induced to subscribe for corporate stock by fraud, neglects for an unreasonable time after the discovery of the fraud to have the subscription canceled, and in the meantime the interests of third parties become involved which would be injured by the cancellation, the cancellation will be denied for laches, especially in view of Civ. Code, § 1691, providing that a person desiring the rescission of a contract must rescind promptly.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244–265; Dec. Dig. § 80.*]

3. CONTRACTS (§ 270*)—RESCISSION — LACHES —QUESTIONS FOR JURY.

Whether a party seeking a rescission of a contract acted promptly is a matter of fact to be determined by the proof, unless the pleadings on their face show laches.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1189, 1200; Dec. Dig. § 270.*]

4. CORPORATIONS (§ 80*)—SUBSCRIPTIONS OBTAINED BY FRAUD — STOCKHOLDERS' REMEDIES.

A complaint, in an action for a rescission of a contract for the purchase of corporate stock for fraud, alleging the purchaser's ignorance of the insolvency of the corporation, and that its officers repeatedly represented it to be in a flourishing condition, does not show such laches as will defeat a rescission, although it shows that 16 months intervened between the purchase and the adjudication that the corporation was insolvent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244–265; Dec. Dig. § 80.*]

5. CORPORATIONS (§ 80*)—SUBSCRIPTIONS OBTAINED BY FRAUD — STOCKHOLDERS' REMEDIES.

The date from which laches begins to run against the right of a subscriber for corporate stock to rescind for fraud is the time when he first learns of the fraud.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 244–265; Dec. Dig. § 80.*]

Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the People, by U. S. Webb, Attorney General, against the California Safe Deposit & Trust Company, in which O. M. Goldaracena filed a petition of intervention. From a judgment dismissing the petition, the petitioner appeals. Reversed.

For decision of the Supreme Court denying transfer of the cause, see 126 Pac. 520.

William M. Cannon, of San Francisco, for appellant. J. V. De Laveaga, of San Francisco (E. De Los Magee, of San Francisco, of counsel), for respondent.

KERRIGAN, J. This is an appeal from a judgment on demurrer denying appellant's petition of intervention by which he sought to have the receiver in the above-entitled action decreed to hold the sum of $12,000 in trust for him, and that the receiver is required to pay him that amount. The petition sets forth the fact of the insolvency of the California Safe Deposit & Trust Company, the appointment of E. J. Le Breton as receiver, and his possession of its assets, and as a cause of action recites that petitioner on the 20th day of September, 1906, was asked, through the officers and agents of the California Safe Deposit & Trust Company, to purchase from said corporation 100 shares of its capital stock, and that said agents and officers then and there made statements to the petitioner concerning such stock, which statements and representations were knowingly false and untrue and were made for the purpose and with the intent of deceiving, defrauding, and tricking the petitioner into subscribing for and purchasing the said capital stock, and the petitioner relied upon the said statements and representations, and, believing the same to be true, was thereby induced to and did purchase the said 100 shares of said capital stock and paid therefor the sum of $12,000. in full reliance upon said statements and representations; that at said time the bank was insolvent. The petition further sets forth that petitioner did not know at the time of said purchase that the said bank was insolvent or that said statements and representations were untrue, and did not learn of the insolvent condition of said bank nor of the falsity of said statements and representations until said bank was adjudged to be insolvent on or about the 14th day of January, 1908, and then alleges that petitioner was unable to ascertain such condition at an earlier date. The petition also recites a rescission of the fraudulent transaction on the 5th day of February, 1908, the deposit of the purchase price of $12,000 in the vaults of said defendant corporation, and that that sum was in the possession and under the control of the defendant and in its vaults continuously from the time of such payment until the assets of said corporation were taken charge of by its receiver under legal proceedings, and that the same can be traced and identified as the identical money of the petitioner. The demurrer of the receiver to the petition was sustained, the petition denied and dismissed, and from the judgment entered in pursuance of said order this appeal is prosecuted.

The proceeding therefore is in the usual form of a complaint predicated upon a rescission of a contract upon the ground of fraud. As hereinbefore stated, notice of rescission was given on the 5th day of February, 1908, and this action was commenced in April, 1908. It will thus be seen that the rescission was made and the action commenced subsequent to the adjudication of insolvency of the bank, which was on or about the 14th day of January, 1908.

The questions presented to us for determination by this appeal are: First, where there has been a fraudulent sale of stock by a corporation, may the subscriber have a rescission after the insolvency of the corporation? and, second, was the petitioner guilty of laches in giving his notice of rescission and in the bringing of this action?

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In England the principle has become well established that, after the statutory proceedings for the winding up of a corporation have been commenced, a subscriber cannot rescind his subscription on account of fraud. He is too late. It matters not that he did not discover the fraud until after the proceedings for the winding up of the corporation had been commenced. The right of the corporate creditors prevails then over the equities of the subscriber. Cook on Corporations, § 162.

In this country this absolute rule does not obtain, and indeed there does not appear to be any fixed rule for claiming a rescission under this condition. While relief has been denied by the United States Supreme Court after proceedings in insolvency, the denial is not based upon the sole ground of the insolvency of the corporation. In one of the earlier cases on this subject the right to a rescission was denied upon the ground that the shareholder had been delinquent and had slept on his rights. Upton v. Tribilcock, 91 U. S. 45, 55, 23 L. Ed. 203.

Some of the American text-writers have declared that corporate insolvency, as a rule, is a bar to such rescission. Cook on Corporations, § 164; 10 Cyc. 441. A close examination of the cases, however, upon which this statement of this principle is based, shows that the cases cited support no such proposition, and even those authors modify their declaration that subsequent insolvency is a bar to rescission, by the statement that there are strong American cases to the effect that the insolvency of a corporation and the appointment of a receiver do not always ipso facto bar the right of a subscriber to rescind his subscription on the ground of fraudulent misrepresentation. Cook on Corporations, §§ 164, 167, 170; 10 Cyc. 441 et seq.

While it may be admitted that there is some conflict of authority on this subject, the majority and best-considered cases where the right to rescind is denied are not based upon the mere fact of the insolvency of the corporation, but for the reason that the subscriber has participated in the management of the insolvent corporation or for some other particular cause such as would create an estoppel or some other doctrine analogous to the equitable doctrine of laches. See 2 Thompson on Corporations, §§ 1447-1456.

It would be a matter of supererogation to review all the authorities; but a brief review of the leading cases on the subject considering the statements of some of the text-writers will not be amiss. That it has become the settled rule in England since the decision of Oakes v. Turguand, L. R., 2 H. L. 325, 344, that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder no matter what diligence he may have shown after proceedings have been taken to liquidate the affairs of a corporation, as has been heretofore stated, cannot be denied. Thompson on Corporations, §§ 1439-1441. Some of the American cases seem to follow the English rule, and an attempt to harmonize them when all the expressions are considered is attended with some confusion.

The action has arisen under different conditions, as where a subscriber has paid for his stock and repudiates the contract on the ground of fraud and sues to recover the price; again, where the subscriber is sued for the unpaid subscription and defends on the ground of fraud. Some of the courts have attempted to distinguish these cases on the ground that different rights arose and that different principles were presented. The question was fully considered in Bank v. Newbegin, 74 Fed. 135, 20 C. C. A. 339, 33 L. R. A. 727, where the leading cases dealing with this subject are reviewed and a conclusion reached that where a considerable time has not elapsed and there is no want of diligence in discovering the fraud, and proof of the alleged fraud is clear, that the stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern. See, also, dissenting opinion in Scott v. Latimer, 89 Fed. 859, 33 C. C. A. 1.

In Wallace v. Bacon (C. C.) 86 Fed. 553, while the right to a rescission is denied for the want of diligence, it is distinctly held that a subscription to stock induced by fraud may be rescinded after as well as before the corporation ceased to be a going concern, where no considerable time has elapsed since the subscription and the subscriber has been diligent in discovering the fraud and in taking steps to rescind. And in this case, which was decided in the Circuit Court of the Southern District of California, Ross, J., delivering the opinion, adopted the views expressed in Bank v. Newbegin, supra, on a right to a rescission.

In the case of Upton v. Englehart, 3 Dill. 496, Fed. Cas. No. 16,800, Judge Dillon concludes his decision on the subject as follows: "I am inclined to the opinion that if a company has virtually misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock, he at the time being guilty of no want of reasonable caution and judgment, and after being guilty of no laches in discovering the fraud, and he thereupon without delay notifies the company that he repudiates the contract, and offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bankruptcy of the company subsequently happening, will not enable the assignee to insist that the purchase of the stock is binding upon him." And Judge Thompson in his work on corporations commenting upon this decision declares that the tendencies of American decisions support this view. 2 Thompson on Corporations, § 1449.

In Merrill v. Florida Land & Improvement Co., 60 Fed. 18, 8 C. C. A. 444, and in Florida Land & Improvement Co. v. Merrill, 52 Fed. 77, 2 C. C. A. 629, it is held that the receipt by a bank of the proceeds of a fraudulent sale of stock belonging to it and the subsequent appointment of a receiver give its creditors no such right in the proceeds as will prevent the purchaser from rescinding the sale and requiring restitution. In this case it is further said that, where it is admitted that the bank's stock when fraudulently sold was the property of the bank, and the proceeds were turned over to the bank, it cannot be said that any creditor of the bank can have such an interest as would prevent restitution; that the receiver representing the creditors has only the rights of property possessed by the bank and to allow the receiver, on the theory that there may be some bona fide creditor of the bank, to retain the proceeds of the fraudulent sale would be to give the creditors of the bank the fruits of a gross fraud which, by taking and holding, would make them participes criminis.

[1] In the case before us it is claimed by respondent that, by the declaration of insolvency of the bank and the appointment of the receiver, the rights of innocent third parties, to wit, the creditors of the bank, have intervened, and that, as the receiver represents the creditors of the bank as well as the bank, such creditors are prior in equity to appellant.

As it is admitted by the pleadings that the bank stock was the property of the bank, and that the proceeds of the sale which it is claimed was fraudulent were turned over to the bank, it cannot be said that the creditors have such an interest as would prevent restitution.

The rule might be otherwise if it appeared that the creditors had given credit to the bank on the faith of the sale of this particular stock; but his right would be a personal one and would not inure to the benefit of all the creditors generally even if it did exist. The receiver, representing the creditors, has only the rights of property possessed by the bank. Merrill v. Florida Land & Improvement Co., supra.

As in the case last cited, it is said that it must be remembered that this is a case where the bank, as a creditor, holds the proceeds of the fraudulent sale. In other words, the receiver of the bank holds property that does not belong to the bank, to which neither he, as receiver, nor the creditors of the bank, are entitled in equity or good conscience, assuming that the matters averred are truly stated.

As before stated, the authorities on this subject are numerous and are extensively discussed in the case here cited, and further comment upon them would answer no useful purpose. We feel that the leading authorities support the proposition that the mere insolvency of the corporation and the appointment of the receiver do not in themselves bar the appellant's right to a rescission of his contract considering that the bank was the real owner and vendor of the stock and that appellant was defrauded, which the complaint charges and the demurrer admits, and, this being so, petitioner is entitled to have a complete rescission of the fraudulent action complained of, provided he has not been guilty of laches.

[2] And this brings us to the second question. Where a subscriber of stock, who is induced to subscribe by fraud, neglects for an unreasonable time after the discovery of the fraud to have his subscription canceled, and in the meantime the interests of third persons become involved and would be injured by the cancellation of such subscription, the subscriber's laches is a bar to relief, and a court of equity will refuse to set aside such a subscription. Cook on Corporations, § 161.

Section 1691 of our Civil Code provides that one desiring the rescission of a contract can only accomplish same by rescinding promptly and restoring to the other party everything of value that he has received.

[3] As to whether or not the party seeking a rescission has acted promptly is a matter of fact to be determined by the proof, unless the pleadings on their face show such facts that in themselves constitute laches.

[4] Here it is alleged, among other things, that the insolvency of the bank was not known to the appellant until the closing of its doors, and that its officers had repeatedly, and up to that time, made to appellant representations of the flourishing condition of the bank. It cannot be said that the intervening time between the purchase of the stock and the insolvency of the bank is in itself such a period as would constitute laches. This is a matter which can only be determined by proof. There is nothing in the recitals of the complaint showing knowledge on the part of the appellant of the condition of the bank, nor is there any fact from which knowledge could be charged. If any such facts exist, they should be set up by answer. No such rule can be laid down declaring within what time a rescission must be made, and the decision of each case must necessarily depend upon the facts presented.

[5] The date from which laches begins to run is the time when the subscriber is first chargeable with notice that a fraud has

been perpetrated upon him. 1 Cook on Corporations, §§ 162–164.

In National Bank v. Newbegin, supra, where the subscriber purchased his stock in May, 1890, and the bank failed in November, and the subscriber rescinded, and in May, 1891, filed a bill for that purpose and then withdrew his suit on the proposed reorganization, and then in November, 1891, started the suit again, the court held that under those circumstances the suit might succeed; the subscriber not having taken any part in the management. Other cases of like import will be found in Cook on Corporations, §§ 162–164.

It is clear that the complaint in itself does not present such facts as would bar appellant of his right of rescission, nor do the facts as alleged show that he has been guilty of laches.

The order sustaining the demurrer is reversed.

We concur: LENNON, P. J.; HALL, J.

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19 Cal. App. 414

PEOPLE v. CALIFORNIA SAFE DEPOSIT & TRUST CO. et al. (S. F. 5,520.)

(Supreme Court of California. Sept. 10, 1912.)

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by the People, by U. S. Webb, Attorney General, against the California Safe Deposit & Trust Company, in which O. M. Goldaracena files a petition of intervention. Judgment dismissing the petition was reversed by the District Court of Appeal (126 Pac. 516), and a petition filed for a transfer to the Supreme Court. Petition denied.

William M. Cannon, of San Francisco, for appellant. J. V. De Laveaga, of San Francisco, (E. De Los Magee, of San Francisco, of counsel), for respondent.

PER CURIAM. The petition of the receiver for a transfer of this cause from the District Court of Appeal to the Supreme Court is denied. We are in doubt concerning the part of the opinion of the district court which seems to imply that in an action for rescission it is unnecessary for the complaint to state facts showing reasonable diligence to discover the facts constituting the fraud on account of which the rescission is asked. But whether this is correct or not, as a rule of pleading, is immaterial to the decision, because in this case the facts alleged by the petitioner in his petition for intervention, but not fully stated in the opinion of the district court, are sufficient to excuse him for the delay in making such discovery.

(163 Cal. 655)

WITTER v. PHELPS. (S. F. 5,878.)

(Supreme Court of California. Sept. 4, 1912. Rehearing Denied Oct. 4, 1912.)

1. Dismissal and Nonsuit (§ 60*)—Power to Dismiss—Failure to Prosecute.

The court has power to dismiss an action for want of reasonable diligence in prosecuting it.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

2. Dismissal and Nonsuit (§ 60*)—Defects in Process—Statute.

The court's discretionary power to dismiss for undue delay in issuing or serving summons is not affected by Code Civ. Proc. § 581a (St. 1907, p. 712), making it mandatory to dismiss where summons has not been issued within one year, or served and returned within three years, even though the delay is for a shorter period than that prescribed by the statute.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

3. Appeal and Error (§ 927*)—Presumptions—Facts Found by Court—Motion to Dismiss.

Where affidavits presented by the parties upon a motion to dismiss are conflicting, it will be presumed on appeal from an order of dismissal that the court below found the facts to be as asserted by the moving and prevailing party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 4024; Dec. Dig. § 927.*]

4. Dismissal and Nonsuit (§ 60*)—Discretion of Lower Court.

Where plaintiff knew when he commenced an action, and at all times thereafter, that defendant resided in another county and could be found and served there, but delayed service of summons for two years and three months after it was issued, and defendant's evidence showed that the matters involved in the action had been settled between the parties, that until service he had no notice of the action, that in the meantime one of his material witnesses had died, and that the action was not in good faith, but to harass him, the granting of a motion to dismiss was within the trial court's discretion.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 140–152; Dec. Dig. § 60.*]

5. Dismissal and Nonsuit (§ 50*)—Waiver of Right to Dismiss—Motion for Change of Venue.

Under Code Civ. Proc. § 396, which provides that an action begun in a wrong county may be tried therein, unless defendant, at the time of answering or demurring, demands a change of venue, a defendant who demurs and moves for a change of venue does not thereby waive his right to object to any previous delay in service of summons.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 100–102; Dec. Dig. § 50.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Geo. F. Witter, Jr., against Josephine A. Phelps. Judgment for defendant, and plaintiff appeals. Affirmed.

Geo. F. Witter, of Oakland (Henry G. Tardy, of Oakland, of counsel), for appellant. Ross & Ross, of San Mateo, for respondent.

SLOSS, J. Plaintiff appeals from a judgment of dismissal.

On May 1, 1908, plaintiff filed his complaint, asking the recovery of $100,000 damages for the breach of an alleged contract. The action was commenced in the city and county of San Francisco. Summons was issued at once, but was not served on the defendant until the 3d day of August, 1910, two years, three months, and two days after the filing of the complaint and the issuance of summons. On August 17, 1910, the defendant appeared by filing a notice of intention to move for change of place of trial to the county of her residence, San Mateo, together with a demand for such change, an affidavit of merits, and a demurrer. The motion was granted, and on September 21, 1910, the papers in the cause were filed in San Mateo county.

On October 13, 1910, the defendant served and filed her notice of intention to move for a dismissal of the action, upon the grounds of long and unnecessary delay in the service of summons "and because of the laches, lack of diligence, and want of prosecution in and of said action by the plaintiff." The appeal is from the judgment entered upon the order of the court granting the motion.

[1, 2] The power of the court to dismiss an action for want of reasonable diligence in prosecuting it has often been declared by this court. First Nat. Bank v. Nason, 115 Cal. 626, 47 Pac. 595; Mowry v. Weisenborn, 137 Cal. 110, 69 Pac. 971; People v. Jefferds, 126 Cal. 296, 58 Pac. 704. In 1889 subdivision 7 was added to section 581 of the Code of Civil Procedure. Stats. 1889, p. 398. The effect of the subdivision, which, as amended (Stats. 1895, p. 31), was in substance re-enacted in 1907 as section 581a (Stats. 1907, p. 712), was to make it mandatory upon the court to dismiss where the summons had not been issued within one year, or served and returned within three years. Vrooman v. Li Po Tai, 113 Cal. 302, 45 Pac. 470; Swortfiguer v. White, 141 Cal. 576, 75 Pac. 172. But this did not affect the discretionary power of the court to dismiss for undue delay in issuing or serving summons, even though the delay had been for a shorter period than that named in the statute. Kreiss v. Hotaling, 99 Cal. 383, 33 Pac. 1125; Stanley v. Gillen, 119 Cal. 177, 51 Pac. 183; Ferris v. Wood, 144 Cal. 426, 77 Pac. 1037; Marks v. Keenan, 148 Cal. 161, 82 Pac. 772; Bernard v. Parmelee, 6 Cal. App. 545, 92 Pac. 658.

[3, 4] The order appealed from must accordingly be affirmed, unless we can say that the court below abused its discretion in determining that the delay in the service of summons had been unreasonably long, and that plaintiff had failed to prosecute his ac-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion with due diligence. The record would not warrant a holding that there had been such abuse. In so far as affidavits presented by the respective parties were conflicting, it must here be assumed that the court below found the facts to be as asserted by the moving and prevailing party. So assuming, the evidence justified the conclusions that plaintiff knew, when he commenced the action, and at all times thereafter, that the defendant resided at San Carlos, San Mateo county, and that she could there be found, if it were his desire to make service upon her. The defendant's evidence also tended to show that the matters involved in the action had been fully compromised and settled between the parties, and that, until the service upon her, she was unaware of the pendency of the action. In the meantime a material witness, whose testimony would have aided in establishing the defense of settlement, had died. The plaintiff's affidavit alleged that the delay in service had been actuated by a feeling of consideration for the defendant, who was in poor health. On the other hand, the defendant's showing, which, as we have said, must be taken to have been accepted by the trial court, warranted a conclusion that the action was instituted, not in good faith, but for the purpose of harassing the defendant. Under all the circumstances, it cannot be held that the granting of the motion involved an abuse of discretion.

[5] We do not agree with the contention that, by demurring and moving for a change of place of trial, the defendant waived the right to object to any delay which had occurred theretofore. Having been served with summons, she was bound to appear, and either demur or answer. Her demand for change of venue could be made only at the time she so answered or demurred. Code Civ. Proc. § 396. She was entirely within her rights in insisting upon the change, and in making her motion for a dismissal in the court to which the action had been removed. By thus taking advantage of her rights, she did nothing which should be held to affect her right to complain of the delays which had occurred.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

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163 Cal. 814

WITTER v. PHELPS. (S. F. 5,879.)

(Supreme Court of California. Sept. 4, 1912. Rehearing Denied Oct. 4, 1912.)

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Geo. F. Witter, Jr., against Josephine A. Phelps. Judgment for defendant, and plaintiff appeals. Affirmed.

George F. Witter, of Oakland, (Henry G. Tardy, of Oakland, of counsel), for appellant. Ross & Ross, of San Mateo, for respondent.

PER CURIAM. Appeal by plaintiff from a judgment dismissing the action.

The facts are, in all material respects, like those in Witter v. Phelps, 126 Pac. 593 (S. F. No. 5,878), just decided, except that this action was commenced at an earlier date, and the delay in service was some months longer than in the case referred to.

For the reasons stated in S. F. No. 5,878, the judgment is affirmed.

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163 Cal. 621

LOS ANGELES GAS & ELECTRIC CORPORATION v. CITY OF LOS ANGELES.

(L. A. 2,865.)

(Supreme Court of California. Aug. 27, 1912.)

1. Constitutional Law (§ 63*)—License Tax—Imposing Legislative Duties on City Clerk.

An ordinance of the city of Los Angeles provided for the payment of license fees by persons, firms, or corporations supplying gas and electricity at a specified rate, to be based on the gross receipts of the company. One section provided for the determination of the amount of licenses from a sworn statement as to the amount of business done in the preceding quarter. *Held*, the ordinance is not invalid as imposing a legislative duty on the city clerk, as his acts are purely ministerial, in that he does not fix the rate of the tax, but merely determines the amount on the basis of the rate fixed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108–114; Dec. Dig. § 63.*]

2. Licenses (§ 7*)—License Tax on Public Service Companies—Validity of Ordinance.

Although an ordinance providing for the licensing of gas and electric companies at a rate to be determined by the gross receipts for the preceding quarter requires a sworn statement from the officers of the companies to be filed "within five days from the beginning of each license period," and does not specify whether the provision applies to the five days before the expiration of the quarter or the five days thereafter, the law will not require the impossible; and it will be construed to mean the five days after the quarter's expiration, to render the ordinance valid.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15; Dec. Dig. § 7.*]

3. Licenses (§ 7*)—License Tax on Public Service Companies—Bestowing Favors on New Companies.

An ordinance providing for a license tax on gas and electric companies is not invalid for providing that newly established companies should, for the first quarter of their existence, be charged only the minimum rate, as there is nothing to prevent a municipality from bestowing such a favor on a starting business.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15; Dec. Dig. § 7.*]

4. Licenses (§ 7*)—Discrimination as to Mode of Enforcement.

And such ordinance is not invalid for its failure to apply to certain classes of corporations a provision for the collection of the maximum license fee, on the failure of the corporation to file a statement of its business for the preceding quarter, where other sections provide for the collection of unpaid license taxes by civil process, the imposition of penalties for failure to make timely payment, and the punishment of any one operating in violation of law without a license.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15; Dec. Dig. § 7.*]

5. Licenses (§ 7*) — Discrimination — Validity of Ordinance.

Nor is the ordinance invalid for its exception of manufacturers of acetylene gas distributed in tanks, and owners of natural gas wells receiving less than $50 a month from their product, from the burden of the ordinance, as the delivery of a product in portable tanks would not require the use of the city streets; and the presumption will be indulged that the local legislative body did not pass an unreasonable by-law, and that the number of wells, each producing less than $50, owned and operated by a single person or corporation, was not considerable.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7–15; Dec. Dig. § 7.*]

6. Constitutional Law (§ 136*)—License Tax on Public Service Companies—Validity of Ordinance — Impairment of Contract.

And such ordinance is not invalid as an impairment of the obligation of a contract, though a lighting company had an existing contract with the city for furnishing electricity to light its streets, where, at the time such contract was entered into, the city was imposing a license on such company, as the contract must be presumed to have been made with the city's right to impose a license tax in contemplation.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 299, 300, 343, 362; Dec. Dig. § 136.*]

7. Municipal Corporations (§ 111*)—Validity of Ordinance—Method of Passage.

The charter of the city of Los Angeles, § 198b, provides that an ordinance shall not be effective before 30 days from the time of its final passage and its approval by the mayor, unless it be for the immediate preservation of the public peace, health, or safety, and contains a statement of its urgency and is passed by a two-thirds vote of the council. It also gives the right to a certain percentage of electors to file a referendum petition within 30 days. An ordinance submitting an ordinance providing for the imposition of a license tax on a large number of professions, trades, and callings, among them gas and electric companies, to the people for a referendum election, after a petition therefor, became effective within 30 days, but was passed by a vote of more than two-thirds of the city council, and contained the recital required by the charter. *Held*, the early submission to a vote of the license ordinance was of such immediate importance that the method of its passage would not invalidate it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245–256; Dec. Dig. § 111.*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by the Los Angeles Gas & Electric Corporation against the City of Los Angeles. From a judgment for defendant, plaintiff appeals. Affirmed.

Wm. A. Cheney, Geo. P. Adams, and LeRoy M. Edwards, all of Los Angeles, for appellant. John W. Shenk, City Atty., and E. R. Young and Leslie R. Hewitt, Asst. City Attys., all of Los Angeles, for respondent.

MELVIN, J. Plaintiff brought an action for an injunction to prevent the enforcement against it of Ordinance No. 20,000 (New Series) of the city of Los Angeles, and seeking to have that part of said ordinance relating to the gas and electric business of plaintiff declared void. A demurrer to the complaint was sustained, and, plaintiff declining to amend, judgment was given against it. From that judgment this appeal is taken.

The objections of appellant to the validity of the ordinance are based generally upon its alleged uncertainty and its supposed contravention of the fourteenth amendment to the Constitution of the United States. The ordinance provides that license shall be imposed as follows upon one of the enterprises conducted by plaintiff: "Sec. 39. For every person, firm or corporation conducting, managing or carrying on the business of furnishing or supplying electricity for light, heat or power, one-third of one per cent. of the gross receipts of such person, firm or corporation for the sale of electricity furnished within the city of Los Angeles which amount shall be payable quarterly."

[1] The provision with reference to the gas business is practically the same as that applicable to the furnishing of electricity, except the business of manufacturing and distributing acetylene gas compressed in tanks is excepted from the payment of license, as is that of furnishing gas from a natural gas well, where the amount of money received therefor is less than $50 per month. Appellant insists that these sections, standing alone, would make the license payable only after the expiration of a quarter and an ascertainment of the gross amount of business transacted by the company, and that there is no provision for the specified percentage of one-quarter's business being paid in advance for the right to operate for the coming quarter. But we find that section 4 of the ordinance thus provides for the payment of quarterly licenses: "The quarterly licenses in this ordinance provided shall be due and payable to the city on the first days of January, April, July and October, and all such licenses shall expire with the last days of March, June, September and December of each year, but the first quarterly license issued to any person, as herein provided, shall be issued for the unexpired one-third or two-thirds of the current quarter." Section 3 is as follows: "It shall be the duty of the city clerk to prepare and issue a license under this ordinance for every person, firm and corporation liable to pay a license hereunder, and to state in each license the amount thereof, the period of time covered thereby, the name of the person, firm or corporation for whom issued, the trade, calling, profession or occupation licensed and the location or place of business where such trade, calling, profession or occupation is to be carried on. The city clerk shall de-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

liver such license to the city auditor and said city auditor shall sign and deliver the same to the city tax and license collector for collection and take his receipt for the amount thereof. In no case shall any mistake by the city clerk in stating the amount of a license prevent or prejudice the collection for the city of what shall be actually due from any one carrying on a trade, calling, profession or occupation subject to a license under this ordinance." It is evident from the foregoing quotations that the purpose of the framers of the ordinance was to require payment of the quarterly license in advance, based upon the income, in each instance, of the preceding quarter, because obviously it would be impossible to determine such income in advance. If there were any doubt upon this point, it would be removed by section 9 of the ordinance, which is in part as follows: "In all cases where the amount of license to be paid by any person, firm or corporation is based upon the amount of receipts or sales, or of business transacted * * * such person, firm or corporation shall, before obtaining a license for his, their or its business, and within five days from the beginning of each license period, if such business is established or in operation, during any part of said five days, render to the city clerk for his guidance in fixing the amount of license to be paid by said person, firm or corporation, a written statement, sworn to before some officer authorized to administer oaths, showing the total amount of receipts or sales, or of business transacted. * * * Such statement shall not be conclusive as to the amount of license to be paid by such person, firm or corporation. If any person, firm or corporation hereby required to make such a statement shall fail to do so, such person, firm or corporation shall be required to pay a license at the maximum rate herein prescribed for the trade, calling, profession or occupation carried on by such person, firm or corporation, and shall be guilty of a violation of this ordinance and be punishable therefor as hereinbefore provided; provided, however, that where the first license is to be issued for a newly established business no statement need be made of the amount of receipts, or sales, or business transacted, * * * and the minimum rate herein prescribed shall be charged for any newly established business, the amount of license for which is regulated by the amount of receipts, or sales, or business done * * * during the first license period in which such business is in operation."

Appellant insists that this section does not apply to cases where the amount of the license is a percentage of the business done, but to instances in which a definite license is exacted for a certain business, or those in which the callings to be licensed are classified according to their receipts. But we do not see any reason why it does not apply to all methods of levying and collecting licenses. It does not fix the amount of the license tax, for that is settled by another part of the ordinance as one-third of 1 per cent. of the gross receipts. Section 9 does, however, furnish a method by which the clerk is enabled to determine the amount which he must insert in the quarterly license. His duties are not, as appellant alleges, legislative, but are purely ministerial A similar question was before the court some years ago in a proceeding involving the construction of an ordinance in which it was made the duty of the clerk, "in fixing the rate of license" for the several classes in the said ordinance mentioned, to "grade the same according to his best information and knowledge"; and he was empowered to require "any person to file his or her affidavit as to which class he or she may belong." Commenting upon the petitioner's assertion that this was an unauthorized delegation of power to the clerk, Mr. Justice McKee, speaking for the court, said in Re Guerrero, 69 Cal. 97, 10 Pac. 267: "The provisions, however, were only regulative of the mode of issuing and collecting the licenses imposed by the ordinance; the acts required of the clerk and tax collector were therefore ministerial; and, while it is undoubtedly true that public powers and trusts devolved by law or charter upon the governing body of a municipality, to be exercised by it in such a manner as it shall judge best, cannot be delegated to another (Birdsall v. Clark, 73 N. Y. 73 [29 Am. Rep. 105]), yet the power to do acts which do not involve judgment or discretion, but are merely mechanical or ministerial, may be delegated. 'The true distinction,' observes the Supreme Court of Ohio, 'is between the delegation of power to make the law, which necessarily involves discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' C. W. & Z. R. Co. v. Commissioners of Clinton County, 1 Ohio St. 88."

[2] Appellant calls our attention to the fact that section 9 does not specify whether the sworn statement mentioned therein shall be filed five days before the expiration of the quarter or five days afterwards. As the law does not require impossibilities, this provision, of course, does not apply to the five days before the end of the quarter. The provision amounts merely to an exemption from arrest during the first five days of a new quarter—a period which may be reasonably necessary to a person or corporation doing a large business, for the preparation of a statement of the gross receipts of the previous quarter.

[3] Appellant also makes the point that the ordinance is discriminative, because un-

der section 9 no tax is fixed for persons in their line of business who fail to file statements, as that section imposes upon such persons the maximum tax prescribed, and there is no maximum tax fixed for the distributors of gas and electricity; and a further complaint regarding the inequity of the ordinance is that a newly established gas or electric company would escape the payment of license for the first quarter of its existence, because there is no minimum rate prescribed as a basis for the quarterly tax in the case of a gas or electric company. This does not render the ordinance void. While a slight advantage might thus be given to a new enterprise, there is nothing to prevent the governing body of a municipal corporation from bestowing such favor upon a starting business. As was said in Ex parte Lemon, 143 Cal. 563, 77 Pac. 456, 65 L. R. A. 946: "We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. Absolute uniformity in the practical application of laws relating to taxation can never be attained; and to prohibit the enforcement of laws which fail to bring such absolute uniformity would be to abolish all taxation."

[4, 5] No difficulty arises from the fact that section 9 does not apply to corporations like appellant, in so far as it contemplates the collection of the maximum rate of license from persons or corporations failing to file the statement prescribed, because other sections provide for the collection of unpaid license tax by civil process, the imposition of penalties for failure to make timely payment, and the punishment of any one operating in violation of law without a license. Nor is the exception of manufacturers of acetylene gas and owners of gas wells from the burden of the ordinance inherently unreasonable. There is a vast difference between a business using the streets for pipes, wires, and conduits and one in which the product is delivered in portable tanks; and, while the owner of a great number of gas wells, each producing a revenue less than $50 a month, might escape his just proportion of the license tax, we must presume that the local legislative body, familiar with existing conditions, did not pass an unreasonable by-law, and that the number of wells, each producing less than $50 per month and owned and operated by a single person or corporation, is not considerable. As was said in Ex parte Lemon, supra: "The rule underlying the decisions upon the matter appears to be that, while the state, county, or city cannot discriminate in the imposition of those taxes between persons exercising the same privilege by imposing different taxes upon persons similarly situated, it may classify and tax occupations, grading the privilege tax by the amount of business done; that different methods of accomplishing this may be adopted; and that any classification reasonably designed to attain this object is within its power to make."

[6] Plaintiff had a contract with the city of Los Angeles for furnishing electricity to light the streets of that city during the entire year 1910. The contention is made that the imposition of a license tax impairs the obligation of this contract, because it imposes additional burdens upon one of the parties to said agreement. It appears from the complaint that plaintiff was paying a license tax when its contract with the city was made, and when the ordinance here considered was adopted by the city council. It is therefore evident that the contract was made in view of the city's right to impose a license tax upon the business of plaintiff. So long as such tax is reasonable, it is a legal imposition, and is a matter apart from the contract between the city and the Los Angeles Gas & Electric Corporation. The fact that the taxing power is a party to a contract does not impair the right to tax the business pursued by virtue of that contract. City of New Orleans v. Crappel, 18 La. Ann. 725. While a city may, by contract, deprive itself of the power to collect license fees, that power is presumed to exist, unless an unequivocal intention to the contrary appears from the terms of the agreement. City of St. Louis v. United Railways Co. et al., 210 U. S. 273, 28 Sup. Ct. 630, 52 L. Ed. 1054.

[7] The method of adoption of Ordinance No. 20,000 (New Series) is attacked by appellant. After this ordinance was adopted by the council and approved by the mayor, a referendum petition, signed by the requisite number of electors, was filed. This suspended the operation of the ordinance, and the city council, on May 10, 1910, reconsidered it, and it was not entirely or at all repealed. Thereafter it and another ordinance were, by Ordinance No. 20,419, submitted to the people at a special election held on June 30, 1910, and consolidated with other matters previously set for determination at a special election on that date. Ordinance No. 20,419 was approved on June 14, 1910, and therefore less than 30 days elapsed between its passage and its operation. Appellant insists that, consequently, it was illegal and void. Section 198b of the charter of the city of Los Angeles provides that (a) "no ordinance passed by the city council, except when otherwise required by the general laws of the state or by the provisions of this charter, respecting street improvements, and except an ordinance for the immediate preservation of the public peace, health or safety, which contains a statement of its urgency and is passed by a two-thirds vote of the council, shall go into effect before thirty days from the time of its final passage and its approval

by the mayor." (b) This is followed by general language giving the right to a certain percentage of electors to file a referendum petition within 30 days. If the ordinance calling the special election and consolidating the referendum Ordinance No. 20,000 (New Series) with other matters does not come within the exceptions mentioned in section 198b, or is not by its very nature exempt from a referendum upon it, then there is no escape from appellant's theory that it was void.

Respondent depends upon two propositions: (1) From the very nature of an ordinance calling an election, it cannot be subject to the referendum provisions, citing such cases as Carlson v. City of Helena, 39 Mont. 113, 102 Pac. 39, 17 Ann. Cas. 1233. (2) Even if, generally speaking, an ordinance providing for a special election be subject to the referendum, the one before us was passed by a vote of more than two-thirds of the city council, and contains a full statement of its urgency for the immediate preservation of the public peace, health, and safety. It is not necessary to discuss the first of these propositions, because the second is correct. While "the mere declaration of the council in such a case that the ordinance is passed for the immediate preservation of the public health is neither conclusive nor yet sufficient" (In re Hoffman, 155 Cal. 120, 99 Pac. 517, 132 Am. St. Rep. 75), the ordinance calling the special election contains more than the mere dictum of the council regarding its urgency; for in section 7 thereof we find this language: "That said Ordinance No. 20,000 (New Series) is a penal ordinance regulating the carrying on of a large number of professions, trades, callings and occupations in the city of Los Angeles, and which affects the public peace, health and safety, and said ordinance also fixes and establishes the rates of licenses for all persons, firms or corporations engaged in carrying on such professions, trades, callings and occupations; that the said license taxes so fixed and established will form a large part of the revenues of the said city, and the collection thereof is necessary for the proper carrying on of the government of the said city." We can easily see how the early submission to vote of an ordinance affecting the conduct of a large number of professions, trades, and callings, and having a bearing on the public revenue so important as that indicated by the above quotation, would be a matter affecting the public peace, if not the public health and safety; consequently we cannot, on the record before us, question the finding of the city council upon this subject.

It follows that the judgment from which the appeal is taken must be affirmed; and it is so ordered.

We concur: LORIGAN, J.; HENSHAW, J.

(19 Cal. App. 536)

CALIFORNIA TELEPHONE & LIGHT CO. v. JORDAN, Secretary of State.

(Civ. 982.)

(District Court of Appeal, Third District, California. July 22, 1912. Rehearing Denied by Supreme Court Sept. 20, 1912.)

1. CORPORATIONS (§ 18*)—CONTENTS OF ARTICLES OF INCORPORATION — NECESSITY OF ACKNOWLEDGMENT.

Neither Civ. Code, § 290, which specifically enumerates the matters which articles of incorporation must contain, nor section 291, which specifically enumerates such matters in the incorporation of certain classes of corporations, and which are the only sections which provide what articles of incorporation shall contain, require that certificates of acknowledgment of the execution of the articles must be made a part thereof. *Held*, such certificates of acknowledgment are impliedly excluded as a necessary part of the articles; and the requirement for such an acknowledgment in Civil Code, § 292, will be regarded as intended only to supply proper proof of due execution.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 53–59; Dec. Dig. § 18.*]

2. CORPORATIONS (§ 40*)—AMENDING ARTICLES OF INCORPORATION—NECESSITY OF ATTACHING ORIGINAL CERTIFICATES OF ACKNOWLEDGMENT.

Under Civ. Code, § 362, which provides for the amendment of original articles of incorporation, but which does not require the certificates of acknowledgment of the execution of the original articles to be attached or annexed to the articles as amended, the attachment of such acknowledgment is not necessary to the validity of the amended articles.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 124; Dec. Dig. § 40.*]

3. CORPORATIONS (§ 66*)—"INCREASING CAPITAL STOCK" OR "DIMINISHING CAPITAL STOCK"—WHAT CONSTITUTES.

A mere classification of the capital stock of a corporation into preferred and common shares, without an increase or decrease in the number, is not an increasing or diminishing of its capital stock, within Civ. Code, § 362, which provides that a corporation may not increase or diminish such stock without complying with the special provisions of the Code applicable thereto, and Civ. Code, § 359, which provides the manner in which the capital stock of a corporation may be increased or diminished.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 173–180, 449; Dec. Dig. § 66.*

For other definitions, see Words and Phrases, vol. 4, p. 3518.]

4. CORPORATIONS (§§ 62, 67*)—"INCREASING CAPITAL STOCK" OR "DIMINISHING CAPITAL STOCK" — METHOD — STATUTORY REQUIREMENTS.

Civ. Code, § 359, provides the method by which capital stock may be increased or diminished, with the proviso that, where the articles of incorporation provide for two or more kinds of capital stock, no increase or reduction shall be made without the assent of two-thirds of all the subscribed stock. *Held*, the Code section applies only to a change in the number of shares of different classes where the stock is already divided, and does not prescribe the procedure where the division of the stock merely involves the creation of two or more kinds of stock out of the number of shares for which the corporation was originally capitalized.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 164, 181–183, 449; Dec. Dig. §§ 62, 67.*]

5. STATUTES (§ 188*) — CONSTRUCTION OF STATUTE—PROVINCE OF COURTS.

The courts may not by construction import into valid statutes language which has not been inserted therein by legislative authority, or take from them by like process language which the Legislature has inserted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267; Dec. Dig. § 188.*]

Mandamus by the California Telephone & Light Company to compel F. C. Jordan, as Secretary of State, to file a certified copy of petitioner's articles of incorporation. Writ granted.

Wm. B. Bosley, of San Francisco, for petitioner. J. Charles Jones, Asst. Atty. Gen., for respondent.

HART, J. This is an original application for a writ of mandate to compel the respondent, as Secretary of State of the state of California, to file nunc pro tunc, as of date of March 21, 1912, in his said office of Secretary of State, a certified copy of the amended articles of incorporation of the petitioner.

The petitioner, whose principal place of business is in the city of Santa Rosa, county of Sonoma, was duly formed as a corporation on the 8th day of November, 1911, and its original articles of incorporation, duly executed, and such execution, duly acknowledged, were, on the 22d day of November, 1911, filed in the office of the county clerk of the said county of Sonoma, and a copy thereof, properly certified by said county clerk, was filed with and in the office of the Secretary of State, as required by law.

Before the filing of said original articles, the petitioner complied with all the essential requirements prescribed by law for the formation of corporations, and which entitled such articles and a copy thereof to be filed in the offices of the county clerk and the Secretary of State, respectively.

"On the 19th day of March, 1912," the petition proceeds to set forth, "said corporation amended its original articles of incorporation by a majority vote of its board of directors, and by the written assent of its stockholders owning, holding of record, and representing more than two-thirds of its subscribed capital stock. Thereupon a copy of said corporation's articles of incorporation, amended as aforesaid, duly certified by the president and secretary of said corporation and of its board of directors to be correct, was filed in the office of the county clerk of said county of Sonoma. The certificate of said president and secretary attached to said copy of said articles, as amended, was duly acknowledged by said president and secretary before a notary public of the state of California in and for said county of Sonoma, who made, signed, and sealed a certificate of acknowledgment to the certificate made, as aforesaid, by said president and secretary."

On the 21st day of March, 1912, a certified copy of said copy of said amended articles, with a copy of said certificate of the president and secretary attached thereto, duly certified by the county clerk of the county of Sonoma, was presented by the petitioner to the respondent, as Secretary of State, for filing in his office. The respondent then refused and still refuses to file said certified copy of a copy of the amended articles in his office, on the ground that there is not attached or annexed thereto a copy of the certificates of acknowledgment which were attached to the original articles of incorporation, claiming that, as a prerequisite to the right of the petitioner to have the copy of the amended articles filed in the office of Secretary of State, it is essential, under the law, that such copy should have attached thereto a copy of the certificates of acknowledgment referred to.

The Attorney General, representing the respondent, has interposed and filed a general demurrer and an answer to the petition, and by argument not only undertakes to support the ground, as above indicated, upon which the respondent refuses to file the amended articles in his office, but makes the additional point that the respondent's position is further sustained by the fact that said amended articles, in violation of the statute relating to that subject, have attempted to increase its capital stock.

[1] We are unable to agree to either of the propositions advanced by the Attorney General.

1. Under the heading, "Articles of Incorporation—What they shall contain," section 290 of the Civil Code specifically enumerates, in various distinct subdivisions, the matters or facts which such instrument must contain, or, in other words, the matters which must be embodied in the original articles of incorporation, in order to legally constitute them such an instrument. That section and section 291 of the same Code (the latter having exclusive application to certain classes of corporations) are the only provisions of our law to which our attention has been directed which pretend to set forth what matters or facts shall be contained in articles of incorporation; and, in the absence of any other provision of law requiring other matters and things than those enumerated in said sections to be set out in such articles, the specific enumeration by said sections of the various facts which the articles must contain necessarily implies the exclusion, ex industria, of any other matters than those thus specifically named.

Now, then, nowhere in either of said sections are certificates of acknowledgment of the execution of articles of incorporation referred to by name or by any language furnishing ground for even the remotest inference that such certificates are any part of articles of incorporation, or that the Legislature intended that they should become or be made a part thereof. Unless, therefore, there is to be found elsewhere in the Code some provision by which such certificates are declared, either expressly or by reasonable construction, to be an essential part of the articles of incorporation themselves, we must hold that the argument advanced in support of the proposition cannot prevail. We have not succeeded in finding in any of the sections of the Code relating to corporations and their formation any language indicating that the Legislature intended to include such certificates as a part of the articles themselves, any more than the acknowledgment of a deed—a prerequisite to the right to record it—is made by the statute a part of the deed proper.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The requirement that articles of incorporation shall be subscribed and acknowledged by certain persons is contained in section 292 of the Civil Code. It is therein provided that "the articles of incorporation must be subscribed by three or more persons, a majority of whom must be residents of this state, and acknowledged by each before some officer authorized to take and certify acknowledgments or conveyances of real property." The meaning of the language of that section and the purpose of the section is merely this: That when the articles of incorporation themselves have been prepared in accordance with other requirements of the Code, the requisite number of the parties intending to form or associate themselves together as a corporation must acknowledge the due execution of the articles, and thus furnish proof that such articles have been properly executed. In other words, the primary purpose of the certificates is to secure "the state and all concerned against the possibility of any fictitious names being subscribed to the articles, and to furnish proof of the genuineness of the signatures." People v. Golden Gate Lodge No. 6, 128 Cal. 257, 263, 60 Pac. 865, 867.

[2] But the Attorney General insists that, according to the true construction of section 362 of the Civil Code, under the terms of which original articles of incorporation may be amended, it is essential that, where such articles are amended, the amendment must not only contain all the matters and things required by the statute to be embodied in original articles, but must further have annexed or attached thereto the certificates of acknowledgment of the execution of the original. But we are unable to extract any such meaning from that section. It is very true that the amendment, in addition to the alteration or change thereby intended to be effected, must contain all the facts which are required to be embodied in the original articles, in order to constitute them legal articles of incorporation. This is not only clearly indicated by the language by which the amendment is referred to throughout the section, viz., "the articles as amended," or "the articles so amended," or "the articles *as thus* amended"; but it is so required by this specific language: "Such original and amended articles of incorporation shall together contain all the *matters and things* required by the laws under which the original articles were executed and filed." In other words, the requirement is that the articles as amended must contain all the facts which sections 290 and 291, in case the corporation is of the class to which the last-named section applies, provide shall be set forth in articles of incorporation. But when this is done (and it has been done in this case) nothing further is required to entitle the amended articles to be filed, except that they shall be certified to be correct by the president and secretary of the corporation. Nowhere does section 362 declare that the certificates of acknowledgment of the execution of the original articles shall be attached or annexed to the articles as amended. It reads as follows: "Any corporation may amend its articles of incorporation by a majority vote of its board of directors, and by a vote or written assent of the stockholders representing at least two-thirds of the subscribed capital stock of such corporation, or the written assent of the majority of the members if there is no capital stock; and a copy of the said articles of incorporation, as thus amended, duly certified to be correct by the president and secretary of the board of directors or trustees of such corporation, shall be filed in the office where the original articles of incorporation are filed, and a certified copy thereof, duly certified by such county clerk, in the office of the Secretary of State. * * *"

There is no other provision of the law, which has been called to our attention, requiring anything further to be done in the matter of effecting an amendment of articles of incorporation than is required by the foregoing provision, except a few other matters, provided by the same section, which are not important in the ascertainment of the meaning of the section in the respect in which we are considering it. And we can conceive of no sound reason for holding the section to have any other meaning; while there are reasons which sustain the construction of said section which appears to us to be correct. As one of such reasons, it may be suggested that the law prescribes a certain *kind* of proof of the due and proper execution of original articles of incorporation. Primarily, as we have seen, the purpose of such proof is to disclose that such articles have been subscribed by bona fide and not by fictitious persons, and the genuineness of the signatures. Without proof of the *kind* prescribed by the statute of the execution of the articles, the officers in whose offices the original articles and a copy thereof must be filed would have no authority or right to file the same in their respective offices, or, if they did so file them under such circumstances, there would still be no legally constituted corporate entity; for it is the settled rule in this state, as well as in many other jurisdictions, that, where the statute requires articles of incorporation to be filed with some public officer before the proposed corporation is authorized to engage in the business for which it has been created, the filing of such articles in the manner prescribed constitutes a condition precedent to the right of such corporation to perform corporate functions. Martin v. Deetz, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; Capps v. Hastings Prospecting Co., 40 Neb. 470, 58 N. W. 956, 24 L. R. A. 259, 42 Am. St. Rep. 677; Thompson on Corporations (2d Ed.) § 200.

Now, since it is legally essential to the filing of the original articles that the *kind* of evidence prescribed by the statute of the execution thereof shall be provided, such evidence must necessarily be preserved in the offices where the filings are required to be made, so that the public, vitally interested in all corporations, may know whether such corporation has a legal existence, has the right to exercise corporate functions, and hence prosecute its corporate purposes, and may legally be bound as a corporate entity by its contracts. The mere annexing, therefore, by the president and secretary of the corporation, to the amended articles of such certificates, the original of which is already on file in the office of the clerk of the county where the corporation has its principal place of business, and a duly certified copy thereof on file in the office of the Secretary of State, could add no force to the articles as amended, either as proof of the legal existence of the corporation prior to and at the time of the making of the amendment, or of the proper adoption and due execution of the amended articles themselves. Indeed, all that the annexing of the original certificates to the amended articles could amount to would be that the president and secretary, in certifying to the correctness of such amended articles, as the statute specifically requires, had further certified that at some other time some other persons had acknowledged the due execution of the original articles, which would involve the mere certifying to a fact of which the public had already been furnished knowledge by the very character of proof prescribed by the statute.

But there is no necessity for further pursuing this discussion. The conclusive answer to the respondent's position upon this point is to be found, as before stated, in an absence of any provision, in the sections of the Code by the authority of which articles of incorporation may be amended, or in any other section, requiring certificates acknowledging the execution of original articles to be attached to amended articles.

[3] 2. There is, in our opinion, no merit in the second point urged by the Attorney General.

It appears from the petition, as it does from the original articles of incorporation, a copy of which is made a part of this record, that the petitioner was formed and organized with a capital stock of $10,000,000, divided into 100,000 shares of the par value of $100 per share. It further likewise appears that by the amendment to the original articles the petitioner has divided said numbers of shares of stock into two classes, viz., preferred and common stock; 40,000 shares being thus made preferred stock, and the remaining 60,000 shares common stock. Prior to such classification, the capital stock of the petitioner was not so divided or classified.

The petition alleges, and, as a matter of fact, it is true, unless the position of the Attorney General can be held as a legal proposition to be sound, that the petitioner has not, by its amended articles of incorporation, increased or diminished, or attempted to increase or diminish, its capital stock, etc. But upon this point the contention is that the classification of the stock in the manner pointed out in effect amounts to an increase of the preferred capital stock; and that in so increasing it the petitioner did not proceed as in such cases provided by section 359 of the Civil Code.

Among other things section 362 of the Civil Code, supra, declares that "nothing in this section shall be construed to authorize any corporation *to increase or diminish its capital stock*, change its name, extend its corporate existence, or increase or diminish the number of its directors, without complying with the special provisions of this Code applicable thereto."

Section 359, supra, points out how and in what manner the capital stock of a corporation may be increased or diminished; and it is, of course, admitted that in the act of classifying the capital stock of the petitioner the procedure, as thus required to be observed, was not followed. It is, however, very clear that the mere act of classifying capital stock, without changing the number of shares of such stock, cannot be held to be in any sense tantamount to increasing or reducing such stock. This proposition is too palpable to require discussion. Still it may with no impropriety be noted that there is, in reason, a marked line of difference between the act of increasing or reducing the capital stock of a corporation and that of simply dividing its capital stock into several classes or kinds, without an increase or reduction of the number of shares of such stock. Both acts can, it is very true, be accomplished only by a substantially strict compliance with the terms of the statute; but as to the first-mentioned act it is plainly manifest that the public are directly and vitally concerned in its execution. Such act, if not legally performed, might result in impairing or disturbing in some manner the rights of the creditors of the corporation, as, for instance, by withdrawing its property from the demands of creditors. The act of classifying or dividing the capital stock into two or more kinds, without any alteration or change in the number of shares of such stock, while required to be done as the statute ordains, involves nothing more than a contract between the stockholders as to how they shall divide the profits and the corporate property of the corporation, after the payment of corporate obligations. Justice Lawton, in Toledo, etc., v. Cont. Trust Co., 95 Fed. 497, 531, 36 C. C. A. 155. If the classification under such circumstances be illegal or not effected according to the statutory requirements, the result cannot affect the public, but only the stockholders. From these considerations, as well as others which need not be referred to, it must become very clear that the mere act of dividing capital stock into two or more kinds, where there is no actual increase or reduction of such stock, cannot be held, upon any rational theory, to amount to, or to have been intended by the Legislature as the equivalent of, the act of increasing or reducing the same.

[4] But section 359 contains another provision upon which the Attorney General, in attempting to support his position lays special stress, and it reads: "Provided, however, that where the articles of incorporation provide for two or more kinds of capital stock, no increase or reduction of capital stock shall be made without the assent of two-thirds of all the subscribed stock and in making such increase or reduction, *the assent shall identify the particular class or classes of stock to be increased or reduced and the amount apportioned to each.*"

The argument is that, the petitioner having had no preferred stock previously to the classification of its capital stock by the amendment in question, the act of thus classfying said stock was, within the meaning of the language of section 359 as above quoted, equivalent to the act of increasing the number of shares of preferred stock. Or, as the Attorney General himself states his position: "The day before the increase it [petitioner] had no preferred stock. The day after it has 40,000 shares of preferred stock. The amount of the preferred stock is thus very much increased over what it was previously, being theretofore nothing in amount."

We do not think the argument thus advanced will stand under the test of a logical analysis of the provision upon which it is built up. That provision very plainly has application to those cases only where a corporation, whose capital stock is already divided into two or more classes, proposes to increase or diminish its capital stock, thus necessarily affecting, in point of quantity, one or, perhaps, all the several kinds of stock of which its capital stock consists, and not to those cases where, as here, the capital stock, being all of one class, is merely divided or classified into two or more kinds without actually increasing or reducing the original capital stock. No other meaning can be ascribed to that provision, it seems clear to us, without most seriously twisting its language out of all shape. The language, "and in making such increase or reduction, the assent shall identify the particular class or classes of stock to be increased or reduced, and the amounts apportioned to each," necessarily presupposes the existence of two or more classes of stock at the time such increase or reduction of the capital stock is made. If, as here, there is but one kind of capital stock, then obviously there would be nothing to "identify," and nothing as to which an apportionment of "amounts" would be necessary. In other words, in a case like the present one, where the capital stock is all of one kind, and the same is merely divided into two or more classes or kinds, without increasing or diminishing the original number of shares of the capital stock, the act of so dividing such stock merely involves the *creation* of two or more kinds of stock out of the number of shares for which the corporation was originally capitalized. This proposition would appear to be self-evident. While it may be said to be true, in a case where, as here, all the stock was originally common stock, the division of such stock into two or more kinds will result in the reduction of the number of shares of the common stock, yet, as declared, the provision relied upon by the Attorney General could not have been intended to refer to any such case, for, as seen, by its own terms it limits its operation to those cases only "where the articles of incorporation provide for *two or more kinds of capital stock*;" hence the necessity, as shown, for the identification of the particular class or classes of stock "*to be increased or reduced.*"

[5] We cannot see our way clear to hold otherwise than that the respondent has failed to present any valid reason for his refusal to file in his office the amended articles involved here. Corporations are creatures of the Legislature, and the method of bringing them into existence must be found in the statutes and followed with substantial strictness to entitle corporations to perform corporate functions. And such statutes, if constitutionally valid, must be accepted as the Legislature gives them to the people; and therefore the courts have no more power or right, by construction, to import into them language which has not been inserted therein by legislative authority than to take from them, by like process, language which the Legislature has put into them. To hold with the Attorney General upon either of the propositions to which he subscribes in

this controversy would necessitate the insertion into the sections of the Code pertinent to the issue submitted here language which they do not contain.

For the reasons herein set forth, a writ of mandate directed against the respondent, as prayed for in the petition, will issue out of this court. It is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

19 Cal. App. 575

JONES v. LEWIS. (Civ. 1,042.)

(District Court of Appeal, Second District, California. Aug. 2, 1912.)

1. ASSAULT AND BATTERY (§ 24*)—CIVIL ACTION—PLEADING.

Where a complaint for assault and battery alleged the assault, the means employed, and the character thereof, containing a statement of the facts constituting the cause of action in ordinary language, as provided by Code Civ. Proc. § 426, and the answer admitted the assault, but pleaded self-defense, there was no error in overruling a demurrer to the complaint.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. §§ 25–35; Dec. Dig. § 24.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

2. ASSAULT AND BATTERY (§ 19*)—CIVIL LIABILITY.

Where defendant committed a willful assault on plaintiff without justification, he was liable for the injuries sustained, as provided by Civ. Code, § 1714.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 21; Dec. Dig. § 19.*]

3. TRIAL (§ 108*)—RIGHT TO ARGUMENT.

That the court announced his impressions from the evidence before an opportunity was afforded counsel for argument was not error; defendant's counsel having refused to make any argument, after the court had stated that his conclusions were subject to change, if subsequent arguments should suggest their impropriety, and offered to afford opportunity to make such argument.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 269, 269½; Dec. Dig. § 108.*]

4. APPEAL AND ERROR (§ 981*) — REVIEW—MATTERS OF DISCRETION.

It is for the trial court, on a motion for new trial for newly discovered evidence, to determine whether the proffered evidence would affect the decision, if introduced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3876; Dec. Dig. § 981.*]

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by J. W. Jones against W. L. Lewis. Judgment for plaintiff, and defendant appeals. Affirmed.

F. E. Davis and Paul W. Schenck, both of Los Angeles, for appellant. Goldberg & Meily, of Los Angeles, and Harry L. Dearing, of Los Angeles, for respondent.

ALLEN, P. J. The action was one for damages on account of an assault and battery. The complaint alleges that the "defendant violently and maliciously assaulted the plaintiff with a hammer, and striking plaintiff upon the arm and upon the face with said hammer, bruising and wounding plaintiff, and more particularly crushing in and fracturing the plaintiff's cheek bone under and to the left of the plaintiff's left eye." The answer admitted the striking as alleged, but undertakes to justify the same upon the ground of self-defense. The case was tried by the court. It was found that on the date mentioned an altercation arose between plaintiff and defendant, during which defendant struck plaintiff, as alleged in the complaint; that the injuries are permanent in their character; that the act of striking plaintiff was not done in self-defense, or to protect defendant in person or property. Judgment was accordingly rendered in plaintiff's favor for $1,000, which was, by consent, at the hearing of the motion for a new trial, reduced to $750.

[1, 2] We see no merit in appellant's contention that the complaint was insufficient. The assault, the means employed, and the character thereof are fully set forth. There is contained in the complaint a statement of facts constituting a cause of action in ordinary language (section 426, Code Civ. Proc.), and no error intervened in the overruling of the general demurrer. Further, the assault was admitted by the answer. The justification claimed was by the court found not to exist. The assault being admitted and found by the court, a resultant injury followed, sufficient to justify the amount of the judgment. The acts of defendant were willful, by reason of which he is responsible for the injury. Section 1714, Civ. Code. The record discloses no assessment of damages on account of malice, and a compensatory amount is not affected by a failure to find malice. The findings of fact and conclusions of law are separately stated, and the criticism in that regard is unwarranted. We see no error in the action of the court refusing a continuance; the record establishes the propriety of such order.

[3] While the court announced its decision, or, more properly speaking, the impressions produced upon the mind of the court by the evidence, before an opportunity was afforded counsel for argument, nevertheless, when its attention was called to the fact by defendant's counsel, the court said that it had merely indicated its conclusions, which were subject to change, if subsequent argument should suggest their impropriety, and offered to hear argument; but counsel for defendant refused to make any argument. No prejudicial error resulted from such conduct.

[4] Appellant contends that the court erred in denying a new trial upon the ground of newly discovered evidence made to appear by affidavits in that regard. We see nothing in the affidavits which may be said to show newly discovered testimony. It is claimed therein that counsel for the defense had no knowledge of the extent of the injuries, and was therefore unable to present evidence in relation thereto; but an examination of the complaint shows that the defense was fully and completely apprised of the extent and character of the injuries complained of. The matter of granting a new trial upon the ground of newly discovered evidence is with the trial court; and it is for that court to say whether or not the proffered evidence is such as would affect the decision of the court, if introduced. The court in this instance determined that it would not.

We see no error in the record, and the judgment and order are affirmed.

We concur: JAMES, J.; SHAW, J.

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19 Cal. App. 577

FAST v. YOUNG, Justice of the Peace.

(Civ. 1,122.)

(District Court of Appeal, Second District, California. August 2, 1912.)

1. JUSTICES OF THE PEACE (§ 122*)—DEFAULT—VACATION—MOTION—TIME.

Under Code Civ. Proc. § 859, as amended by St. 1905, p. 254, providing that a motion to set aside a judgment by default must be perfected within 10 days after notice of the entry of judgment, where an affidavit in support of such a motion alleged that defendant's counsel did not have notice that judgment had been entered against his client until October 3, 1911, and the motion to vacate was heard on October 13th, an order, made by the justice on that day, granting the motion was in time, though more than 10 days had elapsed since the entry of the judgment.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382–388; Dec. Dig. § 122.*]

2. JUSTICES OF THE PEACE (§ 122*)—JUDGMENT—FAILURE TO ANSWER—DEFAULT—VACATION.

Code Civ. Proc. § 872, provides that judgment shall be rendered as if the defendant had failed to appear and answer or demur if, on the overruling of a demurrer to the complaint, defendant fails to answer at once. *Held* that, where judgment was rendered by a justice of the peace for defendant's failure to answer on the overruling of a demurrer to the complaint, such judgment was a judgment by default, within section 859, authorizing a motion to vacate a default judgment within 10 days after notice thereof, etc.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382–388; Dec. Dig. § 122.*]

3. JUSTICES OF THE PEACE (§ 122*)—JUDGMENT—VACATION—COSTS.

An order vacating a justice's judgment for defendant's failure to answer on the overruling of a demurrer to the complaint was not objectionable for failure to require defendant to pay costs, where it did not appear that any costs were claimed, or that any claimed were not paid at the time the order was made.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382–388; Dec. Dig. § 122.*]

4. JUSTICES OF THE PEACE (§ 122*)—JUDGMENT—VACATION—COSTS.

An order vacating a justice's judgment was not objectionable for failure to designate the costs which petitioner was required to pay as a condition to the granting of the motion.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 382–388; Dec. Dig. § 122.*]

5. JUSTICES OF THE PEACE (§ 208*)—REVIEW—PRESUMPTIONS.

Where, on appeal from the judgment on certiorari to review the vacation of a justice's judgment by default, it appeared that the record on appeal did not contain a complete statement of all of the proceedings had in the superior court, and it was objected that the justice's order did not require defendant to pay costs as a condition of granting his motion, it would be presumed in support of the order that there were no costs assessable against the defendant at the time the motion to vacate was granted, or, if there were, that they had been paid.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 807–817; Dec. Dig. § 208.*]

6. JUSTICES OF THE PEACE (§ 209*)—REVIEW BY CERTIORARI—DETERMINATION—JUDGMENT.

Where certiorari was issued to review a justice's order setting aside a default judgment, the superior court, on determining that the order was proper, should have affirmed it, instead of entering an order dismissing the writ.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 818–828; Dec. Dig. § 209.*]

Appeal from Superior Court, Los Angeles County; George H. Hutton, Judge.

Certiorari by Richard Fast against William Young, Justice of the Peace of Los Angeles Township. From a judgment dismissing the writ, plaintiff appeals. Affirmed.

Otto Schroeder, of Los Angeles, for appellant. Newman Jones, of Los Angeles, for respondent.

JAMES, J. This proceeding in certiorari was brought for the purpose of having reviewed an order made in the justice's court of Los Angeles township, whereby a judgment entered in an action brought in that court by the petitioner here against one Mrs. H. Grant was vacated and set aside under the provisions of section 859 of the Code of Civil Procedure. After return made to the writ in the superior court and hearing had thereon, the court ordered the proceedings to be dismissed, and petitioner appeals.

In the justice court action the defendant, within the time allowed by law, made appearance by demurrer to the complaint, which demurrer was filed on August 9, 1911. Thereafter, on September 18, 1911, an order was made by the justice overruling the demurrer and allowing defendant three days within which to answer. No answer was filed, and, on September 28, 1911, judgment was entered in favor of plaintiff. Thereafter, on October 6, 1911, defendant filed a notice of motion to have the judgment vacated, on the ground that it had been taken against her through her excusable neglect, and an affidavit of merits in proper form and of sufficient substance was filed, which affidavit also set forth facts from which the justice might conclude that the neglect of defendant in failing to file her answer was excusable. Thereafter, on October 13, 1911, the motion came on to be heard, and the justice made an order setting aside the judgment and allowing the defendant to answer to the complaint.

[1] It is contended in the brief of counsel for appellant that the justice had no jurisdiction to make the order setting aside the judgment, because the motion for that order was heard more than 10 days after the entry of judgment. Section 859 of the Code of Civil Procedure, prior to the year 1905, did provide that such a motion must be presented within 10 days after the entry of judgment. The Legislature of 1905, however, amended the section (St. 1905, p. 254), and it has since provided that such a motion must be made within 10 days after *notice* of the entry of judgment. The affidavit filed in support of the motion showed that the counsel for defendant in the justice court action did not have notice that judgment had been entered against his client until the 3d day of October, 1911. The motion to vacate the judgment having been heard on October 13,

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1911, the order of the justice, made that day, granting the motion was made within the time provided for by the statute.

[2] There is no merit in the contention of appellant that the judgment as entered in the justice's court was not a judgment "by default," from which relief is provided to be given by the provisions of section 859 of the Code of Civil Procedure. Section 872 of the same Code provides that judgment is to be rendered as if the defendant had failed to appear and answer or demur where: "2. If the demurrer to the complaint is overruled and the defendant fails to answer at once." We have no doubt at all that under the provisions of the section last cited the judgment entered in the justice's court after demurrer, and upon failure of defendant to answer, is to be treated as a default judgment, and as one which may be set aside upon sufficient facts appearing, under the provisions of section 859 of the Code of Civil Procedure.

[3-5] The point is also made that the justice, as a condition to the granting of the motion to set aside the default judgment, should have required the moving party to pay costs. It is not made to appear that there were any costs claimed on the part of petitioner, or that, if any were claimed, they were not paid at the time the order was made by the justice. It was not necessary that the amount of costs be specified in the order granting the motion to vacate the default judgment. Furthermore, it is evident that the record presented to us does not contain a complete statement of all of the proceedings had in the superior court. It is not shown by this record what, if anything, was made to appear to the superior court regarding the matter of costs which might have been assessed by the justice in favor of the petitioner here, who was the plaintiff in the justice court action. The record, after setting forth the contents of the return made to the writ, contains only the following order of the superior court, which is evidently only a portion of the record then made: "It is further ordered that the amended return be filed and made part of the record in this case, and that the proceedings be and are hereby dismissed." In support of the order of the superior court, we must assume, in the absence of a record showing the contrary to be true, that evidence was heard which would furnish facts in support of the order; and that therefore the superior court was satisfied from such evidence, either that there were no costs assessable against the defendant in the justice court action at the time her motion to vacate the default judgment was granted, or that such evidence showed that if there were such costs which were properly so assessable they had been paid by the moving party.

[6] The superior court made its determination in this proceeding in the form of an order dismissing the same. Upon return being made to the writ and hearing had thereon, judgment should have been entered, affirming the order of the justice's court. However, as counsel have not presented any objections to the procedure taken, we have treated the order in the light of a judgment and considered the questions presented upon their merits, and assumed that an appeal was proper to be taken from the order as made by the superior court.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

19 Cal. App. 567

Ex parte MITCHELL. (Cr. 195.)

(District Court of Appeal, Third District, California. Aug. 1, 1912.)

1. Parent and Child (§ 17*)—Failure to Support Child—Criminal Liability—Statutes—Police Power.

Pen. Code, § 270, making a parent's willful omission, without legal excuse, to furnish necessary food, clothing, shelter, and medical attendance for his children a penal offense, was a proper exercise of legislative power to provide for the public welfare.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 176–181; Dec. Dig. § 17.*]

2. Statutes (§ 64*)—Partial Invalidity.

Where only a part of a statute is invalid for any reason, in order to render the whole void for the same reason, all the parts must be so interdependent that no one part can be eliminated without destroying the entire force of the whole statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

3. Statutes (§ 64*)—Partial Invalidity—Separation.

Pen. Code, § 270, provides that a parent who willfully omits, without legal excuse, to furnish support for his child is punishable by imprisonment in the state's prison or in the county jail not exceeding two years, or by a fine not exceeding $1,000, or both. Section 270d, as added by Laws 1911, c. 379, provides that in such case all or part of any fine which may be imposed or collected may be paid over to a person therein named for the support of the child or children; and, in case the parent is imprisoned in the county jail, he may be compelled to work on the highways, for which service the board of supervisors may allow the wife, or some other person, for the support of the child, $1.50 for each day's work so performed; and section 1203 declares that the court may, after imposing sentence, suspend it and place the person convicted on probation. *Held*, that sections 270d and 1203 were separable from section 270; and hence any unconstitutionality of sections 270d and 1203, did not invalidate section 270.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58–66, 195; Dec. Dig. § 64.*]

4. Habeas Corpus (§ 32*)—Suspension of Sentence—Enlargement—Enforcement of Sentence.

Where a person convicted of a criminal offense was enlarged under a suspension of the sentence authorized by statute, alleged to be unconstitutional, such enlargement was in the nature of an escape, which did not affect the validity of the sentence, so that on his subsequent incarceration for violation of his parole he was not entitled to release on habeas corpus.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 29; Dec. Dig. § 32.*]

Application of John W. Mitchell for habeas corpus to obtain his release from imprisonment for omitting, without lawful excuse, to furnish necessary food, clothing, and shelter for his minor children. Writ discharged, and prisoner remanded.

Martin I. Welsh, of Sacramento, for petitioner. J. Q. Brown, Asst. Dist. Atty., of Sacramento, for respondent.

HART, J. The petitioner, Martin I. Welsh, acting in behalf of one John W. Mitchell, and claiming that he is unlawfully restrained of his liberty by the warden of the Folsom state prison, at Represa, this state, seeks the release of said Mitchell through the writ of habeas corpus.

The petition discloses that Mitchell, in the month of December, 1911, was arrested upon a complaint, based upon section 270 of the Penal Code, charging him with the crime of omitting, without lawful excuse, to furnish necessary food, clothing, shelter, etc., for his minor children. Said crime being an indictable misdemeanor or an offense of which the superior court has triable jurisdiction, Mitchell was, in due course, arraigned before the superior court of Sacramento county upon an information charging him with said crime, and upon said arraignment entered a plea of guilty.

On the day of the arraignment of Mitchell and his plea of guilty, as stated, the court before which said proceeding took place, in the exercise of the power and authority vested in the courts of this state by section 1203 of the Penal Code, made an order suspending the imposition of sentence and placing Mitchell on probation pending his good behavior; the order to that effect to remain in force for the term of five years.

On the 7th day of March, 1912, said Mitchell was brought before department 1 of said superior court, and was thereupon, after due proceedings, sentenced by said court to imprisonment for a term of two years in the state prison, which is the maximum punishment by imprisonment prescribed by section 270 of the Penal Code, under which he was charged and convicted. After the imposition of said sentence, the court, acting upon the authority given it by said section 1203 of the Penal Code, again gave Mitchell another chance by ordering the withholding of the commitment, and thus allowing him the benefit of further probation, upon certain terms, of which an agreement on his part to support his wife and children in a proper manner was one. Mitchell, upon the making of the last-mentioned order, was released; but on the 16th day of June, 1912, said order withholding the commitment and the order of probation therewith made were set aside and annulled, upon the ground that Mitchell had violated the terms of his probation. A commitment was thereupon ordered to be forthwith issued, and upon compliance with said order, and under the authority of the commitment so issued Mitchell was delivered into the custody of the warden of the state prison at Represa, where he is now confined and restrained of his liberty.

The specific grounds upon which the contention is urged that the restraint of Mitchell is illegal are that the several sections under which the proceedings above outlined were had are, for a number of alleged reasons, violative of certain provisions and inhibitions of the Constitution. These reasons may thus be briefly stated: That a person proceeded against under said sections is thus denied a speedy trial and "in part of the right of trial by jury." That section 1203, supra, in effect gives the court power to imprison for debt. That said section unwarrantably "authorizes a judge to suspend the law, in that he may suspend the punishment." That section 270d, as added by Laws 1911, c. 379, contravenes section 22 of article 4 of the Constitution, in that it provides that a fine imposed thereunder may be paid to the wife of the defendant or the guardian or custodian of the child or children of such defendant; the argument being that the diversion of the money obtained through fines so imposed constitutes a "direct appropriation of public funds for private or individual purposes," etc.

Section 270 of the Penal Code, upon which the charge against Mitchell was founded, has been, in some form or another, on our statute books since the year 1872, and was, like many of our Code sections, taken, at least in substance, from the New York Codes. Up to the year 1909, the punishment prescribed by said section for the willful omission by a parent, without lawful excuse, to furnish necessary food, clothing, shelter, and medical attendance for his child was as for an ordinary, or what is often termed a "low-grade," misdemeanor. The Legislature of 1909, however, amended the section by fixing the maximum penalty at imprisonment, either in the county jail or the state prison, in the discretion of the court, for the term of two years, or by fine not exceeding $1,000 or by both. The section was not otherwise altered or amended.

The Legislature of 1903, working on certain humane lines developed by the investigations of criminologists, who had for many years devoted their time and much study to the question of a scientific treatment of criminals, passed what is known as the probation law, by which, if valid, the courts are authorized, when the circumstances justify it, to allow persons arraigned before them for public offenses to go at large on probation, on certain conditions, such persons still, however, remaining within the jurisdiction and power of the courts, in preference to incarcerating them in prison and thus marking them with the indelible opprobrium of a convict. The manifest object of this humane enactment was and is to accomplish, if possible, the reform of those thus led astray, either through their own uncontrolled volition, or by vicious associates. The Legislature of 1905 amended this law in some particulars; but such amendment is not material to this inquiry.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In 1911 the Legislature added a number of sections to the Penal Code, of which section 270d, supra, is one. Those sections provide a sort of scheme by which, in cases where a parent has willfully refused to support his children, all or part of any fine which may be imposed and collected for such misbehavior may be paid over to a person therein named for the benefit and support of such children; and, where the parent is given a punishment of imprisonment in the county jail, he may be compelled to work on the public highways of the county, for which services the board of supervisors may allow to his wife, or to some other person, for the support of his children, the sum of $1.50 for each day's work so performed.

[1] We do not understand that the petitioner questions the constitutional power of the Legislature to penalize the act of parents in willfully, and without lawful excuse, refusing to support and maintain their minor children. In other words, it is not our understanding that it is claimed that section 270, viewed alone or without reference to any supposed or real connection it may have with sections 1203 and 270d, of the Penal Code, is in any sense in contravention of any of the inhibitions of the Constitution. Nor can we perceive wherein such legislation can in any manner or respect offend the Constitution. Indeed, the provisions of section 270 in reality merely represent, as to the subject to which it relates, the crystallization of the power of police, under and by virtue of which the state is authorized to make all manner of reasonable and wholesome rules controlling and regulating the individual behavior of people in their intercourse with each other and toward society and government. And we are not, nor have we ever been, nor do we expect to be, advised of any case in which the constitutional right of the Legislature to enact such legislation has been successfully challenged. The necessity for such a law becomes obvious when it is considered that there is a class of parents immune from the force of civil processes, by which the duty of parents to their minor children may in certain cases be coerced; and, in the absence of a statute authorizing penal punishment for such default, the members of such class could with impunity cruelly neglect the helpless infants for whose existence they are responsible, and whose support and maintenance constitute a natural duty, and by such conduct make their minor children a charge upon others or the public, or, perhaps, drive them into habits of indolence and profligacy. In the last analysis, the supreme purpose of all government is to promote and maintain the happiness of mankind; and the very first step to that end is the giving of such care and attention to infancy as that it may be developed and nurtured into sterling man and womanhood.

But, as stated, it is not the contention that section 270 itself is out of harmony with any of the provisions of the Constitution. The proposition upon which the petitioner plants his claim to the release of Mitchell is that the other sections to which we have referred—sections 1203 and 270d—are unconstitutional and void, and that they have been so connected by the Legislature with section 270 that the irresistible effect of their invalidity is to drag with them the last-mentioned section.

We are unable to agree to the contention as thus stated. It is not necessary, in the determination of the issue submitted here, to inquire into the question whether sections 1203 and 270d of the Penal Code are obnoxious to the constitutional objections urged against them by counsel for Mitchell; for section 270 is not in any degree dependent upon those sections. Section 270 existed and was enforced as a complete act or statute for many years before sections 1203 and 270d were introduced into the Code; and it lives, not from anything contained in those sections, but from and upon its own intrinsic vitality. Eliminate the other sections entirely, and section 270 will still exist and possess the same force that was breathed into it at the time of its enactment.

[2] But assuming that sections 1203 and 270d were intended to be and are a part of section 270, and that said sections are unconstitutional and invalid, still section 270 could and would nevertheless stand as an effective provision; for it is a well-settled rule that, where a statute is valid in one part and invalid in another, the former part, if not dependent in any measure upon the latter, and can, without the latter, accomplish one or all the material purposes of the act, will be sustained, and that which is void may be eliminated and disregarded without destroying or impairing the force or efficacy of the statute for the purpose or purposes which the valid part is capable of subserving. In other words, where only a part of a statute is invalid for any reason, in order to render the whole statute void for the same reason, all the parts thereof must be so interdependent as that no one part can be eliminated without destroying the entire force of the whole statute.

[3] Section 270 is not, as we have shown, in any sense dependent for its force on the

other sections. And, manifestly, the mere fact that by sections 1203 and 270d the Legislature may have undertaken to confer upon the court some unauthorized power in the matter of the disposition of cases arising under section 270 can in no degree affect the validity of the last-mentioned section. If the power thus conferred is beyond the constitutional right of the Legislature to confer on the court in such cases, then the simple result is that the legislation attempting to bestow such power upon the court must fall, but without, however, carrying with it a statute in all respects valid and having no necessary connection, so far as the latter's own force is concerned, with such invalid legislation.

[4] The result of the foregoing views is that, assuming that section 1203 is void, because violative of certain mandates of the Constitution, the effect of the course adopted by the court in the case of Mitchell, under said section, was simply a failure on its part to do its duty under the law in not proceeding with the execution of its sentence immediately upon the imposition thereof; and the mere fact that it did not thus do its duty cannot be held to have deprived it of jurisdiction to compel the execution of its judgment at some subsequent time. The enlargement of the prisoner under such circumstances would involve a void act, because in excess of the court's jurisdiction; and the effect thereof would be rather in the nature of an escape, as the prisoner could lawfully be taken at any time.

As to the contention with respect to section 270d (which was not invoked in this case, no fine having been imposed), it is very clear that, conceding, for the purposes of this case, that said section is in conflict with section 22 of article 4 of the Constitution, the act of the court, in pursuance of the provisions of said section, in improperly diverting fines imposed by authority of section 270 from the public treasury, and causing them to be appropriated to the use and benefit of the wife or minor children of the delinquent husband or father, cannot in any manner or degree invalidate or detract from the force of section 270. As before shown, even if the provisions of section 270d were incorporated into and made a part of section 270 as it now reads, the latter section could stand, after an elimination therefrom of the provisions authorizing the payment of the money from such fines as might be imposed thereunder to the wife or children of the husband or father upon whom the fine is imposed. In short, as stated, section 270 of the Code is complete in itself for all the purposes that it was designed to accomplish; and the sections of the Code at which the complaint of the petitioner is particularly aimed cannot, by any reasonable construction, be held to affect in the slightest measure its validity, or in any degree or respect impair its force.

The Texas cases cited and relied upon by counsel for Mitchell present a different situation from that involved here; and they are therefore not in point, and have no application to the facts of this case.

As to sections 1203, 270d, and 273h of the Penal Code, we can only say that they are framed on highly commendable and humane lines; and it would, indeed, be a result much to be deprecated if the courts shall ever conceive it to be necessary to declare them invalid for any reason, and therefore nonenforceable.

For the reasons herein set forth, the writ will be discharged, and the prisoner remanded to the custody of the warden of the state prison at Represa.

We concur: CHIPMAN, P. J.; BURNETT, J.

19 Cal. App. 581

ANDERSON et al. v. BLEAN et al.

(Civ. 979.)

(District Court of Appeal, First District, California. Aug. 14, 1912.)

1. MECHANICS' LIENS (§ 271*)—ENFORCEMENT — COMPLAINT — JOINDER OF COUNTS OR CLAIMS.

A complaint in an action to enforce a mechanic's lien, alleging that the contract between the owner and principal contractor was not properly recorded, and on the theory that this rendered it void, seeking to recover the reasonable value of the services rendered, and also alleging that there was sufficient money in the owner's hands to pay all claims against the building, was not subject to general demurrer as placing plaintiff in a position to recover whether the contract was void or valid, since if a complaint contains two causes of action not separately stated, or is uncertain in any respect, the defect can be reached only by special demurrer, and not by a general demurrer.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 494–513; Dec. Dig. § 271.*]

2. TRIAL (§ 395*) — FINDINGS—SUFFICIENCY —REPETITION.

In an action involving several causes of action, it is not necessary to repeat with reference to each cause the findings which apply in common to each of the causes.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934, 939; Dec. Dig. § 395.*]

3. TRIAL (§ 395*)—CONCLUSIONS OF LAW—SUFFICIENCY.

Where the findings of fact and conclusions of law in an action to enforce a mechanic's lien ended with the statement or direction that judgment be entered in accordance therewith, and it was apparent that any more specific conclusions of law, if made, would have been in favor of plaintiff, the omission of the formal conclusion that plaintiff was entitled to a lien did not warrant a reversal of the judgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927–934, 939; Dec. Dig. § 395.*]

Appeal from Superior Court, Alameda County; William H. Waste, Judge.

Actions by A. Anderson and another against Margaret E. Blean and another, which were consolidated and tried together.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Judgment for plaintiffs, and defendants appeal. Affirmed.

W. B. Rinehart, of Oakland, for appellants. C. L. Colvin, of Oakland, for respondent Anderson. Austin Lewis, of San Francisco, for respondent Lehto.

KERRIGAN, J. This is an action to foreclose several mechanics' liens. The appeal is from the judgment alone, and is brought to this court solely upon the judgment roll.

In October, 1907, defendant John Weitzel entered into a contract with defendant Margaret E. Blean, under the terms of which he was to construct a building on land belonging to her situated in Alameda county. This contract was in writing "and a portion thereof without the plans and specifications was recorded." In November, 1907, defendant Weitzel entered into an agreement with Panttaja, Latonen & Juniki, copartners, whereby said copartners were to construct the building in accordance with the contract between Weitzel and Blean. This contract was in writing, but was not recorded. The building, however, was constructed by said firm according to agreement, and notice of completion was regularly prepared and filed. The members of this firm were made defendants in this action, but apparently no judgment was sought or taken against them. There were two actions brought to foreclose liens on the property involved, which, pursuant to an order of the trial court, were consolidated.

The complaint filed by plaintiff Anderson embraces five separate causes of action, one of which is for services rendered by Anderson himself, and the others are for services rendered by four assignors of Anderson. The other complaint was filed by the plaintiff John Lehto, and is for labor performed by him as a carpenter under employment by said copartners. Judgment went for the plaintiffs, Anderson recovering the sum of $337.90 and costs, and Lehto being awarded the sum of $49.50 and costs.

The case is well briefed, but the points presented are highly technical, and none of them in our opinion warrants the reversal of the judgment.

A general demurrer was filed by the defendants Blean and Weitzel to each of the several causes of action set forth in the complaint filed by Anderson, and defendants contend that the trial court erred in not sustaining that demurrer.

[1] In each of the causes of action alleged by said Anderson he proceeds apparently upon the theory that the contract between Weitzel and the owner to construct the building was void, and he seeks to recover the reasonable value of the services rendered, while he also states in another part of his complaint that there is sufficient money in the hands of the owner Blean to pay all claims against the building. In support of their demurrer it is objected by the defendants to this method of pleading that said plaintiff is in a position to recover whether the contract be void or valid, but we see nothing wrong in this. For aught that appears in the record, this plaintiff has simply alleged the actual facts, i. e., that part only of the contract between the owner and Weitzel was recorded, and that there was a sufficient sum of money in the hands of the owner to pay all claims and liens against the property. If these are the facts of the case, the plaintiff had a perfect right to allege them in one cause of action, and to leave the validity of the contract to the judgment of the court. If the complaint contained two causes of action not separately stated, or if it was uncertain in any respect, it was amenable to a special demurrer, but such defects in the pleading afford no ground of general demurrer.

[2] Defendants' next point is equally without merit. The court "embraced its decision in a single set of findings," and it made but one finding as to each matter which was common or applicable, to all the causes of action in both complaints, and it made a separate finding for each matter peculiar to or applicable only to any one cause of action. For example, the court made but one finding that there remained in the hands of the owner a sufficient sum of money to pay all claims against the building; and a separate finding in each cause of action as to the amount due each claimant and lienholder. This is according to the approved practice. Certain it is that in a divorce case, for example, one finding that the plaintiff and defendant are husband and wife would be sufficient where the divorce was granted upon several grounds. It would not be necessary in that case to repeat in the findings that plaintiff and defendant were husband and wife, nor was it necessary, we think, in the case at bar to repeat in the finding matters which were common to two or more causes of action. To have made a complete and separate set of findings for each cause of action would have been needless repetition, and would have retarded an examination of the record. Steam Mills Lumbering Co. v. L. A. College Co., 94 Cal. 229, 29 Pac. 629; Marble Lime Co. v. Lordsburg Hotel Co., 96 Cal. 332, 31 Pac. 164.

[3] Defendants also assert that the court failed to state as a conclusion of law that Anderson was entitled to a lien.

The findings of fact and conclusions of law end with the statement or direction that a judgment be entered in accordance therewith. Such statement alone has several times been held to be a sufficient conclusion of law. In Rea v. Haffenden, 116 Cal. 596, 48 Pac. 716, the court held that a mere direction of judgment following the findings of fact was a sufficient conclusion of law to support a judgment on appeal, where, as here, it is clear that any more specific conclusions of law must have been in favor of the plaintiff. Such being the case, the omission in the conclusions of law was merely as to a matter of form, and therefore would not warrant a reversal of the judgment.

There are two more assignments of error made by the defendants. In one defendants urge that the court should have made a finding of fact as to whether or not the contract between Blean and Weitzel was void or valid. This presents the same question as that first considered in this opinion, and is disposed of by what is there said. The other point is as to an inconsistency between two certain findings of fact, and is too finely draw and inconsequential to merit serious consideration.

The judgment is affirmed.

We concur: LENNON, P. J.; HALL, J.

19 Cal. App. 511

GOLDWATER v. HIBERNIA SAVINGS & LOAN SOCIETY. (Civ. 1,000.)

(District Court of Appeal, First District, California. July 22, 1912. Rehearing Denied by Supreme Court Sept. 20, 1912.)

1. Limitation of Actions (§ 167*)—Mortgages—Lien—Extinguishment.

Under Civ. Code, § 2911, providing that a lien is extinguished by lapse of time within which an action can be brought on the principal obligation, the lien of a mortgage is extinguished by the lapse of time that will bar an action on the debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651–653; Dec. Dig. § 167.*]

2. Limitation of Actions (§ 167*) — Foreclosure of Mortgage—Power of Sale—Determination—"Lien."

Civ. Code, §§ 858, 2932, provide that a power of sale in a mortgage shall be deemed a part of the security, and section 2872 declares that a lien is a charge imposed in some mode other than by a transfer in trust on specific property, by which it is made security for the performance of a particular act. *Held*, that a power of sale contained in a mortgage is a "lien," and can no longer be exercised after an action on the debt is barred.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 651–653; Dec. Dig. § 167.*

For other definitions, see Words and Phrases, vol. 5, pp. 4144–4153; vol. 8, p. 7707.]

3. Mortgages (§ 338*)—Power of Sale—Injunction—Barred Debt.

Where a power of sale contained in a mortgage provided that the recitals in the deed given on a sale under the power "must be deemed conclusive evidence of the facts recited," and the right to exercise the power was barred by the fact that limitations had run against the debt, the landowner, who had paid full value for the land after the debt was barred, was not bound to pay the debt as a condition to his right to sue to restrain a sale in the exercise of the power, under the rule that he who asks equity must do equity.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026–1035; Dec. Dig. § 338.*]

4. Mortgages (§ 338*) — Foreclosure — Injunction—Cross-Complaint—Defenses.

Where, in a suit to restrain foreclosure of a mortgage, defendant filed a cross-complaint for a decree authorizing a sale under the power contained in the mortgage, plaintiff was entitled to plead that the exercise of the power was barred by limitations in defense to the cross-complaint.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1026–1035; Dec. Dig. § 338.*]

Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Hyman Goldwater against the Hibernia Savings & Loan Society to restrain defendant's enforcement of the power of sale contained in a mortgage. From a judgment for plaintiff, defendant appeals. Affirmed.

For opinion of Supreme Court denying rehearing, see 126 Pac. 863.

Tobin & Tobin, of San Francisco, for appellant. Reed, Black & Reed and J. W. Bingaman, all of Oakland, and Thos. C. Huxley, for respondent.

HALL, J. This is an appeal by defendant from a judgment rendered in favor of plaintiff, after an order overruling defendant's demurrer to plaintiff's amended complaint and sustaining plaintiff's demurrers to defendant's answer and cross-complaint. Plaintiff by his complaint sought a decree restraining defendant from the threatened sale of land of plaintiff under a power of sale, contained in a mortgage, executed by the predecessor in interest of plaintiff, one Julia Hinz, upon her homestead, to secure the sum of $3,000 and interest.

As appears from the complaint, Julia Hinz had deceased before the attempted execution of the power, and the debt and note had also become barred by the statute of limitations, which bar is pleaded and set up both in the complaint and in the demurrer to defendant's answer and cross-complaint. The debt, as appears from the pleadings, has never been paid. The answer and cross-complaint set up the facts in greater detail than in the complaint; but it is perfectly clear from each and all of the pleadings that the mortgagor had deceased long before the attempted execution of the power, and that, likewise, any action upon the debt, note, and mortgage had become barred by the statute of limitations. An attempt was made to foreclose the mortgage by suit instituted by defendant against the executor of the last will of the mortgagor, which failed for the reasons set forth in the decision on appeal to this court. Hibernia S. & L. Scy. v. Laidlaw, 4 Cal. App. 626, 88 Pac. 730.

The points of law presented by the demurrer may be considered under three heads and are so discussed in a very able manner by counsel: (1) Is a power of sale contained in a mortgage given to secure the payment of a sum of money, owing by the mortgagor to the mortgagee, revoked by the death of the mortgagor? (2) Does the power of sale contained in the mortgage survive the barring by the statute of any action upon the debt, note, and mortgage? (3) If it be determined that the power of sale is no longer existent, for either of the reasons above suggested, may the mortgagor or her successor in interest invoke the aid of a court of equity to restrain a threatened sale under the power, without tendering payment of the outlawed, but unpaid, debt?

Both appellant and respondent have discussed these three questions elaborately and with much ability. Whether or not the power to sell contained in the mortgage is revoked by the death of the mortgagor depends upon whether or not such power of sale is a power *coupled with an interest.* Civ. Code, § 2356. Upon this question there is much conflict in the decisions in those states where, as in California, a mortgage transfers no title or estate in the property mortgaged.

[1] In this case, however, we do not deem it necessary to determine this question, for we agree with appellant that the ultimate determination of the matters in controversy between plaintiff and defendant depends upon the construction of sections 858 and 2911 of the Civil Code, for it depends upon the meaning of these sections whether or not the power to sell contained in a mortgage survives the bar of the statute against the debt and mortgage. Section 2911 of the Civil Code provides that: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." No other state in this country, so far as we are advised, has any such provision in its law. In New York the statutory provision is just the reverse; the word "not" being inserted before the word "extinguished." It is apparent that little light can be thrown upon the law of this state by decisions from other jurisdictions which have no such provision or rule of law as is contained in our section 2911. This section can have but one meaning according to its plain terms, which is that the *lien is extinguished* by the lapse of time that will bar an action upon the principal obligation.

[2] This at once suggests the question: What is a power to sell, contained in a mortgage? Such a power is authorized by the terms of section 2932 (Civ. Code), and by the terms of section 858 (Civ. Code) "is to be deemed a part of the security." In other words, the power to sell is a part of the security for the payment of the debt. By the execution of the power, the mortgagor has placed the property under the power of the mortgagee for sale to secure the payment of the debt. In other words, the power to sell is but a lien upon the property affected by the power. It conveys no estate or title to the land. By the terms of section 2872 (Civ. Code) "a lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act." A power to sell land contained in a mortgage, and which is expressly by our law "to be deemed a part of the security" (section 858, Civ. Code), comes squarely within the definition of a lien. It is a lien imposed upon the mortgaged land to secure the payment of the debt. Being a lien, by the very terms of section 2911 (Civ. Code), it is extinguished by the barring, by the statute of limitations, of an action upon the debt to secure the payment of which it was given. We can see no escape from the logic which compels the conclusion at which we have arrived from a consideration of the section of our law bearing upon the question under discussion.

The argument of appellant that the language of the section suggests that its application should be confined to the remedy by action does not strike us as sound. The bar as to remedies by action in court had already been fully and completely provided for. This section was intended to do something that had not been done by the various sections relating to the time within which action may be brought. It was intended to provide for the extinguishment of the lien given upon property for the payment of a debt, whenever by the lapse of time an action on the debt or other obligation is barred. This is clearly the view of the effect of section 2911 (Civ. Code) taken in Puckhaber v. Henry, 152 Cal. 419, 420, 93 Pac. 114, 125 Am. St. Rep. 75, 14 Ann. Cas. 844, where the court points out the difference between the rule in California and other states. The court had before it the case of a pledge remaining in the possession of the creditor, which the debtor or his successor in interest sought to obtain, which is not the case here. The court said: "The effect of the California rule is undoubtedly to prevent any affirmative action on the part of the mortgagee or pledgee to enforce his lien, after the debt is barred by the statute of limitations." This is precisely what appellant is trying to do in the case at bar. By advertising the property for sale, and by the threatened sale, appellant is taking affirmative action to enforce his lien. By its cross-complaint, in which it asks for a decree directing it to proceed to sell under the power, it is also taking affirmative action.

Appellant cites the case of Menzel v. Hinton, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647, from North Carolina, as a case holding that the power of sale survives the bar of the statute as to the debt, and claims that the law of such state is similar to the law of this state embodied in section 2911; but examination of the case discloses that there is no law in North Carolina similar to our section 2911. The court had before it simply the construction of the usual statute of limitations as to the time for bringing action in court. There is nothing in the statute of North Carolina, as disclosed in the case cited, providing for the extinguishment of liens. The case is not in point. (It may be noted that Menzel v. Hinton, was decided by a divided court—three to two.)

For the reasons above set forth, we are of the opinion that the power of sale under which appellant threatens to sell plaintiff's land has expired, and it is no longer of any validity.

[3] This brings us to the third question involved in this appeal: May the plaintiff invoke the aid of a court of equity to restrain a threatened sale under the power contained in the mortgage, without tendering payment of the outlawed, but unpaid, debt? Appellant argues with much earnestness and learning that this case comes within the rule that "he who seeks equity must do equity," and within the rule of the many cases that might be cited that hold that a mortgagor may not invoke the aid of the court to quiet his title against the cloud of an outlawed mortgage, without offering to pay the unpaid debt. But in this case plaintiff is not seeking to disturb the status quo. He is not asking the court to remove a cloud upon his title, except as it may incidentally do so by preventing the appellant from taking aggressive and further action that will put upon plaintiff's title a further and additional cloud. The power involved in this case contains the provision that the recitals in the deed that may be given upon the sale under the power "must be deemed conclusive evidence of the facts recited."

Appellant is threatening to proceed to sell under this lapsed power, and, as it is alleged, will execute a deed to the purchaser under such sale. It cannot be doubted but that, if appellant should sue plaintiff in foreclosure, plaintiff could successfully plead the bar of the statute in such a suit in equity. It seems to us that plaintiff now bears the same relation to appellant, in presenting for adjudication his right to prevent the enforcement of the extinguished lien, by the affirmative action of appellant in the threatened sale which may result in a deed containing recitals that may result in extinguishing plaintiff's title, that he would bear to appellant if appellant should sue in foreclosure and plaintiff herein should plead the bar of the statute. In either case he would but be setting up the bar of the statute to prevent affirmative action against him. He would be using the bar of the statute as a shield and not as a sword.

In this connection we are glad to refer to the case much relied upon by appellant as sustaining the proposition that a court of equity will not restrain the execution of a power to sell contained in a mortgage. House v. Carr, 185 N. Y. 453, 78 N. E. 171, 6 L. R. A. (N. S.) 510, 113 Am. St. Rep. 936, 7 Ann. Cas. 185. In this case the court was divided in the proportion of four to three. The majority held that the action would not lie. The only two cases which the majority opinion cited as exactly in point are the cases of Goldfrank v. Young, 64 Tex. 432, and Hutoff v. Adrian, 112 N. C. 259, 17 S. E. 78. In the Texas case the sale was under a trust deed, which conveyed the fee to the trustee; and the North Carolina case was in a jurisdiction where suits by a plaintiff in possession will not be entertained, where such plaintiff can defend against the suit of the purchaser in ejectment. Neither of these cases lends much support to the rule followed by the majority opinion in House v. Carr. Upon the other hand, the other three judges agree in an opinion written by Vann, J., which to our minds presents most cogent reasons why the action should be sustained. This opinion very fully points out the reasons that have suggested themselves to this court as sound reasons why this plaintiff should be permitted to invoke the aid of the court to protect himself and his title from a threatened aggressive attack—an attack, which, because of the language of the power, may result in unlawfully depriving plaintiff of his property, for which, as it appears from the allegations of the pleading, he paid full value after the claim of appellant had been barred and its lien extinguished. For these reasons we do not think that this case comes within the rule that a plaintiff may not invoke the aid of a court of equity to quiet his title against the cloud of an outlawed, but unpaid, mortgage.

[4] Certain it is, we think, that plaintiff had a right to plead the bar of the statute as a defense to appellant's cross-complaint, in which he sought for a decree directing and expressly authorizing a sale under the power, and the ruling of the court upon the demurrer to the cross-complaint was undoubtedly correct. Marshutz v. Seltzor, 5 Cal. App. 141, 89 Pac. 877.

Upon the whole case, we think the court did not err in its rulings upon the demurrers, and that the judgment should be affirmed; and it is so ordered.

We concur: LENNON, P. J.; KERRIGAN, J.

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19 Cal. App. 511

GOLDWATER v. HIBERNIA SAVINGS & LOAN SOCIETY. (S. F. 5,603.)

(Supreme Court of California. Sept. 20, 1912.)

MORTGAGES (§ 334*)—FORECLOSURE—POWER OF SALE—EXTINGUISHMENT—DEATH OF MORTGAGOR.

Where a note secured by mortgage had become barred by limitations, the mortgagee thereby ceased to have any interest in the land, as a lienholder or otherwise, in the enforcement of the power of sale contained in the mortgage, and the power thereby became a mere naked one, which terminated on the death of the mortgagor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1017, 1018; Dec. Dig. § 334.*]

In Bank. Appeal from Superior Court, Alameda County; Wm. H. Waste, Judge.

Action by Hyman Goldwater against the Hibernia Savings & Loan Society. Judgment for plaintiff, and defendant appeals. Petition for hearing in Supreme Court denied.

Tobin & Tobin, of San Francisco, for appellant. Reed, Black & Reed and J. W. Bingaman, all of Oakland, and Thos. C. Huxley, for respondent.

PER CURIAM. We deem the opinion of the District Court of Appeal (126 Pac. 861) herein correct, regardless of the question whether a power of sale included in a mortgage is, or is not, technically a lien on the land. At the time the defendant attempted to execute the power, the debt, note, and mortgage had become barred, and the mortgagor was deceased. The lien of the mortgage was therefore extinguished, and the mortgagee, as holder of the power, was without any interest whatever in the land, as lienholder or at all. Consequently, on well-settled principles, the interest once coupled with it had then ceased to exist, it had become a naked power, and, the mortgagor who made it being dead, the power had terminated with the extinction of the interest.

The petition for a hearing in the Supreme Court is denied.

(163 Cal. 405)

GALLATIN et al. v. CORNING IRR. CO. et al. (Sac. 1,936.)

(Supreme Court of California. Aug. 5, 1912. Supplemental Opinion Sept. 4, 1912.)

1. Waters and Water Courses (§§ 130, 132*) —Flood Waters — Appropriation—"Parcel."

Flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes "parcel" of his land within the meaning of the law of riparian rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 145; Dec. Dig. §§ 130, 132.*

For other definitions, see Words and Phrases, vol. 6, pp. 5166, 5167.]

2. Costs (§ 12*) — Allowance — Judicial Discretion.

In an action involving defendants' rights to take waters from a stream, it was not an abuse of discretion on awarding judgment sustaining their right to take flood waters to give them judgment for costs, where, at the trial, they disclaimed right to take any other waters, and where the head gate completed by defendants before the action was begun showed that the ordinary flood would not reach it.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 20, 22, 23; Dec. Dig. § 12.*]

3. Waters and Water Courses (§ 39*)—Riparian Rights—Lands Affected.

Only tracts which border upon a stream, and not all the land within the watershed, are endued with riparian rights.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 31; Dec. Dig. § 39.*]

4. Waters and Water Courses (§ 130*)—Flood Waters—Riparian Rights.

Since the flood waters of a stream do not come within the protection of the law of riparian rights, a riparian owner is not entitled to claim them against an appropriator on the theory that the riparian owners may at some indefinite future time determine to construct a reservoir on their lands to impound such flood waters for use during the dry season.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 145; Dec. Dig. § 130.*]

5. Waters and Water Courses (§ 140*)—Riparian Rights—Priority Over Appropriation.

Rights of riparian owners are paramount to those of appropriators under the Civil Code.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 140.*]

6. Appeal and Error (§ 1011*)—Review—Findings.

Where the evidence is conflicting, but was sufficient to prove the facts on which the decision was based, the findings of the trial court are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

7. Appeal and Error (§ 1071*)—Harmless Error—Findings.

On judgment awarding defendants' right to take flood waters from a stream, plaintiffs, riparian owners, are not entitled to complain of inaccuracies in the trial court's findings in describing the condition and size of the bed of the stream at and about defendants' head gate, where the judgment requires the bed of the stream to be kept in such condition that it will never take any other water than flood waters.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234–4239; Dec. Dig. § 1071.*]

8. Evidence (§ 484*)—Expert Testimony—Hydraulic Engineering.

In a suit involving the right to take flood waters from a stream, a witness, though not a hydraulic engineer, was properly permitted to testify to rough measurements which he made and caused to be made of the quantity of water flowing in the creek, where he took the speed of the current and the width and depth of the stream at the point of measurement, and from that calculated the quantity.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2267; Dec. Dig. § 484.*]

9. Witnesses (§ 267*) — Cross-Examinations—Scope—Discretion.

The extent of cross-examination is a matter within the sound discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923–930; Dec. Dig. § 267.*]

10. New Trial (§ 102*)—Newly Discovered Evidence—Diligence.

In an action involving the right to take waters from a stream, evidence concerning the relative elevations of a head gate and the stream and the physical characteristics of the stream at that point are not to be deemed newly discovered, if there was ample time within which plaintiff might have ascertained the facts before the trial.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210–214; Dec. Dig. § 102.*]

11. Appeal and Error (§ 1010*)—Review—Findings—Conclusiveness.

A finding supported by substantial evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979–3982; Dec. Dig. § 1010.*]

12. Waters and Water Courses (§ 152*)—Appropriation of Waters—Adjudication of Rights—Effect of Judgment.

In a suit involving conflicting claims upon the flow of a stream, a judgment requiring defendant to provide for the permanent maintenance of an existing head gate under existing conditions to secure the present capacity of the stream at such head gate so that there shall flow past the head gate the usual and normal flow of the stream, including the usual flood waters before there shall be any diversion of flood waters by defendant, is not so uncertain as to authorize defendant to take any part of the ordinary flood flow of the stream, nor is it insufficient for failing to specify in miner's inches, or in any other artificial measure, the water that must flow in the stream before defendant takes any.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 156, 157; Dec. Dig. § 152.*]

13. Appeal and Error (§ 1195*)—Law of Case.

The construction given by the Supreme Court on appeal to a trial judgment constitutes the law of the case, and binds the lower court in all subsequent proceedings, and whenever interpretation of the judgment is material.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661–4665; Dec. Dig. § 1195.*]

14. Appeal and Error (§ 714*)—Review—Papers Not in Record.

On appeal, a map not constituting part of the record cannot be considered for any purpose.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958–2963; Dec. Dig. § 714.*]

15. Appeal and Error (§ 714*)—Review—Affidavits.

On appeal, affidavits used in the trial court in support of a motion for new trial cannot be considered in determining the sufficiency of the evidence to support a finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2958–2963; Dec. Dig. § 714.*]

Department 1. Appeal from Superior Court, Tehama County; A. J. Buckles, Judge.

Action by Malvena Gallatin and others against the Corning Irrigation Company and others. From a judgment for defendants, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Rehearing denied; Beatty, C. J., dissenting.

McCoy & Gans, of Red Bluff (Heller, Powers & Ehrman, of San Francisco, of counsel), for appellants. Frank Freeman, of Willow, for respondents.

SHAW, J. The plaintiffs appeal from a judgment, and from an order denying their motion for a new trial.

Each plaintiff owns a parcel of land which, it is claimed, abuts upon Elder creek and South Elder creek, in Tehama county. South Elder creek is a tributary to Elder creek. The aggregate area of the several parcels is about 47,000 acres. The prayer of the complaint is that the defendants be enjoined from diverting or interfering with the water of South Elder creek so as to prevent it from flowing down the natural channel thereof to and upon the lands of plaintiffs. The complaint alleges that all the waters of South Elder creek are required by them for use upon their said lands and are necessary for that purpose, that during the irrigating season they are insufficient to supply said needs, and that their lands are also irrigated by the natural seepage and percolation from said stream. It is further alleged that the defendants threaten, intend, and claim the right to take from South Elder creek a flow of 5,000 inches of water, measured under a 4-inch pressure, and carry the same to nonriparian land and outside the watershed of said stream, to the injury of the plaintiffs' lands.

The answer denies that "all of the lands" of plaintiffs abut upon the stream, and avers that but a small portion of them "are riparian lands upon and along said stream," and that the waters thereof flow naturally to and upon only a small portion of said lands. It denies that the water of the stream is insufficient during the irrigating season for the needs of the respective plaintiffs. It further avers, in effect, that the defendants do not claim, or intend to take, any of the waters of said stream during the irrigating season, or any of the ordinary flow at any season, and that the only claim of defendants is that of the Corning Irrigation Company, which company claims the right to take and intends to take from South Elder creek the flood waters flowing therein during the months of December, January, February, and March of each year, to the extent of 5,000 inches measured under 4-inch pressure and no more, and carry the same to nonriparian land outside of the watershed of said stream, to be there used for irrigation and other purposes. It further alleges that during the said months of each year South Elder creek carries flood waters to the extent of 25,000 inches, and the main Elder creek 25,000 inches more, all of which flow unobstructed past the lands of the plaintiffs and into the Sacramento river, none of which can be applied by plaintiffs to irrigation, that said flood water is unnecessary for any beneficial purpose or use on their lands, and that, if said company does not take the proposed 5,000 inches of water, the same would run into the river and serve no useful purpose.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The findings set forth the facts with perhaps unnecessary detail. We give here their substance and effect with respect to the claim of the right to take flood water. South Elder creek, and Elder creek below the junction, flow through the lands of the respective plaintiffs. A considerable portion of the lands of each abuts thereon. It is unnecessary to state the exact area of the riparian land. The normal and usual flow of South Elder creek, including not only the flow in the dry season, but also the usual normal flood waters in the winter or wet season from rains and melting snows, is equal to at least 5,000 miner's inches, but this "does not include the waters that come down the stream in times or seasons of unusual freshets and floods from rains and melting snows." The head gate by which the Corning Irrigation Company intends to divert water from South Elder creek is built in the side of the steep bank thereof with its floor three feet and eleven inches above the bed of the creek at that place. In consequence, the entire usual and normal flow of the stream, as above defined, will flow down the stream and pass the head gate without any of it entering the gate or being diverted thereby. It is not expressly stated in the findings, but the inevitable result of these facts will be that said head gate will not receive or divert any part of the usual or normal flow or of the usual or normal flood waters of the creek, and will not divert or receive any water therefrom except a part of the water that comes down during times of unusual freshets and floods which are sufficient to raise the surface of the stream above the level of the floor of the head gate. The head gate is so constructed that it will divert approximately 5,000 miner's inches of the water of the creek when the stream rises to the top of the aperture. The diversion of that quantity of such unusual flood waters during said months will in no wise damage the plaintiffs. At times during said months there is flowing in said Elder creek at said head gate a volume of water equal to 60,000 miner's inches, or more, and the water rises at such times until it is 10 feet deep at that point, being 6 feet above the floor of the head gate. There is not at such times, or at any time, any overflow of South Elder creek or of Elder creek; the banks being high enough to confine its waters along its whole course, except near the Sacramento river, where the flood waters are confined by artificial levees. There is no percolation or seepage of water from the creek to the adjacent land. The head gate was constructed by said company in the fall of 1908 for the purpose of thereby diverting 5,000 inches of said flood waters during said months of December, January, February, and March, to be conducted to a storage reservoir and used for irrigation on nonriparian lands outside of the watershed of Elder creek and its tributaries. It was made before this action was begun.

[1] These facts present the question whether or not flood waters, of the character proposed to be diverted from South Elder creek by the company, may lawfully be taken from the stream for use upon nonriparian lands and outside of the watershed of the stream, without the consent of the riparian owners and without compensating them therefor. In other words, whether the right to have such flood waters flow down the stream in its usual course, under the circumstances here disclosed, is one of the riparian rights attached to lands abutting upon the stream, as parcel thereof, which the owner of such lands may enforce against one who proposes to divert the same to nonriparian lands, where no use is made of such waters on the riparian land and no benefit accrues to riparian land from their passage over the bed of the stream, and no damage is caused to the riparian land from the proposed diversion.

The question is not entirely new in this state. In Miller v. Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115, 27 L. R. A. (N. S.) 772, Miller & Lux v. Madera, etc., Co., 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391, and Miller & Lux v. Enterprise Co., 145 Cal. 652, 79 Pac. 439, the question of the right to divert flood waters was considered in cases where the trial court had decided that they formed a part of the regularly recurring flow of the stream during a considerable period of each season, or where it appeared that such flood waters were necessary to supply the gravel strata and artesian basins under the lands of a valley, from which water was obtained to supply the overlying lands. These cases are not parallel to the case at bar. The case of Anaheim, etc., v. Fuller, 150 Cal. 327, 88 Pac. 978, 11 L. R. A. (N. S.) 1062, is cited by the appellant. It does not decide anything at all concerning flood waters. The portion of the opinion in which such waters are mentioned merely declares the rule that a riparian owner may enjoin a diversion of the ordinary flow without a showing of present damage. This is decided in many other cases, but none of them lays down any rule with respect to riparian rights in flood waters such as those involved here. In Edgar v. Stevenson, 70 Cal. 286, 11 Pac. 704, Heilbron v. Land & Water Co., 80 Cal. 194, 22 Pac. 62, Modoc, etc., Co. v. Booth, 102 Cal. 151, 36 Pac. 431, Fifield v. Spring Valley W. W., 130 Cal. 552, 62 Pac. 1054, and San Joaquin, etc., Co. v. Fresno Flume Co., 158 Cal. 626, 112 Pac. 182, 35 L. R. A. (N. S.) 832, the court was dealing directly with the question of riparian rights in flood waters. The last-named case is the latest statement by this court upon the subject. It appears to be direct authority for the contention of the defendants. In that case the defendant, by means of a dam in Stevenson creek at the foot of a mountain meadow through which it flows, made a reservoir of the meadow, impounding therein the water from the rains and snows falling upon the watershed above, including, necessarily, the water of excessive rains and freshets from melting snows. By this means it made such a salvage of water that, after taking from the reservoir and out of the watershed a large and constant stream of water for its own uses, the ordinary flow of the stream was not diminished, but, on the contrary, was increased, and the stream continued to deliver more than its usual quantity of water to the plaintiffs' lands and diversion works below. One of the plaintiffs was a riparian owner. The other was an appropriator of water from the stream. Thus, it will be seen, the water which the defendant actually took was not water of the ordinary flow of the stream, but was the accumulation of the flood waters flowing in the stream during excessive rains and in the season of the melting snows. It was of the same character, with respect to the stream, as that which the defendant company proposes to take from South Elder creek. The opinion gives a careful review of all the cases above cited on the subject. The conclusion is thus stated: "It will be found, therefore, that the decisions of this state, not only do not deny the right to the use of storm and flood waters, but encourage the impounding and distribution of those waters wherever it may be done without substantial damage to the existing rights of others." Thereupon the court affirmed the judgment of the court below denying the injunction against the maintenance of the dam and diversion of the water by the defendant. The facts of the Fifield Case are also similar to the present case. The defendant there proposed to take only the storm water of the stream flowing therein "during times of extraordinary high water or freshets * * * during and after a rain storm and which are in excess of the ordinary flow," and use it out of the watershed, leaving the ordinary flow to go down the channel undiminished. No damage was caused to the plaintiff's land thereby. It was held that the defendant could lawfully take such water, citing the Modoc Case as authority. The Modoc Case, though somewhat obscure in its statements, obviously holds that flood waters may be taken for nonriparian uses at times when the flood is so great that the water diverted therefrom could not be used by the riparian owner, and the diversion would cause no injury to him or his land, and would greatly benefit the appropriator. A similar doctrine is stated in the Edgar Case and in the Heilbron Case. These decisions, in effect, establish the just rule that flood waters which are of no substantial benefit to the riparian owner or to his land, and are not used by him, may be taken at will by any person who can lawfully gain access to the stream, and conducted to lands not riparian, and even beyond the watershed, without the consent of the riparian owner and without compensation to him. They are not a part of the flow of the stream which constitutes "parcel" of his land, within the meaning of the law of riparian rights.

This rule does not conflict with the decisions in the Bay Cities and Miller & Lux Cases first above cited. In those cases the water in question, although in a sense high water, or flood water, was nevertheless a part of the regular and usual flow of the stream for a considerable part of each year and at a time when such flow was of substantial use and benefit to the riparian lands, or the flow of such waters in their accustomed place was necessary to the gathering of water in subterranean strata from which the owners of overlying land were entitled to take it. The decisions were based on these facts, neither of which exists here, according to the findings.

The judgment declares that the full normal and usual flow of South Elder creek at defendant's head gate is equal to at least 5,000 inches, and that plaintiffs, as riparian owners along the stream, are entitled to have the full, usual, and normal quantity of water of the creek (whether more or less than the 5,000 inches, as we understand its terms), flow down the stream by said head gate, including both the usual and normal flow in the dry season and the usual and normal flow in the winter season from rains and melting snow, but not including the additional water that comes down the stream in times of unusual freshets from rains and snows, and that plaintiffs are also entitled to have all other waters of the stream flow therein, except the 5,000 inches awarded to the defendant corporation. It then declares that said corporation is entitled to divert and take, during the months above named, by means of its said head gate, for use outside the watershed, 5,000 inches of the flood waters of the creek, and no more, after the usual and normal flow to the plaintiff has been provided. There is also a provision that said company shall keep its head gate of its present capacity and as it is now situated with respect to the bed of the creek, and shall maintain the bed of the creek for its entire width of 30 feet at a level at said gate 3 feet and 11 inches lower than the floor of the head gate, so that there shall flow in said creek past the head gate the usual and normal flow of water before there shall be any diversion of water by said company. This judgment, in effect, terminates any right or claim the defendants may have had under the notice of May, 1908, or otherwise, to any water of the creek other than the flood waters described. Under the view we take of the law concerning flood waters, as above stated, it is supported by the findings.

In using the term "inches" or "miner's

inches" in this opinion we mean to designate an inch of flowing water, miner's measurement, measured under a four-inch pressure. The findings define the quantity thus indicated, so that there can be no uncertainty in the judgment regarding it. It appears that the defendants, other than said corporation, are its directors, and that they are not otherwise interested.

The complaint was filed on December 8, 1908. According to its allegations, the defendant company proposed to take 5,000 inches of water of the ordinary flow of the stream, under a notice of appropriation posted in May, 1908, and was proceeding to construct the diversion works therefor, and would complete them and take the water if not restrained. The answer was filed on February 3, 1909. It alleges that the 5,000 inches of flood waters, which alone the company intends to take, are claimed under a notice posted in January, 1909, after the action was begun. It denies that the company claimed anything under the notice posted by it in May, 1908. It admits, by failure to deny them, the allegations that for several months before the action was begun the company was actively engaged in the work of diverting the waters of said stream to be used on outside lands, that it posted the notice of May, 1908, and that the same was posted with the intent to claim and take water from said stream thereunder, but it alleges that said work was done to prepare for the claim afterward made by it under said notice of January, 1909, and that it now claims no right except under the last notice.

[2] At the trial the defendant expressly stated that it had abandoned all claim of right or intention to take water under the notice of May, 1908, set forth in the complaint, or to take water at all except under the notice of January, 1909, aforesaid, referring to flood waters only. This entirely eliminated the question of the right and intent of the company to take a part of the usual and ordinary flow of the stream. And, as the judgment gives the company no right at all except to 5,000 inches of the additional flood waters coming down the stream in unusual freshets from rains and snows, the evidence as to the other water right once claimed by respondents, and errors of law in admitting or excluding evidence of it are, for the purposes of this appeal, wholly immaterial and harmless, except upon the question of costs, which, however, the appellants do not mention in their briefs. The facts that defendants made such a claim before the action was begun and abandoned it at or before the trial might have some bearing upon the right of plaintiffs to recover costs of suit. This is an equitable action in which costs are allowed, apportioned, or withheld in the discretion of the court. Code Civ. Proc. § 1025. The head gate was completed a month before the action was begun, and its position showed that the ordinary flow would not reach it. Under all the circumstances, we cannot say that the court abused its discretion in giving defendants judgment for costs. The appellants specify many particulars in which they claim the evidence is insufficient to support the findings. They also assign numerous errors of law occurring at the trial. A large number of these are, for the reasons just stated, immaterial. We need consider those only which could in some manner affect the judgment actually given.

[3-5] It is claimed that the finding that the diversion of the unusual flood waters proposed by the defendant company will not damage the plaintiffs is contrary to the evidence. There was some evidence to the effect that on Elder creek, below the defendant's head gate, there is a reservoir site where, by a dam across said creek, enough water of the flood and winter season could be caught and stored to irrigate 3,000 acres of land in the driest year and a large additional acreage in the average years. This site is partly upon the lands of Gallatin, but chiefly upon the land of others who are not parties to the suit. If this reservoir were made and the several plaintiffs should obtain the right to receive water therefrom, they could irrigate a larger area of their land than can be irrigated by the natural flow during the irrigating season. The evidence does not clearly show how much of their lands are really riparian to the stream. At the trial it seemed to be conceded that all of it that was within the watershed of the stream was riparian land to which the water of the stream was of right attached. In law, however, only the tracts which border upon the stream are endued with riparian rights. Anaheim, etc., Co. v. Fuller, supra. The appellants suggest, rather than argue, that, by reason of this possible reservoir site, they, or some of them, may at some indefinite future time determine to construct the necessary dam, and may obtain the right to flood the lands to be covered by the impounded water, and may secure sufficient funds and thereupon build the costly structure and the necessary distributing ditches to use the water on their lands, and that, in that event, they would be entitled to collect, store, and use the unusual flood water of the stream, a part of which is awarded to the defendants by the judgment; that this prospective use is a part of the riparian right, and hence that a judgment giving an appropriator for non-riparian use flood waters which plaintiffs might thus eventually be able to take and use is an invasion of their vested rights and necessarily erroneous. It may be doubted whether a possibility so remote as this would be included within riparian rights under any circumstances, or, at least, whether such possibility would justify a court in enjoining the actual use of such flood waters in order to preserve the riparian owner's right to the

possibility. But, however this may be, if the decisions above cited and the conclusion deduced therefrom that such flood waters do not come within the protection of the law of riparian rights be correct, it is obvious that this argument or suggestion is of no force. The precise area of the plaintiffs' lands which are actually riparian is not of importance to the decision of the case. It appears from the findings and also from the evidence that there is a sufficient quantity of it to give them a standing as riparian owners upon the stream and to entitle them to enforce all the rights belonging to such owners. The rights of riparian owners are paramount to those of an appropriator under the Civil Code. As riparian owners they were entitled to enjoin the taking by the defendants of any water which belonged to them as riparian owners or which would injure or destroy their riparian rights. Our conclusion that the water which the defendants propose to take does not pertain to the riparian right makes the evidence concerning the recording of the notice of January, 1909, and as to the exact amount of riparian land, immaterial to the judgment, and errors in relation thereto require no consideration, as they could not operate to the prejudice of the appellants. This also applies to the evidence or lack of evidence of the fact that the defendant proposes to apply the water to a useful purpose. It does appear that they propose to use it to irrigate land outside of the watershed of the creek. But, as the plaintiffs have no right to the unusual flood waters, it is immaterial to them whether the defendants use it or not.

[6] It is also claimed that the evidence is insufficient to show that there was no percolation or seepage of water from the creek which benefited the riparian land. The evidence on this subject was conflicting. There was sufficient evidence to prove the fact, and hence the decision of the trial court is conclusive on appeal. On this point, however, it may be said that there was ample evidence from which the court might well have concluded that the water to be taken by the defendant would have no appreciable effect upon such seepage or percolation as may occur, and that its flow down the stream would not in that manner benefit the plaintiffs' lands.

[7] The description of the condition and size of the bed of the creek at and about the head gate, as given in the findings, may not be entirely accurate. It is difficult to describe such conditions in words so as to make it entirely clear. The essential finding in this regard is that the head gate is situated at such a height above the stream that it will not divert any water therefrom excepting during the unusual floods and freshets mentioned. The judgment requires the bed of the creek to be kept in such condition that it will never take any other water, and it specifies the width and depth at which the channel of the creek is to be maintained for that purpose. This will sufficiently protect the plaintiffs against the taking of the ordinary flow and ordinary flood waters. The accuracy of the description in minor details is therefore unimportant. It is said that there is no line of demarcation shown, either by the evidence or the findings, between the ordinary and usual flow of flood waters and the extraordinary and unusual flow from which the defendants are entitled to take. In the nature of things this must be so. In course of time there will be every degree of variation in this flow. In general, the fact seems to be that the stream rises in the mountains and the bed thereof runs upon a considerable grade until it reaches a point about 12 miles from the Sacramento river. Down this steep grade in the winter season the water flows with great velocity and at considerable volume. During ordinary rains and for a considerable time between such rains it carries what may be called the usual and ordinary flood water, but at the time of any hard rain and for a short period thereafter very large additions are made to the water in the stream, and this addition is carried on to the river without contributing anything whatever in the way of benefit to the lands of the plaintiffs or any other person. It is a part of this water which the defendant company proposes to take and which the judgment awards to it. It is clear from the evidence that the amount proposed to be taken will seldom include all of this flood water, and frequently not even a large proportion of it. We think the evidence sufficiently sustains the finding of the court that 5,000 miner's inches will include all of the ordinary and usual flow of flood waters during the winter season, but the finding as to the exact number of inches is immaterial.

[8, 9] A witness who was not a hydraulic engineer was allowed to testify to certain rough measurements he had made and caused to be made of the quantity of water then flowing in the creek. It is claimed that he was incompetent to testify upon such matters. We think the ruling admitting the evidence was not erroneous. His methods were correct in principle; that is, he took the speed of the current and the width and depth of the stream at the point of measurement, and from that calculated the quantity. The result was not as accurate as a more precise and complete measurement would have given, but it furnished some evidence of the quantity and its weight was for the trial court to determine. The cross-examination of the witness Jewett as to his qualifications to make such measurements was, perhaps, too much restricted, but it appears that he pursued the usual and correct method of measurement. He measured sufficiently to ascertain the area of a cross-section of the creek, he put a bench mark on the bank from which the altitude of the surface of

the water could be readily ascertained at any time, and he ascertained with fair accuracy the speed of the current at that place. It does not appear that the court was required to allow an extended cross-examination on such a subject. The extent of cross-examination is a matter within the sound discretion of the trial court.

[10] With regard to the contention that a new trial should have been ordered because of newly discovered evidence concerning the relative elevations of the head gate and the creek and the physical characteristics of the creek at that point, it is sufficient to say that the answer, disavowing any claim to the usual flow and claiming only the flood waters, was filed in February, 1909, and that the trial began in December, 1909. The evidence could not be deemed newly discovered, since there was ample time within which the plaintiffs might have ascertained all of these facts before the trial.

Many other objections were made in the course of the trial which are assigned as error. In view of the conclusions we have reached concerning the respective rights of the parties in the flood waters, the greater number of these are wholly immaterial. Of those remaining we have mentioned the only ones which we deem of sufficient importance to justify remark.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

Supplemental Opinion.

SHAW, J. After the opinion herein was filed, the plaintiffs applied to have the judgment of this court and the court below modified. They claim that the judgment of the lower court is so uncertain in its terms that if left unmodified there is danger that it may be understood to permit the defendant company to take a part of the ordinary flood flow of the stream.

[11] The findings state, in effect, that the defendant's head gate is 47 inches higher than the bottom of the creek at that point, and that at that comparative elevation (and this is the controlling fact) it will not divert any of such ordinary flood water; in other words, that it is only the occasional and unusually high floods which are high enough to enter the gate at such elevation, and that, when such flood does so enter, there will be a quantity flowing down the creek and passing the head gate equal to the ordinary flood flow thereof. There is substantial evidence to support this finding, and hence we not only cannot set it aside, but must accept it as fact. Hence, under present existing conditions as the findings state them, the defendant cannot divert any of the ordinary flow or usual flood water.

[12] The third paragraph of the judgment provides that said corporation defendant "shall provide for the permanent maintenance of the said head gate under the present existing conditions and for the present capacity of said creek at the said head gate * * * so that there shall flow in said creek past said head gate the usual and normal flow of the waters of said creek at said point, as herein defined (i. e., including usual flood waters), before there shall be any diverson of flood waters by defendant corporation." If this is done and the findings are true, as we must presume, the plaintiffs will be perfectly protected in their right to the usual flow and ordinary flood waters. It is in the nature of a mandatory injunction. The defendant corporation and its officers, agents, and employés will be subject to punishment for contempt if they disobey it. The provision applies to and safeguards against changes of conditions from any cause, natural as well as artificial. If, for example, a flood should fill in the bed of the creek with rocks at that point so that a part of the ordinary flood water would enter the gate, or so that water would enter it at a lower stage than under present conditions, the defendant could be compelled to refrain from diverting any water at all until it had restored the creek to the same condition, with respect to its capacity to carry water past the gate, as that in which it was at the time the judgment was rendered. An artificial change would entail the same consequences.

It is suggested that it is uncertain because it does not specify in miner's inches, or in any other artificial measure of quantity, the amount of water which must be suffered to flow in the creek before the defendant takes any. The number of miner's inches is not the criterion given by the judgment, but it is certain nevertheless. The existing conditions, whether expressly stated or not—that is, the comparative elevations of the creek bed and the floor of the gate, the various natural widths and grades of the creek at and near the gate, the directions of its course, and the roughness and irregularities of its bed at all places near enough to the gate to affect its capacity at that point—absolutely determine its carrying capacity at that point. These conditions the defendant must preserve, and, so long as they remain the same, the capacity will remain the same.

[13] The reference in the first paragraph of the judgment to the usual and normal flood waters as a "volume of water equal to at least 5,000 miner's inches" does not adjudge that quantity to be the usual flow. It is obviously a mere estimate of the minimum. It proceeds to adjudge that it means all that the creek will carry when the surface is as high as the floor of the head gate, with the creek there 30 feet wide and 47 inches below said floor, whether more or less than 5,000 inches. Counsel express a fear that the judgment may be so interpreted hereafter by the court below as to give the defendants greater rights than it gives as we construe it. The construction given to a judgment of the lower

court by this court, in determining an appeal therefrom, constitutes the law of the case, and is binding on the lower court in all subsequent proceedings and whenever its interpretation is material.

[14, 15] Appellants also quote statements from an affidavit used in the court below only upon a motion for a new trial, and they present a map which is not in the record at all, all of which as they claim tends to show that the findings as to the width, depth, and carrying capacity of the creek under the level of the head gate, are incorrect, and that it will in fact carry much less than 5,000 inches and less than it would carry if the stated widths and elevations were correct. The map cannot be considered for any purpose. The affidavit cannot be considered in determining the sufficiency of the evidence to support the findings.

Under all the circumstances, we do not think any modification of the judgment is necessary to protect the plaintiffs in the rights which are awarded to them therein.

We concur: SLOSS, J.; ANGELLOTTI, J.

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163 Cal. 658

ANDERSON v. QUICK. (S. F. 5,889.)

(Supreme Court of California. Sept. 6, 1912. Rehearing Denied Oct. 5, 1912.)

1. Contracts (§ 303*)—Building Contracts — Recovery by Contractor — Wrongful Prevention of Performance.

Where a contractor had proceeded with the erection of a building no further than the point at which he was entitled by his contract to a first payment, he could not recover additional payments from the owner without showing that such owner had wrongfully prevented further performance.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. § 303.*]

2. Contracts (§ 303*)—Building Contracts — Recovery by Contractor — Wrongful Prevention of Performance.

A building contract provided for the proportion of loss which should be borne by the contractor and owner in case of a partial or total destruction of the building by fire, earthquake, etc., but contained no provision that an adjustment of the loss should be necessary before the contractor should further proceed with the building. *Held*, as it is not necessary to the purpose of the agreement that such a provision be read into the contract, a failure of the owner to provide for an adjustment of the loss after destruction of the building by an earthquake pending its construction would not wrongfully prevent further performance, and entitle the builder to payment outside of the terms of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1409–1443; Dec. Dig. § 303.*]

3. Insurance (§ 580*)—Building Contracts — Destruction of Property — Right of Contractor to Share in Proceeds of Owner's Insurance.

A contractor engaged in the building of a house destroyed by fire and earthquake cannot share in the proceeds of insurance taken out by the owner.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1439–1443; Dec. Dig. § 580.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; T. J. Lennon and J. J. Van Nostrand, Judges.

Action by W. B. Anderson against Mary A. P. Quick, administratrix of the estate of J. W. Quick. From a judgment for defendant and an order denying a new trial, plaintiff appeals. Affirmed.

Ames & Manning, of San Francisco, for appellant. Charles W. Slack, of San Francisco, for respondent.

SLOSS, J. On November 3, 1905, the parties entered into a contract whereby the plaintiff, as contractor, agreed to construct for the defendant, as owner, a seven-story brick building upon a lot fronting on Seventh street, in the city and county of San Francisco. The contract price was $45,927, payable in installments, as the work progressed. Construction was commenced, and continued until April 18, 1906, when the earthquake and fire which occurred on that day partially destroyed the work done and the materials furnished by plaintiff under the contract. There had then been paid to plaintiff the first installment, amounting to $3,049. No further payment had become due. Work was never thereafter resumed under the contract.

In this action, brought to recover damages, the plaintiff, after setting forth the provisions of the contract, alleged that he had up to April 18, 1906, expended $14,694.55 for work and materials furnished, that after April 18, 1906, he was ready, able, and willing to proceed with the performance of his contract, but that defendant refused to permit him to so proceed, and prevented him from performing any of the work required to be performed by him under the terms of said contract. Damage in the sum of $14,694.55, together with the further sum of $6,500 for loss of profits, is alleged to have resulted. The answer denied all of these allegations except those relating to the making of the contract and its terms. The court found that, in the performance of work under the contract, the plaintiff had expended $13,279.43. It found that after the 18th day of April, 1906, the plaintiff was not ready, or able, or willing to proceed with the performance of the work or the furnishing of materials under the contract; that defendant did not refuse to permit him to proceed, nor did the defendant prevent the plaintiff from performing his contract. There is also a finding that plaintiff has not been damaged in any sum. Judgment in favor of the defendant followed. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

[1] In order to overthrow the judgment, the appellant attacks, as unsupported by the evidence, the findings that defendant did not refuse to permit him to proceed, and did not

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prevent him from performing. Unless this attack be well founded, the plaintiff obviously can have no right of recovery. The contract for the construction of the building provided that payments should be made only when specified portions of the work had been done. Inasmuch as the plaintiff had not performed to a point entitling him to receive more than the first payment (which he had in fact received), he could claim nothing additional without showing that the defendant had wrongfully prevented further performance.

[2] On the issue of prevention, the record unquestionably contains evidence sufficient to support the finding of the court, unless the appellant be right in the construction which he seeks to put upon section "Twelfth" of the contract. That paragraph reads as follows: "Twelfth. In case said work herein provided for should before completion, be wholly destroyed by fire, defective soil, earthquake or other act of God which the contractor could not have reasonably foreseen and provided for, then the loss occasioned thereby shall be sustained by the owner to the extent that he has paid installments thereon, or that may be due under the fifth clause of this contract; and the loss occasioned thereby and to be sustained by the contractor, shall be for the uncompleted portion of said work upon which he may be engaged at the time of the loss, and for which no payment is yet due under said fifth clause of this contract.

"In the event of a partial destruction of said work by any of the causes above named, then the loss to be sustained by the owner shall be in the porportion that the amounts of installments paid or due bears to the total amount of work done and materials furnished, estimated according to said contract price, and the balance of said loss to be sustained by the contractor."

It appears that on July 24, 1906, the plaintiff addressed to the defendant a letter in which, after calling attention to the last paragraph of the section just quoted, he requested the defendant to fix a time before August 1, 1906, when he, the plaintiff, might meet the said defendant, "and adjust the losses on this building, as provided in the foregoing paragraph of the contract." No time for such meeting was fixed by the defendant.

The contention of the appellant is that, under the second paragraph of section "Twelfth," it became incumbent upon the parties, before further work could proceed, to meet and agree upon the extent of the injury to the building and the loss occasioned thereby. Since plaintiff sought to bring about such meeting, and the defendant did not comply with his request to fix a time, the said defendant, it is argued, thereby made it impossible for the plaintiff to go on with the construction of the building. But the difficulty with this argument is that it requires us to read into the agreement a provision which is not contained therein, either in express language or by necessary implication. The twelfth clause certainly does not declare in terms that the parties shall agree upon the amount of the loss to be borne by the owner and the contractor, respectively, in the event of a total or partial destruction of the work before completion. All that it does is to provide the basis upon which the loss shall be apportioned. It must be conceded that a term or condition, although not expressed in a contract, may be implied, but this will be done only where the implication is necessary in order to effect the purpose and intent of the agreement. We see no reason why a prior adjustment of the loss was necessary to enable the contractor to proceed. The plaintiff was at perfect liberty to go on without such adjustment. Upon reaching a point where a payment was due him, he could have demanded of the defendant such amount as he could show to be due under the contract.

The two paragraphs of section "Twelfth," both relating to the subject of destruction of work done, are to be read together. It is not claimed that the first paragraph contemplates the adjustment of loss before proceeding, nor, a fortiori, the payment by the owner to the contractor of the proportion of the loss chargeable to him. The owner is to sustain a part of the loss, and this he does when, upon the restoration of the building to a point where an installment becomes due, he is required to make duplicate payment of an installment already paid, or due and unpaid before the loss. There is no necessity for interpolating into the first paragraph any condition requiring adjustment or payment of loss before proceeding, and the second paragraph contains nothing which would require or justify a different construction.

[3] What we have said disposes of all the points made by appellant, with the exception of the suggestion that the result of the judgment appealed from is to make the defendant an actual gainer by reason of the partial destruction of the work. In so far as this conclusion rests upon the fact that the defendant collected insurance money, it may be said that this is a matter wholly between the defendant and the insurers, and in no way a concern of the plaintiff. The plaintiff could have protected his interest by insurance. Not having done so, he is not entitled to share in the proceeds of the insurance taken out by the owner.

If defendant benefited by the salvage on the building, such benefit came to him solely because the plaintiff failed to go on with the performance of his contract. Furthermore, there was no issue on this point, and we cannot know whether, in fact, the loss which defendant may have sustained through plaintiff's failure to complete his contract did not exceed the supposed gain in salvage.

In any aspect, the plaintiff, having failed to establish the necessary allegation that performance by him was prevented by the act of the defendant, cannot recover.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

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163 Cal. 663

BURR v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 5,865.)

(Supreme Court of California. Sept. 6, 1912. Rehearing Denied Oct. 5, 1912.)

1. TRIAL (§ 142*)—NONSUIT—SUFFICIENCY OF EVIDENCE.

Nonsuit should not be granted when there is any substantial evidence which, with the aid of all legitimate inferences favorable to plaintiff, would support a verdict or finding that the material allegations of the complaint are true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.*]

2. NEGLIGENCE (§ 136*) — QUESTION FOR COURT OR JURY.

Negligence is a question for the jury, though there is no conflict in the evidence, if different conclusions on the subject can be drawn from the evidence; and is a question of law for the court only when but one conclusion from the evidence could be reached by a reasonable and impartial man.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. § 136.*]

3. STREET RAILROADS (§ 117*)—COLLISION OF CAR WITH AUTOMOBILE—NEGLIGENCE—EVIDENCE.

Evidence that at a street crossing, where an automobile attempting to get across the tracks of the street railroad was struck by a street car, the track and roadway were undergoing repair; that the car was running 25 miles an hour; that the motorman saw the automobile on the track; that, though it was in motion, it was moving first forward and then back; and that the motorman came on without slackening speed till he was on the automobile—is sufficient to go to the jury on the question of his negligent speed, even if he did not see the automobile, and of his negligence in not reducing speed if he did see it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. § 117.*]

4. PARTIES (§ 75*)—AMENDMENT—DISCRETION.

It is in the discretion of the court to allow defendant during the trial to amend his answer to set up an alleged defect of parties plaintiff; the facts relating thereto not coming to defendant's knowledge till the trial.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 115, 116; Dec. Dig. § 75.*]

5. PLEADING (§ 264*)—NONSUIT—HEARING—GROUNDS.

The filing of amendment to the answer, with permission of court, setting up a defect of parties plaintiff, in that the action was for injury to an article not belonging to plaintiff, but to a firm of which he was a member, raises an issue on which defendant may rely in its motion for nonsuit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 803–805; Dec. Dig. § 264.*]

6. APPEAL AND ERROR (§ 1052*)—EVIDENCE — ERROR IN ADMISSION — CURE BY AMENDMENT OF PLEADING.

Filing amendment to the answer, with permission of the court, setting up that the article, injury to which was sued for, belonged not to plaintiff, but to a firm of which he was a member, cured any prior error in admitting evidence that it belonged to the firm.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171–4177; Dec. Dig. § 1052.*]

7. TRIAL (§ 143*) — NONSUIT — CONFLICTING EVIDENCE.

Nonsuit on the ground of defect in parties, in that the article, injury to which was sued for, belonged, not to plaintiff, but to a firm of which he was a member, should not be granted; the evidence on such issue being in conflict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Percy L. Burr against the United Railroads of San Francisco. From a judgment of nonsuit and an order denying a motion for new trial, plaintiff appeals. Reversed.

Humphrey & Hubbard and William P. Hubbard, all of San Francisco, for appellant. A. A. Moore and Stanley Moore, both of San Francisco, for respondent.

SLOSS, J. In this action, brought to recover damages for the alleged negligent destruction by defendant of plaintiff's automobile, the court at the close of plaintiff's case, granted a nonsuit. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

One of the grounds upon which a nonsuit was asked was "that no negligence has been shown, actionable or otherwise." The evidence offered by plaintiff tended to show that at a point on the "Mission road," a street of the city and county of San Francisco, the defendant, a street railroad corporation, was repairing its track. The roadbed had been torn up for some distance, and there was a temporary crossing over the tracks for vehicles. On the evening of November 8, 1907, at about 7 o'clock, the plaintiff was riding northerly over the Mission road in his automobile. The plaintiff says that it was dusk, although the time stated by him was about two hours after sunset. On coming to the place where the temporary crossing was, he attempted to cross the defendant's tracks. One of the front wheels of his automobile struck a rail which protruded for some three inches above the surface of the ground. The rail caused the wheel to slip or "skid" sidewise, and the automobile failed to get across. Plaintiff made several attempts to get his machine over the track, but each time failed, the machine facing more and more in a direction parallel with the track and toward the north. While the automobile was in this position, it was struck by one of defendant's cars, which was traveling southerly at a rate, as plaintiff testifies, of 25 miles per hour. The automobile was lighted, as was defendant's car. While the car was approaching, and when it was about a block away, the plaintiff gave "what is generally known as a railroad stop signal"; that is to say, he stood up and threw down his hands. He did not sound his horn. The engine of his automobile was in motion until the collision, and the automobile itself was moving forward or back during the entire time, except for a brief interval. The plaintiff judged that the motorman saw him "from the fact of his furious whistling." The motorman could have stopped when he first saw the plaintiff.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[1, 2] On this testimony, we think the issue of negligence should have been submitted to the jury. It is elementary that a motion for nonsuit is not to be granted where there is any substantial evidence which, with the aid of all legitimate inferences favorable to the plaintiff, would support a verdict or finding that the material allegations of the complaint are true. Equally well settled is the rule that "negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be drawn from the evidence." Wahlgren v. Market St. R. Co., 132 Cal. 656, 663, 62 Pac. 308, 64 Pac. 993; Kimic v. San Jose-Los Gatos R. Co., 156 Cal. 379, 104 Pac. 986. It is only where the evidence is such that but one conclusion with respect to negligence could be reached by a reasonable and impartial man that the question becomes one of law for the court.

[3] In the absence of an ordinance or a law limiting the rate of speed at which cars may travel, no particular rate may be said to be negligent per se. But, in any case, the circumstances may be such as to authorize the jury to determine that, under the circumstances shown, the speed employed was excessive. Here there is testimony that the defendant's car was being run over a street at the rate of 25 miles an hour. It was approaching a point at which the track and roadway were undergoing repair, and where vehicles, properly upon the street, were, or might be, required to cross the track. The testimony justified the inference that the motorman saw the plaintiff's automobile upon the track, but that, notwithstanding, he came on without slackening his speed until he was actually upon the automobile. While plaintiff's machine was in motion during most of the time of the approach of the car, it was not moving in any one direction, but was going first forward, then back. It seems clear to us that the jury might reasonably have inferred that an ordinarily prudent man, operating a street car thus approaching this crossing, would, whether he saw ony one on the crossing or not, have run at a speed enabling him, in case of need, to bring his car to a stop in a shorter space of time, or else that he would, upon seeing an automobile moving upon the track in the erratic manner described, have realized the danger of a collision and reduced his speed until he could ascertain whether the automobile would be able to get clear. So inferring, they might properly conclude that the collision was the direct result of the motorman's want of due care in operating his car in the way he did. Certainly it cannot be said that every reasonable man would be bound to conclude, on the facts shown, that the collision was not caused by excessive speed of the car, or by the failure of the motorman to slow down as soon as he should have. If this be so, the plaintiff was entitled to have the question of negligence submitted to the jury.

[4-6] The only other ground now urged in support of the order granting the nonsuit is that the evidence shows that the automobile was the property of a partnership composed of plaintiff and one Willett, and that, therefore, the plaintiff had no right to maintain this action individually. The appellant objects to any consideration of this ground, for the reason that the original answer of the defendant failed to set up the alleged defect of parties plaintiff. But the court during the trial permitted the defendant to amend its answer by adding this plea. The facts relating to the defense did not come to the knowledge of the defendant until the trial, and it cannot be held that the court abused its discretion in permitting the amendment. Under our practice, great liberality is to be exercised in allowing amendments to pleadings. The filing, with the sanction of the court, of the amendment, raised an issue upon which defendant was entitled to rely in its motion for nonsuit. It also cured any error that might have been theretofore committed in admitting evidence tending to show that the ownership of the automobile was in the partnership.

[7] But, even though the defense of defect of parties plaintiff was properly before the court, it could not justify an order of nonsuit unless the evidence plainly established the truth of the plea. The most that can be said is that the evidence on the point is conflicting. There is testimony tending to show that the automobile was purchased and owned by the partnership. On the other hand, testimony was introduced tending to show that the automobile was the individual property of Burr, the plaintiff. The conflict, then, was one of fact to be resolved by the jury, and not to be determined by the court as matter of law on motion for nonsuit.

The judgment and the order denying a new trial are reversed.

We concur: SHAW, J.; ANGELLOTTI, J.

163 Cal. 668

Ex parte RUSSELL. (Cr. 1,733.)

(Supreme Court of California. Sept. 13, 1912. Rehearing Denied Oct. 11, 1912.)

1. Constitutional Law (§ 16*) — Amendments—Construction.

The court, in applying and interpreting an amendment to the Constitution, must consider the conditions existing prior to its adoption to ascertain the objects and purposes of the amendment.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 12, 16; Dec. Dig. § 16.*]

2. Municipal Corporations (§ 56*)—Powers—Right to Acquire and Operate Public Utilities.

Prior to Const. art. 11, § 19, as amended in 1911 (see Laws 1911, p. 2180), a municipal corporation, unless specially authorized by its charter, had no authority to construct or operate public utilities.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 148; Dec. Dig. § 56.*]

3. Municipal Corporations (§ 661*)—Powers—Right to Acquire and Operate Public Utilities—"Conditions"—"Regulations."

Const. art. 11, § 19, as amended in 1911 (see Laws 1911, p. 2180), authorizing any municipal corporation to establish and operate enumerated public utilities, and providing that persons or corporations may establish and operate such works under "such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof," grants to all municipalities the power to construct and operate public utilities, and to prescribe the conditions on which persons and corporations may establish and operate such works, subject to charter provisions; and an ordinance of a city empowered to regulate conduits and works for the production and distribution of gas, etc., which prohibits excavations in streets without first obtaining permission from the board of public works, is valid when applied to one engaged in laying a gas pipe in a street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city; the word "condition" meaning something established as a requisite to the doing or taking effect of something else, while the word "regulations" is something distinct from the word "conditions," and implies a broader meaning in the latter word than mere regulation of the manner of use.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1432, 1434–1437; Dec. Dig. § 661.*

For other definitions, see Words and Phrases, vol. 2, pp. 1394–1400; vol. 7, pp. 6049–6051.]

4. Gas (§ 7*)—Franchises—Acceptance.

The grant in Const. art. 11, § 19, declaring, prior to the amendment of 1911, that a corporation organized to supply any city with light shall have the privilege of using public streets and of laying pipes necessary for introducing into and supplying the city and its inhabitants with light, is a general offer to all corporations that may be organized for the purpose, but is specific as to the privilege offered by limiting the use of the public streets, and the grant of the use of the streets is effective only when actually used; and a city may at any time prescribe conditions under which extensions may be made.

[Ed. Note.—For other cases, see Gas, Cent. Dig. § 2; Dec. Dig. § 7.*]

5. Franchises (§ 2*) — Statutes (§ 238*)—Grants of Franchises—Construction.

Grants made by the Constitution or statutes to private persons or public service corporations of rights belonging to the state or to the public must be construed most strongly in favor of the public; and only that which is granted in clear and explicit terms passes by the grant.

[Ed. Note.—For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2;* Statutes, Cent. Dig. § 319; Dec. Dig. § 238.*]

In Bank. Application for writ of habeas corpus by Robert Russell against Charles E. Sebastian, Chief of Police of the City of Los Angeles, for the discharge of the applicant from custody on a charge of having violated an ordinance of the city. Denied, and petitioner remanded to custody.

Rehearing denied in bank; Beatty, C. J., dissenting.

Chickering & Gregory, of San Francisco, Trippet, Chapman & Biby, H. H. Trowbridge, Gibson, Dunn & Crutcher, and O'Melveny, Stevens & Milliken, all of Los Angeles, and Guy C. Earl, of San Francisco, for petitioner. Guy Eddie, City Pros., of Los Angeles, John W. Shenk, City Atty., of Los Angeles, Wm. J. Carr, City Atty., of Pasadena, and Percy V. Long, City Atty., and Thos. E. Haven, Asst. City Atty., both of San Francisco, for respondent.

SHAW, J. The petitioner alleges that he is in custody upon a charge of having violated an ordinance of the city of Los Angeles.

The ordinance referred to was approved by the mayor on February 21, 1912. It declares that it shall be unlawful for any person, firm, or corporation to make any excavation in a street, for any purpose, without first obtaining permission in writing from the board of public works; and that before issuing the permit the board must require the applicant therefor to state the purpose for which the excavation is to be made, and show legal authority to occupy and use the street for that purpose. A violation of any provision of the ordinance is declared to be a misdemeanor, punishable by fine or imprisonment, or both.

Another ordinance, approved October 26, 1911, provides that no person, firm, or corporation shall exercise any franchise or privilege to lay or maintain pipes or conduits in or under any street of the city for the transmission of gas, water, heat, steam, or other substance without having first obtained a grant therefor from the city in accordance with the city charter and said ordinance, unless such person, firm, or corporation is entitled to do so "by direct and unlimited authority of the Constitution of the state of California, or of the Constitution and laws of the United States."

On the 10th of October, 1911, section 19 of article 11 of the state Constitution was amended. The city council passed these ordinances in the belief that by this amendment the city was given authority to forbid the use of public streets by public service corporations, unless the city should have first granted a franchise permitting such use. The petitioner was engaged in laying a gas pipe in the street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city, known as the Economic Gas Company. He claims, first, that the gas company is directly authorized by said amendment to lay gas mains in the streets as part of its works for supplying gas, and hence that the city cannot forbid it from so doing; and, second, that because of the fact that it had established its works, laid some mains, and began supplying gas before the adoption of the amendment, it had a vested right to extend its mains and lay them in streets not before used by it for that purpose—a right which the city could not restrict by ordinance, nor the people take away by constitutional amendment. These claims present the questions herein to be considered. We will take them up in the order stated.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1. Section 19, art. 11, as amended, is as follows: "Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation may furnish such services to inhabitants outside its boundaries, provided that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance." Laws 1911, p. 2180.

[1, 2] The first step in the application and interpretation of an amendment to a Constitution or statute is to consider the conditions existing prior to its adoption, so as to ascertain its objects and purposes. At the time this amendment was adopted, municipal corporations, unless specially authorized by charter, were without power to make or operate the several public utilities mentioned in the amended section. Von Schmidt v. Widber, 105 Cal. 157, 38 Pac. 682; Hyatt v. Williams, 148 Cal. 585, 84 Pac. 41; Platt v. San Francisco, 158 Cal. 82, 110 Pac. 304. Natural persons had full liberty to do so, and private corporations could secure the power by filing the proper articles of incorporation. There had apparently arisen a general opinion among the people that municipal ownership and operation of such public utilities was desirable.

[3] Considering the language of the amendment in the light of these circumstances, its effect is plain. It is one of the evidences of a prevailing sentiment in favor of such municipal activities. It first makes to all municipal corporations a direct grant of power to make and operate public works of the kinds enumerated. As to works of like kind to be operated privately, the design was to place them all in control of the municipality. Following out this design, the succeeding provision expressly limits the pre-existing powers and rights available to private corporations and natural persons. They are permitted to engage in such enterprises within the city only "upon such conditions and under such regulations as the municipality may prescribe."

The use of the word "regulations" as something distinct from "conditions" implies a broader meaning in the latter word than mere regulation of the manner of use. In ordinary use, in this connection, the word "condition" means something established "as a requisite to the doing or taking effect of something else." Webster's Dict. In law, it means "a qualification, restriction or limitation modifying or destroying the original act with which it is connected," or defeating, terminating, or enlarging an estate granted. 1 Bouv. Dict. 382. The conditions and regulations are to be such as the city "may prescribe under its organic law." There is no other qualification of the words. The conditions prescribed may therefore include every kind, conditions precedent, as well as conditions subsequent, if they may be made under the city charter. The charter of Los Angeles gives the city power to prescribe the character and quality of any public utility service, to fix the rate of compensation therefor, to regulate conduits and works or plants for the production, transmission, and distribution of gas, and to grant franchises or privileges in, on, across, under, or over the streets, and prescribe the terms thereof. If the taking effect of this constitutional provision in any city depends on the existence of provisions in its organic law giving the city power to make conditions, then these provisions of the Los Angeles charter give that city power to prescribe the conditions expressed in the ordinances above mentioned. But we think the provision itself, by necessary implication, gives each city power to prescribe conditions.

To give the city power to prescribe the conditions upon which persons and corporations may establish and operate such works is to place the entire subject-matter within the control of the city, and, in effect, to provide that no such person or corporation may do so without obtaining the privilege from the city by a grant specifying the conditions it chooses to prescribe. With respect to the mode of imposing and enforcing the conditions, the city is, of course, bound by the provisions of its charter. If conditions are found in the charter itself, the legislative authority of the city will be bound thereby and could not impose inconsistent conditions, nor abrogate those of the charter. In such a case the city would be imposing the conditions by its organic law, and all grants by the city legislative body would be required to conform thereto. We need not here determine whether, in the absence of anything in the charter or city ordinances forbidding it, such persons or corporations, under their general powers, could go on to establish and operate such works without asking the consent of the city, or whether such action would be unlawful without affirmative permission from the city. It is sufficient for the disposition of this case to say that, where the city has prescribed conditions, they must be observed, or the construction and operation of such works will be unlawful.

It is argued that this gives the city power to refuse to grant such franchises, and that this would allow the city to create monopolies by limiting such grants to a single person or corporation; that this would be against public policy; and hence that this construction is not permissible. Opinions are variant upon the question whether, in the case of public utilities in cities, monopolies are, or are not, detrimental to the general good. In 1885, when section 19, as it stood prior to October 10, 1911, was adopted, the general opinion doubtless was against such monopolies. Subsequent experience of the effects of competition seems to have changed that opinion. This is clearly indicated in the statement in favor of this amendment printed on the ballots by which it was adopted. It declares that such utilities are by nature monopolistic. Its adoption upon such a statement of reasons is strong evidence of a change of public sentiment on the question. The general opinion now seems to be that where municipal ownership is not feasible or attainable a properly regulated monopoly is advisable. The amendment shows an intention to allow this policy to be determined by each city in its own behalf. It may establish works of its own, excluding all others; it may permit but one system of works by refusing more than one franchise; or it may encourage competition by allowing rival companies to enter the field, either in competition with its own system, or with those of others. We refer here to new systems, not to systems in operation prior to the amendment.

A consideration of the entire section in connection with all classes of public utilities mentioned therein shows that no other interpretation would be reasonable. It applies throughout to works for supplying the city with light, water, power, heat, with transportation of freight or passengers, and with telephone service or other means of communication. The claim of the petitioner is, in effect, that the third clause gives directly to every person or corporation desiring to establish and operate works of any of the kinds above mentioned the right to enter upon the streets of the city to establish and operate its system of works, regardless of the wish or will of the city authorities; and that the power of the city to prescribe conditions is confined to such conditions as relate merely to the manner of establishing and operating the systems. If this is the effect of the clause, then the amendment greatly enlarges, instead of restricting, the privileges given directly to private persons and corporations in the streets. Formerly the right to use them extended only to water and lighting systems; now, if this claim is correct, the right vests in all persons and all corporations for the purposes mentioned. The right could be exercised after the city had established its own works, as well as before. It would be unlimited with respect to the number of rival establishments. New street car lines could parallel existing lines, not only upon different streets, but upon the same streets, if there was space for another track. The city could only make conditions as to the manner of laying the track and operating the cars; and it would be a necessary qualification that the conditions must be reasonable, and not of a character which would prevent the use or unreasonably restrict it. To give the amendment this meaning would make it almost the direct opposite of what it has been generally supposed to be. It is apparent, of course, that the language is not as clear to the contrary as it could be made, in view of the claim here presented. But it is reasonably susceptible of the interpretation we have given it; and we are satisfied that this construction is consistent with and in furtherance of its general intent and policy.

We have high authority to the same effect. In Pomona v. Sunset, etc., Co.. 224 U. S. 330, 32 Sup. Ct. 477, 56 L. Ed. 788, decided April 8, 1912, this provision was construed by the Supreme Court of the United States. The claim was substantially the same as that here made. It was urged that this provision constituted a grant to the telephone company of the right to use the streets of Pomona as a place on which to erect its poles and string its wires. That court dismissed the claim with this statement: "If the municipal corporation does not see fit to establish the public works itself, it may let others do it; but its power to impose conditions excludes the notion that the Constitution alone is a grant to others of a right to occupy the streets without its consent."

The ordinances are therefore valid and enforceable against the gas company and the petitioner, as its employé, unless the claim that it has a vested right to extend its pipes is well taken. This brings us to the second question.

[4] 2. As a foundation for the second proposition, the petitioner shows that the works of said company were established and operated with the intent to supply gas in every section of the city, and to lay pipes in every street, if necessary for that purpose; that to this end it constructed works of a size sufficient to supply gas to a much larger territory than it was supplying prior to October 10, 1911, and had expended in so doing $100,000 more than would have been required for works to supply only the territory reached by its pipes at that date; that it had laid and maintained its pipes in many streets of the city, and had supplied gas thereby to the inhabitants in such streets for more than two years before said date; that prior to said date said company had made contracts with many of the inhabitants of the city to supply gas to them; that said contracts were still in force; and that, in order to perform them, it must extend its mains into streets not before used by it. All its works before that date were constructed in accordance with the provisions of the Constitution existing prior to said amendment, and in compliance with the existing regulations and directions of the city authorities. The petitioner was excavating a trench to lay gas pipes for said company in a street not before occupied or used by it for that purpose.

Prior to October 10, 1911, section 19 of article 11 was as follows: "In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

The grant or offer set forth in this section is in the most general terms. It is not specific with respect to either places or persons. It is not made to a particular corporation; nor is it confined to any particular city. It is a general offer to any person and all corporations that may be organized for that purpose, and it embraces all cities in the state. It is specific only with regard to the kind of privilege offered, to wit, that of "using the public streets" and "laying down pipes and conduits therein, * * * so far as may be necessary for introducing into and supplying said city and its inhabitants" with gas or water. No provision is made for any formal or written acceptance of the offer, whereby a conveyance of a right to specified streets, or within specified limits, or to all the streets of the particular city, might be manifested, which would be in the nature of a conveyance vesting the right in advance of, and regardless of, its use. No officer is empowered to take, receive, record, or preserve such acceptance. The only means whereby an effectual manifestation of acceptance can be made is the act of taking possession and occupying the street for the purpose allowed. Then, and not before, is the acceptance complete. Thus far the public grant extends; thus far the public property in the street is burdened and diverted to another use; thus far the grant is accomplished. There is nothing in the language of the section which can be fairly said to express the intention that the right offered should take effect in any street before it is actually used, or should vest as to all of them the moment that the use is begun in good faith in one.

[5] It is an established principle of construction, applicable to Constitutions as well as to statutes, that grants thereby made to private persons or public service corporations of rights belonging to the state or to the public "are to be construed most strongly in favor of the public." Clark v. Los Angeles, 160 Cal. 39, 116 Pac. 725; Sunset, etc., Co. v. Pasadena, 161 Cal. 273, 118 Pac. 799. "Only that which is granted in clear and explicit terms passes" by such grant. "Nothing passes by implication." Knoxville v. Knoxville, 200 U. S. 33, 26 Sup. Ct. 224, 50 L. Ed. 353. The grant to be made effective by actual use and acceptance of the constitutional offer is not, under the rule of construction just stated, to be carried further by implication. It is a necessary conclusion, therefore, that the vested right of the Economic Gas Company in the streets of Los Angeles at the time the Constitution was changed extended so far only as its actual occupancy and use of the streets then extended. The people had the right, at any time before acceptance, to repeal the provision and withdraw the offer. The investment of money in gas works designed to supply additional territory was not an acceptance, and could not operate as an estoppel against the state or the people to divest them of their sovereign authority to change the Constitution. The company must be deemed to have had knowledge of this sovereign power, and to have assumed the risk that the power might be exercised before it had further availed itself of the existing offer.

The section has heretofore been considered, in some of its aspects, by this court. In People v. Stephens, 62 Cal. 209, its effect as an executed and completed grant of the right to lay pipes in the public streets was the question involved. It was held that no legislative action was necessary to give it force; that it constituted a direct grant from the people, through the Constitution, to the corporation in charge of the public use of supplying gas or water of the privilege of laying in the streets such pipes as were required to distribute the supply. The main question considered was that of the necessity of legislative action to put the constitutional provision in force. In Re Johnston, 137 Cal. 115, 69 Pac. 973, it was decided that this constitutional grant gave to the corporation desiring to accept it the privilege granted, free from any interference or supervision by the municipality, other than that authorized by the terms of the section; and hence that the city could not require such corporation to procure a permit as a condition precedent to such use of the streets. See, also, South Pasadena v. Pasadena, 152 Cal. 586, 93 Pac. 490. In Stockton, etc., Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511, the decision was that this franchise or privilege, when accepted and used, is an incorporeal hereditament, an easement in the particular street and partaking of the realty, local in situation and taxable in the county in which the street is situated, the same as other real property; and that it is not one of, or a part of, the general corporate franchises to do business upon which corporations are taxable only in the county in which the principal place of business is situated. In none of these cases was it necessary to consider the extent of the franchise acquired by acceptance of the constitutional offer; that is to say, whether it was acquired and became vested only as far as it was used at the particular time to which the inquiry related, or whether it was a general present grant of a right or estate in all the streets to which the proposed system was designed to extend, and which vested as to all of them the moment it was accepted and used in one. There are expressions, however, in several of the decisions which show that the understanding of the court has been that the acceptance did not become complete otherwise than by actual use, nor extend further than such use; and that the right vested at the time of such use, and not before. In Stockton v. San Joaquin Co., supra, 148 Cal. 318, 83 Pac. 56 (5 L. R. A. [N. S.] 174, 7 Ann. Cas. 511), speaking of such a franchise we said: "It is only acquired when the constitutional grant is actually accepted; when the pipes and conduits for gas or the electric poles are laid in or erected on the streets of the city." Corporations having the capacity to take "do not acquire it until they have accepted it by proceeding to its actual exercise." Such franchise "is indissolubly annexed to the street of a city in and upon which it is exercised." In South Pasadena v. Pasadena, supra, we said: "This right, when made available by actual possession and use, is a species of real property, appropriately designated as a franchise." The point decided in Western Union Telegraph Co. v. Hopkins, 160 Cal. 111–122, 123, 116 Pac. 559–564, is, in principle, decisive of the precise question here involved. Referring there to the similar legislative grant to telegraph companies to construct telegraph lines along the highways of the state, contained in section 536 of the Civil Code, the court says it is similar to the constitutional provision in question here, and that it "would vest only when actually accepted by the exercise of the right granted;" that "the exclusive occupation by a company of portions of public highways for the authorized purpose is an acceptance by it of the offered franchise;" that the statute was a grant of rights in streets "which, to the extent that they were accepted and availed of by any company, constitute a franchise granted by the state and accepted by the company." And again: "To the extent that the offer of the state contained in the section was accepted by a telegraph company by the actual occupation of a highway prior to any repeal, modification, or suspension of the section, no right of revocation having been reserved, such telegraph company has vested rights that cannot be taken away by the state or city without compensation." And further: "So far as any company had not at such time availed itself of and thus accepted the provisions of section 536, there was no 'existing' grant or franchise to be annulled; and there was never any 'special' or 'exclusive' privilege given by the section." The part of the decision last quoted relates directly to the question whether the telegraph company, under the general legislative grant to all companies in any street, acquired any right in the streets in which it had not erected poles or strung wires prior to a repeal of the section, which such repeal would divest. It is practically the same question as that presented here, and is authority for the proposition that the gas company had no vested rights in streets not previously used for the laying of gas mains. To the same effect are St. Louis v. W. U. Telegraph Co., 149 U. S. 465, 13 Sup. Ct. 990, 37 L. Ed. 810, Northwest, etc., Co. v. St. Charles (C. C.) 154 Fed. 388, and Muskogee, etc., Co. v. Hall, 4 Ind. T. 18, 64 S. W. 603. There are cases involving grants of franchises in streets of a particular city to a particular person or corporation, which hold that a right vests in all streets as soon as the franchise is accepted, and that such acceptance may be manifested either by a formal written acceptance, or by the actual exercise of the rights granted thereby. We do not consider these decisions authority upon the question here involved. The distinction between such a special grant of a described right and the general offer here involved is obvious.

For these reasons, we are of the opinion that the Economic Gas Company had no vested right to excavate in the new street, or to lay pipes therein to extend its service into new territory within the city.

The petitioner is remanded to the custody of the chief of police of the city of Los Angeles.

We concur: ANGELLOTTI, J.; SLOSS, J.; LORIGAN, J.; HENSHAW, J.

163 Cal. 690

LYNCH v. KEYSTONE CONSOL. MINING CO. (S. F. 5,881.)

(Supreme Court of California. Sept. 18, 1912. Rehearing Denied Oct. 18, 1912.)

1. ATTORNEY AND CLIENT (§ 166*) — CONTRACTS FOR COMPENSATION — EVIDENCE—SUFFICIENCY.

In an action to recover money due for services rendered a mining corporation and payable out of the proceeds or net profits of a mine, evidence *held* insufficient to show unreasonable delay in payment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 368–372; Dec. Dig. § 166.*]

2. ATTORNEY AND CLIENT (§ 143*)—COMPENSATION—SOURCE.

A party to a contract for his services may validly agree that he shall be paid from a certain source, as where one rendering services to a corporation agrees that he shall be paid only from proceeds or profits of a mine.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 328–331; Dec. Dig. § 143.*]

3. ATTORNEY AND CLIENT (§ 144*) — CONTRACTS—CONSTRUCTION.

A contract reciting an indebtedness to an attorney for services, and a promise to pay him out of the proceeds of any sale of a mine, and, if no sale should be made, out of the net profits of the mine, not exceeding 10 per cent. of such profits monthly, limits the sources from which the attorney can compel payment to such proceeds or profits.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 332, 333; Dec. Dig. § 144.*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Edward Lynch against the Keystone Consolidated Mining Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed and remanded.

Rehearing denied; Beatty, C. J., dissenting.

Geo. C. Sargent, F. H. Gould, and Vincent Surr, all of San Francisco, for appellant. Edward Lynch and Bertin A. Weyl, both of San Francisco, for respondent.

ANGELLOTTI, J. This is an action instituted by plaintiff on December 22, 1905, against appellant corporation and M. J. McDonald, to recover $20,300 alleged to be due plaintiff on a written contract. The findings and decision were in favor of plaintiff as against appellant, and in favor of defendant McDonald. Judgment was accordingly given awarding plaintiff as against the corporation the sum of $20,300, with interest, and dismissing the action as to McDonald. On an appeal taken by plaintiff from the judgment of dismissal as to McDonald, such judgment was affirmed; the conclusion being that McDonald never signed or executed such contract in any other capacity than as an officer of appellant corporation. Lynch v. McDonald, 155 Cal. 704, 102 Pac. 918. This is an appeal by the defendant corporation from the judgment against it and from an order denying its motion for a new trial.

The contract was one bearing date March 1, 1901, and in form was one between appellant corporation and M. J. McDonald as parties of the first part, and plaintiff as party of the second part, but it was signed by McDonald only in his capacity as president of the appellant corporation. It recited that the corporation was the owner of a certain group of mines; that McDonald was the owner of nearly all the capital stock of said corporation; that plaintiff had since May 26, 1892, rendered the corporation services as attorney in various legal proceedings and also by the discovery and development of very valuable ore deposits in its mines, and had facilitated the operation of its mines by an arrangement and condensation of mining records, maps, surveys, and compilations of surveys and maps; and that "it is the intention of the parties hereto to satisfy and adjust the compensation of said Lynch for the performance of said services." It then proceeded as follows: "Now, therefore, the parties of the first part for themselves and for and on behalf of said corporation, do hereby acknowledge themselves indebted to said Lynch in the sum of $20,000 over and above the sum of $409.95 advanced to said Lynch on his notes given to said corporation (the payment of which notes and said $409.95 is hereby acknowledged), and whereas, it is not convenient for the parties of the first part to pay said sum of $20,000 at this time, and, whereas, they intend to sell the whole or a large portion of said mining property of said corporation, or of the capital stock thereof, as soon as possible, and they desire and intend to pay said sum to said Lynch out of the proceeds of such sale, or otherwise, as hereinafter provided: It is therefore agreed, that out of the proceeds of such sale the parties of the first part shall pay to the party of the second part said sum of $20,000 as in full compensation of the past services of said Lynch as aforesaid: Provided, that, whereas, a new mill and shaft equipment of said mine is now being planned and provided for, and whereas, said mine or said stock may not be sold as soon as is now anticipated, and whereas, the relations of the parties hereto are friendly and confidential, and it is the wish and desire of each to aid and assist the other in every way: Now, in case said sale is not effected as aforesaid by August 1st, 1902, then provisions shall be made for the payment of said $20,000 to said Lynch out of the monthly proceeds of the mine, not to exceed ten per cent. of the net profits of the mine."

It was then further provided that as the parties of the first part desired the future services of Lynch in prosecuting and defending any litigation pending or which might arise, and generally in doing any and all things which he was able to do, Lynch should render all such services for three years at $150 per month until August 1, 1902, said compensation to be then increased if the profits of the mine warranted it; "it being understood and agreed that the amount $150 per month, so to be paid to said Lynch, is measured by the present ability of the parties of the first part to pay rather than by the amount which is earned by said Lynch, and said monthly payment shall be made and accepted in full of said services and in consideration of the desire of the parties of the first part to afford said Lynch an income from said mine in lieu of and instead of interest on said indebtedness, and said payments provided for herein are additional to those provided for by an agreement of even date herewith, made between said McDonald and said Lynch." The provision as to the $150 per month was continued in force by later agreements, the last of which was dated September 27, 1904. On or about April 25, 1901, the contract, executed in duplicate, was signed by plaintiff, and by McDonald as follows: "Keystone Consolidated Mining Company by M. J. McDonald, President"—and at McDonald's instance by appellant's secretary as follows: "By Charles F. Anderson, secretary"—the latter affixing the corporate seal, and McDonald then delivered to plaintiff one of the duplicate contracts.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Under the terms of this contract, appellant has paid to plaintiff $150 per month for each month from March 1, 1901, to and including May, 1905, but has failed to make any payment for either June or July, 1905, although he performed the stipulated service throughout June and until July 20, 1905, when he was notified that his services were no longer required. It has paid nothing on account of the $20,000, although demand was made for $5,000 on July 15, 1905, and demand for the whole $20,000 on August 8, 1905. No sale was ever effected of any part of the mining property, nor of any of the capital stock referred to in the contract, and there has never been any transfer of any of said stock except one of 402 shares by McDonald to his wife. There is no finding of net profits of the mine aggregating $200,000, the amount necessary to entitle plaintiff to his full $20,000; the only findings that may be claimed to establish net profits being one which it will be assumed shows $41,284.74 net profit from August 1, 1902, to June 30, 1903, and one which it will be assumed shows $18,820.96 net profit from December 1, 1901, to July 31, 1902, and $22,443.62 net profit for the year 1900. The findings as to the amount of net product of the mine are not such as to force any conclusion that there was net profit amounting to $200,000 (including that expressly found), or any net profit approximating that amount, or, indeed, any net profit exceeding the aggregate amount of net profits expressly found. There was no allegation or finding to the effect that there had been any lack of diligence on the part of the corporation either in the matter of the proposed sale of the mining property, or in the operation of the mine; the latter having continued almost constantly from the date of the execution of the contract to the time of the commencement of this action. The conclusion of present liability on the part of the corporation for the full amount of $20,000 named in the contract is apparently based entirely on the finding "that by reason of the premises the defendant corporation, Keystone Consolidated Mining Company, had unreasonably delayed the payment of the amount due and owing under said contract dated March 1, 1901, prior to the 8th day of August, 1905, and prior to the commencement of this action." The only preceding statements in the findings that may be claimed to be pertinent to this are the following: The products of said mines each month have been gold bullion and gold bearing sulphurets. Ever since April 1, 1903, the monthly product has been shipped to McDonald each month or to banks named by him, and the corporation has been paid each month the money for which said bullion and sulphurets were sold. Ever since April 7, 1903, McDonald, who owned practically all the stock of the defendant corporation, has personally supervised the purchase of every article used in the business, and has personally supervised and been cognizant of the payment of every cent of expenditure, and has usually received duplicate vouchers of every dollar paid out; one being kept at the San Francisco office and one sent to the bookkeeper at the mines. The receipts, bills, pay rolls, and vouchers kept in the San Francisco office were destroyed by the fire of April 18, 1906. Prior to April 18, 1906, the accounts of said mines and the net profits of said mines subsequent to April, 1900, could be ascertained only from the examination of the original vouchers, bills, receipts, and pay rolls aforesaid, consisting of many thousand documents. McDonald stated to plaintiff prior to the commencement of this action that he had not the information whereby to ascertain what profits had been made by the operation of said mines since August 1, 1902, and also that no profits had been made during such period. It was further found, but such finding is attacked as being insufficiently sustained by evidence, that neither of such statements was true. It was further concluded by the trial court in a finding attacked by appellant as follows: The receipts of products realized monthly from the mines were evidenced originally by mint receipts and checks in payment for sales of sulphurets, and the expenditures were evidenced originally by bills, receipts, vouchers, and pay rolls, and, "in so far as these original transactions were entered in books of account," they were entered in four different sets of books, viz., in two different sets of books kept at defendant's office in San Francisco, one set in the name and for the use of defendant corporation, entries in which appear to have ceased about April, 1900, the other in the name and for the use of McDonald, which appears to have been kept up to the date of the commencement of this action; and in two different sets of books at Amador City, one of the defendant corporation, entries in which appear to have ceased or to have been neglected for two years prior to the commencement of this action, and the other of the Keystone Supply Company, a company organized by McDonald, and by which he transacted a general merchandise business at Amador City, and bought goods for and sold goods to defendant corporation. The entries in these books appear to have been kept up to the commencement of the action. The two last-named sets of books and the vouchers and papers constituting original entries and evidence appear to be in existence.

[1] We are unable to see in these facts any warrant for the conclusion that defendant had unreasonably delayed the payment of the amount specified in said contract, if, by a proper construction of its terms, such amount was to be paid by it solely out of the proceeds of the sale of the mining property, or out of the net profits of the mines. No failure by defendant, either willful or negligent, in the matter of the proposed sale or working of the mine by which proceeds or profits might be obtained from which the amount could be paid, being alleged or found, decisions to the effect that where the agreement is to pay only out of the net proceeds of the products of certain land or a certain mine, and the debtor then transfers such land or mine without working the same, and thus voluntarily puts it out of his power to get any product, or retaining it fails and refuses to work the mine, he breaks his contract and is immediately liable for the indebtedness (see Poirier v. Gravel, 88 Cal. 79, 25 Pac. 962; Wolf v. Marsh, 54 Cal. 228; Love v. Mabury, 59 Cal. 484), are therefore not at all in point. Nor does it appear from the findings, or, so far as we can see, from the evidence, that the mine is not being worked at some profit, or that from any cause it has become impossible to ascertain whether the monthly net profits of said mine between August 1, 1902, and the commencement of the action amounted to as much as $200,000. Indeed, we are not at all satisfied that the evidence was not of such a nature that it would have sufficiently supported a conclusion by the trial court that such an amount of net profit had, in fact, been obtained. But it is not necessary to determine this, as no such conclusion is contained in the findings. So far as appears from the findings, defendant corporation has acted with due diligence and care in the matter of the working of the mine, has not as yet derived therefrom the amount of $200,000 as net profit or any net profit approximating that amount, is still working the mine at a profit, and has done nothing making it impossible to ascertain approximately the amount of net profit thus far obtained, and it is not impossible, as matter of fact, to now ascertain approximately the amount of net profit. We repeat that, under such circumstances, we can see no warrant for holding that defendant has unreasonably delayed the payment of the full $20,000, if it is apparent that it was the intent and purpose of the parties that the amount should be paid only from the net profits in the event that there was no sale of the mine prior to August 1, 1902. As said by learned counsel for respondent, "it is substantially upon the basis of the interpretation of the provisions of this contract that the conclusions of the court must be reached."

In considering the question of the intent of the parties to the contract, certain facts shown by the evidence may properly be stated. Plaintiff was an attorney at law, and had been rendering services to appellant as attorney and in other capacities, ever since the year 1892, and was well acquainted with the mining property. He had also been rendering services to McDonald, and, as is recited in the contract, the relations of all the parties were "friendly and confidential." He had constantly been receiving pay on account of his services, but claimed that there was justly and fairly due him a large balance for his services, including a large sum as a fair and equitable reward or bonus because of the alleged discovery by him of a valuable ore deposit in the mine, which would increase very materially the value of the mine and the amount of profit that would thereafter be derived therefrom. His claims were entirely unliquidated in nature. His good faith in the matter of representations as to the value of the mine by reason of the existence of these ore deposits and the probability of great profit therefrom is clearly apparent from the evidence. Shortly before March, 1901, he strongly insisted upon some adjustment of his claims, with the result that, after much consideration by both plaintiff and McDonald, the agreement in suit was executed on March 1, 1901. This agreement was prepared by plaintiff, and was the third draft of a proposed agreement, the others also having been prepared by him. Of the amount of $20,000 thereby stipulated as due plaintiff, McDonald substantially testified that $10,000 was allowed plaintiff as a sort of reward on account of his alleged discovery of certain ore deposits in the mine, and we do not find that this testimony was in any way denied.

[2] Of course, it cannot be successfully disputed that a party to a contract may abso-

lutely limit his right to receive a sum of money to be paid him thereunder to money derived by the other party from a certain source, as in this case it is claimed it is so limited to 10 per cent. of the net profits of the mine, and that in such a case, where the other party continues diligently to endeavor to derive such money from the specified source, he can recover only as it is so derived. In other words, the right to the money in such a case is by the contract conditioned on the other party's obtaining it from the specified source. And the question here simply is whether it was so intended to limit plaintiff's right by the agreement before us.

[3] Taking the agreement as a whole, such would appear to be the meaning and intent of its provisions. The acknowledgment of the indebtedness cannot be taken by itself, detached from all other provisions of the agreement, as showing an absolute acknowledgment of so much money due plaintiff in any event. It must be read in connection with all the other provisions of the contract, and so read it shows no more than an intention on the part of the parties to settle all alleged claims and equities of plaintiff by an undertaking on the part of defendant to pay plaintiff $20,000 solely out of the proceeds of a sale of such mining property if a sale was made prior to August 1, 1902, and, if no such sale was made, then solely out of the monthly proceeds of the mine, not to exceed 10 per cent. of the net profits thereof. The agreement on its face clearly shows that it was the intention of the parties that nothing should be due and payable to plaintiff on account of said $20,000 until August 1, 1902, in the event that no sale was effected prior to that time, and it appears to just as clearly indicate the intent that after that nothing in excess of 10 per cent. of the net profits should be due and payable on account thereof. The circumstances we have referred to, even if we exclude from consideration the fact that the agreement was drawn by plaintiff, make it manifest that it is the proper construction of what the parties have said in their writing in this regard, if there be any ambiguity in the language used therein, which we do not concede. And it may be added that this appears to have been the practical construction of the agreement by all parties up to July, 1905.

Plaintiff would practically have us substitute for the provisions contained in this agreement as to the payment of the $20,000 a stipulation that the same shall in any event be payable within a reasonable time, relying on such statements as the following, to be found in Noland v. Bull, 24 Or. 483, 33 Pac. 985: "Where there is a present debt then due, constituting the basis of an agreement which merely postpones the time of its payment to an uncertain future date, when a certain specified transaction shall be accomplished, the agreement is to pay within a reasonable time, whether such transaction is accomplished or not." Similar in principle are such cases as Busby v. Century Gold Mining Co., 27 Utah, 231, 75 Pac. 727, and our own case of Williston v. Perkins, 51 Cal. 554, in which laborers engaged in constructing a schooner were given, for the amounts due them for wages, certificates stating the amount due and that the party named therein was entitled to receive such amount "when the * * * schooner now in course of construction is sold." It was held that the defendants were entitled to only a reasonable time in which to finish and sell the schooner, and that, such time having elapsed, the plaintiff could maintain the action. We have no disposition to question the correctness of such decisions, many of which may doubtless be found. The agreement before us was not, as we look at it, of the nature of the kind of agreement referred to by such cases. It was an agreement of settlement of certain alleged claims and equities upon certain terms and conditions, one of which conditions was that the amount agreed upon should be paid only in the event that moneys for such payment should become available from certain specified sources. This being the agreement, as long as there is no default on the part of defendant in the matter of endeavoring to obtain the fund from which alone such payment is to be made, plaintiff is bound by the terms of the contract as to the event upon which he is to receive payment thereunder. The case of Earle v. Sunnyside Land Co., 150 Cal. 214, 88 Pac. 920, specially relied on by plaintiff, does not assist him. While the contract there called for payment of a valid indebtedness only from the proceeds of the sale by a land company of certain lots, the land company expressly agreed to use reasonable diligence in placing its lands upon the market and making such sales, and the trial court found that it had failed to use such diligence. It was simply held that, while violating this covenant on its part, the company could not stand upon the connected clause providing that no payments were to be made except out of the sale, and that by reason of the failure to observe this covenant it was liable upon the obligation. As we have indicated in this opinion, even in the absence of an express provision to use reasonable diligence to obtain the money by means of which the payment is to be made, such a provision may be implied, and failure to observe it may result in entitling the other party to recover, independent of the condition, as is shown by cases discussed in the opinion in the case last cited. But, as already shown, we have no showing or finding of any such failure in the case at bar.

It follows from what we have said that the findings do not support the judgment, by reason of their failure to show that there have been net profits of the mine aggregating

$200,000, or any sum approximating that amount, or other facts warranting the judgment in the absence of such net profits.

For the purposes of a new trial, it is proper to say that we have considered the other points made by appellant, and are of the opinion that none of them is well based. We can see no reason for doubting that Mr. McDonald was fully authorized to make this agreement for and on behalf of defendant corporation; that the agreement was executed and delivered by the corporation; that it was based upon a valuable consideration; and that its execution was not induced by any fraudulent misrepresentation or concealment.

The judgment and order denying a new trial are reversed, and the cause is remanded for a new trial.

We concur: SHAW, J.; SLOSS, J.

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163 Cal. 710

HOME REAL ESTATE CO. et al. v. LOS ANGELES PAC. CO. et al.

(L. A. 2,715.)

(Supreme Court of California. Sept. 20, 1912. Rehearing Denied Oct. 18, 1912.)

1. Railroads (§ 82*)—Right of Way—Abandonment—Evidence.

In ejectment by the owners of the fee of a railroad right of way to recover possession of the easement given, evidence *held* to show a cessation of operation of the road with an intent to permanently abandon the right of way for the purposes of a railroad.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213–219; Dec. Dig. § 82.*]

2. Railroads (§ 82*)—Right of Way—Abandonment—Nonuser—Evidence.

While nonuser, not accompanied by an intent to abandon, will not divest a railroad company of its easement in land for a right of way, the intention with which the use was abandoned is one of fact, to be determined from the party's conduct and the circumstances, and a long continued nonuser is some evidence of intent to abandon.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213–219; Dec. Dig. § 82.*]

3. Appeal and Error (§ 1011*)—Review—Findings of Fact.

Findings based on conflicting evidence are conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983–3989; Dec. Dig. § 1011.*]

4. Railroads (§ 82*)—Parties—Who May Sue—Use of Easement for Public Purpose.

While a private individual may not maintain ejectment against a corporation which has entered upon his land, where the effect of a recovery would be to stop a public service which has grown up in consequence of his acquiescence, he may maintain the action where the use for a public service has been abandoned.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213–219; Dec. Dig. § 82.*]

5. Railroads (§ 82*)—Railroad Right of Way—Necessary Parties.

In ejectment by the owners of the fee of an abandoned railroad right of way, owners of a lumber yard on the line and others who may derive benefit from the operation of the road, but who have no interest in the land or right to its possession, are not necessary parties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213–219; Dec. Dig. § 82.*]

In Bank. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Ejectment by the Home Real Estate Company and others against the Los Angeles Pacific Company and another. From a judgment for plaintiffs and an order denying a new trial, the Los Angeles Pacific Company appeals. Affirmed.

J. W. McKinley and Gurney E. Newlin, both of Los Angeles (Roy V. Reppy, of Los Angeles, of counsel), for appellant. Bernard Potter and W. H. Fuller, both of Los Angeles, for respondents. Robert C. Fairall, of Los Angeles, amicus curiæ.

SLOSS, J. This action was brought to recover possession of a strip of land 30 feet in width, located in the county of Los Angeles. That plaintiffs are the beneficial owners of a fee in the property is not disputed. The claim of the appellant the Los Angeles Pacific Company is that it holds and is entitled to retain possession of the strip as a right of way for railroad purposes.

It appears that on March 9, 1887, a number of persons (including Emanuel Peltier, the then owner of the premises, and the predecessor in interest of the plaintiffs), as parties of the first part, entered into an agreement with James McLaughlin, appellant's predecessor, as party of the second part. The agreement recites that McLaughlin is the owner of a steam dummy railroad line running from a point in the city of Los Angeles, and that the other parties desire to have the line extended westerly beyond the city limits to the territory in which their lands are located. The parties of the first part, besides agreeing to make certain payments and conveyances to McLaughlin by way of subsidy, agree that McLaughlin "shall have the right to locate the route of his road as hereinafter stated, along, through, over and upon the lands of the parties of the first part," and that upon such locating they will convey to him a right of way for said railroad not exceeding 30 feet in width. McLaughlin agrees that he will "extend, construct, operate and maintain his steam dummy line of railroad from the terminus of his present franchise at the westerly corporate boundary of the city of Los Angeles," over a described route to and through the lands of Peltier and others. It is alleged in the complaint that McLaughlin constructed the extension about January 1, 1888, and operated his steam dummy line thereover for about five years. Thereafter, it is alleged, he ceased operating or running cars over the railroad "and abandoned the said road and the operation thereof." In 1905 the Los Angeles Pacific Company, claiming to have succeeded to McLaughlin's rights, constructed a roadbed over the property in controversy, laid ties and rails thereon, erected poles, and threatens to operate by electricity street cars over said road. It is alleged that since the abandonment of the road by McLaughlin there have been no acts done toward operating a street railway over the said road, except that cars have been run over plaintiffs' property occasionally for the purpose of hauling lumber or oil, but the same have not been run to accommodate the public or to carry passengers. By amendments to the complaint the plaintiffs sought to set up a further right of recovery, based upon the failure of McLaughlin and his successors, for a period exceeding six months, to operate the road as required by the statute of 1880 (Stats. 1880, p. 43), now incorporated into section 468 of the Civil Code. The defendant the Los Angeles Pacific Company denied the alleged abandonment as well as the failure to operate as required by the statute.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The court found in favor of plaintiffs upon both of the grounds asserted by them. Finding 12 declares that during the year 1897 McLaughlin and his successors in interest ceased to run cars over said line, but abandoned the said railroad and the operation thereof; that since the latter part of the year 1899 the track has been in many places covered with earth and débris, rendering it impossible to operate cars thereover; that since 1897 neither McLaughlin nor the appellant has run cars over plaintiffs' property, except intermittently during a portion of the time for the purpose of transporting oil to the town of Sherman (but not to or from the city of Los Angeles), and not for the purpose of accommodating the public. There are further findings supporting the allegations of the amendments to the complaint. Judgment went for plaintiffs, and the Los Angeles Pacific Company appeals from such judgment, as well as from an order denying its motion for a new trial. The foregoing findings are attacked as unsupported by the evidence.

In their briefs the parties devote much attention to the claim based on the terms of the statute of 1880. The appellant argues that that act does not provide for a self-executing forfeiture to be asserted in an action between private parties, and that, in any event, there can be no forfeiture until the Railroad Commission has decided, under the power conferred by section 3 of the act, the existence or nonexistence of the conditions excusing a failure to operate. These are interesting questions, but we find it unnecessary to pass upon them here, for the reason that, irrespective of the statute, the judgment is fully supported by finding 12, above referred to. The appellant concedes that, "where there has been an abandonment of a railroad right of way consisting of an easement only, the ōwner of the fee may maintain ejectment to recover possession." The court has found such abandonment, and the only question is whether this finding has the support of adequate evidence.

[1] We do not doubt that it has such support. Numerous witnesses testified that the active operation of the road stopped about 1897, and that it was never thereafter run over that portion of the track connecting with the city of Los Angeles. The hauling of oil cars continued for only two or three years, and even then was intermittent. The later carrying of lumber was of like character. During all this time no passengers were carried, and there was evidence that, after the appellant installed its electric system, passengers were not taken upon its cars. At no time was any service maintained over the line in question between the lands of the parties to the agreement with McLaughlin and the city of Los Angeles. The finding that a part of the track had become covered with débris, so that it could not be used, was also based on sufficient testimony.

[2] It is no doubt true, as claimed by appellant, that mere nonuser, not accompanied by an intent to abandon, will not divest the right of the railroad company to the easement. 33 Cyc. 222; Roby v. N. Y. C. & H. R. R. Co., 142 N. Y. 176, 36 N. E. 1053; Townsend v. M. C. R. Co., 101 Fed. 757, 42 C. C. A. 570. But in this class of cases as in others, the intention with which an act is done is a question of fact, to be determined by the trial court or jury from a consideration of the conduct of the party and the surrounding circumstances.

[3] Where the evidence is such that a finding either way might reasonably be made, the conclusion of the trial court must be upheld under the familiar rule protecting from review on appeal findings based on conflicting evidence. And, while nonuser alone does not extinguish the easement, a long-continued nonuser is some evidence of an intent to abandon. Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Townsend v. Mich. C. R. Co., supra.

But here we have more than a mere nonuser. The agreement under which McLaughlin and his successors claimed shows, by its recitals, that the main purpose of the parties of the first part was to secure a rail connection with the city of Los Angeles. No conveyance of a right of way, as contemplated by the agreement, was ever made by the parties of the first part to McLaughlin. The appellant is not, therefore, the owner of an easement conveyed by deed, but must rest upon its right as one who went into possession of land for certain purposes under license from the owner. Such entry, together with the designed use of the land, is no doubt sufficient to confer a right which is not revocable at the mere will of the owner of the fee. So. Cal. Ry. Co. v. Slauson, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58. But the nature and extent of the right acquired must be measured by the terms of the license under which entry was made. In this case the license is embodied in the agreement between the landowners and McLaughlin. The finding of the court is that by the agreement McLaughlin was given the right and privilege to locate, construct, and operate a steam dummy railroad over the strip in controversy "for the purpose of carrying passengers over said road and across said thirty-foot strip to and from the city of Los Angeles, and otherwise to do a general railroad business over the same." The right of McLaughlin and his successors to do a "general railroad business" is, of course, to be read as meaning the railroad business of a common carrier; i. e., the carriage of passengers or freight for the public generally. The only business which was ever done after 1897—i. e., the carriage, intermittenly, of oil and lumber—was not "for the purpose of accommodating the public," as the court finds. This finding is supported by the testimony of appellant's own witnesses, one of whom testified that the oil was being hauled to Sherman "for the Los Angeles Pacific Company itself"; another, that "the road was not operated for the purpose of accommodating the public or carrying passengers after 1900." As to this element of appellant's right, therefore, the record shows nonuse of the easement. But with respect to the other and the main purpose of the easement—that is, the transportation of passengers to and from Los Angeles—it shows much more. It shows that McLaughlin's successors permitted a part of the track between plaintiffs' lands and the city to get into such condition that operation over it was impossible. Furthermore, there is testimony that the line in question was paralleled by another line of the Los Angeles Pacific Company, and that the latter was used for transporting passengers to and from Los Angeles. The superintendent of appellant's lines testified that "after 1900, as there were no passengers to travel on it (the McLaughlin line), * * * we quit." We think this testimony, together with the other facts in evidence, fully warranted the trial court, in drawing the inference that the cessation of operation of the road had been accompanied with the intent to permanently abandon the use of the strip for the purpose of a railroad. By allowing a part of the track to become impassable, and constructing a parallel road over which it carried all traffic to and from Los Angeles, the Los Angeles Pacific Company furnished evidence sufficient to satisfy a trial court that it did not intend to again use the road for that traffic. And, as we have seen, there was no other use which was within the purposes for which the right of way had been acquired.

[4] The appellant makes the point that a private individual cannot maintain an action of ejectment against a corporation which has entered upon his land, where the effect of a recovery would be to stop a public service which has grown up in consequence of plaintiff's acquiescence in the entry and use. Gurnsey v. No. Cal. Power Co., 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185. But the rule relied on has, obviously, no application here, where the findings are that the appellant has not been, and is not, using the line for a public service.

[5] We see no merit in the contention that the action cannot be maintained because the owners of the lumber yard mentioned in the testimony are not joined as parties. They, and others who may derive benefit from the existence of the railroad, are, it is claimed, entitled to be heard in opposition to any judgment which will prevent the operation of the road. We do not think the interest of such persons is so direct as to require them to be made parties. The sole matter presented for adjudication by the pleadings was the right, as between the plaintiffs and the appellant, to the possession of the strip of land in controversy. No interest in this land or right to its possession was asserted by the owners of the lumber yard or by any one other than the parties to the action. If the railroad company occupied such a relation to the public interest as to make it improper for the court to grant the remedy of ejectment, this objection could properly be, as it in fact was, raised by the company itself. But, as we have seen, the facts were not such as to support the objection. To say that every member of the public who may desire or require the service of a railroad company must be joined in an action of this character would virtually abrogate the rule that where a right of way has been given, ejectment may be maintained by the owner of the land upon abandonment of the easement.

In the view which we have taken, the other questions discussed by counsel are of no importance.

The judgment and the order denying a new trial are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.

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163 Cal. 705

WEBSTER v. BOARD OF REGENTS OF UNIVERSITY OF CALIFORNIA.

(S. F. 5,874.)

(Supreme Court of California. Sept. 20, 1912. Rehearing Denied Oct. 18, 1912.)

1. APPEAL AND ERROR (§ 417*)—NOTICE OF APPEAL—VALIDITY—MISNOMERS.

Where a notice of appeal correctly states that the appeal is taken by the "Regents of the University of California," as designated by St. 1867–68, p. 252, the appeal is not subject to dismissal because the board is named in the complaint and judgment as the "Board of Regents of the University of the State of California."

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2140–2143; Dec. Dig. § 417.*]

2. TAXATION (§ 213*)—EXEMPTIONS—"PROPERTY BELONGING TO THE STATE."

A mortgage held by the Regents of the University of California is "property belonging to the state" within Const. art. 13, § 1, which exempts state property from taxation, and hence where land is mortgaged to the Regents and the mortgagor's interest is sold to the state at a tax sale, and a resale and deed is made by the state to an individual under Pol. Code, § 3897, the deed to such purchaser remains subject to such mortgage, though Const. art. 13, § 4, makes both the interests of mortgagors and mortgagees subject to a tax levy upon either interest; that provision not applying to public property.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 353; Dec. Dig. § 213.*]

3. TAXATION (§ 183*)—PROPERTY SUBJECT TO—PUBLIC PROPERTY.

Constitutional and statutory provisions relating to taxation of property are to be understood as referring to private property, and as not including public property of the state, or any subordinate part of the state government.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 295; Dec. Dig. § 183.*]

Department 1. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by A. M. Webster against the Board of Regents of the University of California. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Reversed.

Warren Olney, Jr., and F. A. Cutler, both of San Francisco, for appellant. James H. Boyer, of San Francisco, for respondent.

SHAW, J. The appeals presented were taken by the defendant from the judgment and from an order denying it a new trial.

[1] In the complaint and judgment the name of the defendant is stated to be "Board of Regents of the University of the State of California." The notices of appeal state that the appeals are taken by the defendant, and its true name is "Regents of the University of California." Respondent moves to dismiss the appeals because of this discrepancy, claiming that there is no appeal on behalf of the party named in the complaint and judgment as the defendant. There is no merit in the motion. The name as given in the complaint and judgment is a misnomer. The true name is that given in the notices of appeal. Stats. 1867–68, p. 252. The misnomer in this case is wholly immaterial.

[2] The only question necessary to decide is whether or not, where land is mortgaged to the Regents of the University of California, and a tax sale and conveyance of the mortgagor's interest is made to the state and a resale and deed thereupon is made by the state to an individual, under section 3897 of the Political Code, such sales and deeds operate upon the mortgage interest or lien of the mortgagee and vest title in the tax sale purchaser free from the mortgage lien. The sales all took place while the constitutional provision was in force declaring that for purposes of taxation the interest of the mortgagor, and that of the mortgagee in the land mortgaged should be distinct interests and separately taxable.

The mortgage to the Regents was executed on December 6, 1890, and was duly recorded. The tax sales to the state were made on July 3, 1897, for the taxes of 1896. The deeds from the tax collector to the state were made on July 7, 1902. The State Controller on March 20, 1905, directed the tax collector to sell the lands in pursuance of said sales and deeds. The tax collector thereupon, on April 18, 1905, sold said lands to the plaintiff and executed to him deeds therefor in due form. On August 31, 1899, the Regents of the University of California began an action in Alameda county, where said land is situated, to foreclose its said mortgage, making parties defendant thereto all persons interested in the land except itself and the state of California, and notice of the pendency of the action was duly filed on the same day. Process was duly served, or appearances duly entered, and on January 4, 1905, judgment of foreclosure of said mortgage and for the sale of said property was duly given. Said judgment was entered on January 19, 1905. Thereafter, on May 16, 1905, said lands were duly sold, in pursuance of said judgment, to the Regents of the University of California. No redemption having been made, a deed was duly executed to said purchaser on December 28, 1905. Upon these facts there can be no serious doubt of the proposition that the title is not in the plaintiff, but in the defendant, and that the finding to the contrary is without support in the evidence.

The Constitution declares that all property belonging to the state shall be exempt from taxation. Section 1, art. 13. A mortgage of land, executed to the Regents of the University of California, to secure money due said body for any purpose for which it was created, and the interest which it thereby, for the purposes of taxation, holds in the land, is the property of the state, within the meaning of this provision, and as such the said interest is exempt from taxation. Hollister v. Sherman, 63 Cal. 38; People v. Board, 77 Cal. 137, 19 Pac. 257; Henne v. Los Angeles Co., 129 Cal. 298, 61 Pac. 1081. The mortgage interest belonging to the Regents being thus free from taxation, it necessarily follows that the lien of the tax assessments, they being made upon the interest of the mortgagor alone, did not extend to or include the interest vested in the state by virtue of the mortgage to the Regents. Hence the tax sales and deeds, made in pursuance of the assessments upon the mortgagor's interest, did not operate to transfer or convey the exempt interest of the state represented by the mortgage. Their effect was confined to the interest of the mortgagor. The result is that the plaintiff by his purchase and deeds from the tax collector, conceding that they were regular and valid in form, obtained only the right and title of the mortgagor in the land; that is, the right to pay off the mortgage at any time before the foreclosure sale and the right to redeem from said sale for six months after it was made, and thereupon to hold the land discharged therefrom. His title was subject to the mortgage and to said foreclosure judgment and not paramount to it. If this were not so, the constitutional provision exempting the mortgage interest of the Regents from taxation would be to that extent ineffectual. If the lien of the mortgagor's tax, and the power to sell the land for nonpayment thereof, extended to and covered the mortgage interest of the Regents, that interest would not be exempt. To give adequate effect to the Constitution and to protect the property of the state as it intends, the exemption must be complete and must exclude not only a direct tax thereon, but also any lien or charge thereon growing out of the tax upon the complementary interest of the mortgagor.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[3] We do not overlook the fact that section 4 of article 13 of the Constitution which makes the interest of the mortgagor and mortgagee distinct and separate for the purposes of taxation declares that a tax levied upon either interest shall be a lien upon both interests, or that it has been directly held that the payment by a mortgagee of the tax on his interest does not exempt it from sale for nonpayment of taxes on the interest of the mortgagor, and also that such tax assessed upon the interest of the mortgagor is paramount to the mortgage itself, although junior thereto in point of time. Cal. Loan, etc., Co. v. Weis, 118 Cal. 489, 50 Pac. 697. These two apparently conflicting provisions must be interpreted and applied so as to be in harmony with each other, if reasonably possible. They are to be construed in the same manner as similar provisions of this character have always been construed. The rule applicable thereto is thus expressed in People v. Doe, 36 Cal. 222: "The Constitution and laws upon the subject of taxing property are therefore to be understood as referring to private property and persons, and not including public property of the state, or any subordinate part of the state government." See, also, People v. McCreery, 34 Cal. 456; Low v. Lewis, 46 Cal. 552; Doyle v. Austin, 47 Cal. 360; Smith v. Santa Monica, 162 Cal. ——, 121 Pac. 920. The general rule applied in all such cases is that statutes authorizing liens on or forced sales of property, generally, will not be held applicable to public property, unless the intention to make them so expressly or plainly appears. Mayrhofer v. Board, 89 Cal. 110, 26 Pac. 646, 23 Am. St. Rep. 451; Ruperich v. Baehr, 142 Cal. 193, 75 Pac. 782, and cases there cited. It follows, therefore, that the said provision of section 4 of article 13 must be understood as referring wholly to the taxation of private property and to mortgages made to private persons and not to those belonging to the state. The rule that a tax lien is paramount and prior to the mortgage lien must for like reasons give way when the mortgage lien is exempt from taxation because the mortgage is the property of the state.

This conclusion is decisive of the case. The title is vested in the Regents of the University of California and not in the mortgagor. The deeds to the plaintiff conveyed only the interest of the mortgagor in the property, which interest has been extinguished by the foreclosure sale and the deed thereunder. The title is now in the Regents free from any claim of the plaintiff.

We do not find it necessary to notice the other points urged by the defendant in support of its appeals.

The findings are in favor of the plaintiff generally and the specific facts are not stated. Hence, we cannot direct a judgment, and a new trial is necessary.

The judgment and order are reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

163 Cal. 701

PEACOCK v. SUPERIOR COURT IN AND FOR SOLANO COUNTY et al. (S. F. 6,186.)

(Supreme Court of California. Sept. 19, 1912.)

1. MANDAMUS (§ 57*)—SUBJECTS OF RELIEF—JUDICIAL PROCEEDINGS.

Writ of mandate lies to compel vacation of an order of the superior court wrongfully dismissing an appeal from justice's court, and compelling restoration of the appeal for trial.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 68, 114, 120; Dec. Dig. § 57.*]

2. JUSTICES OF THE PEACE (§ 160*)—APPEAL—NOTICE—CONCLUSIVENESS OF RECITALS.

Recitals in a notice of appeal from a justice's judgment that the appeal is taken both upon questions of law and fact is not conclusive.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 579–591, 658; Dec. Dig. § 160.*]

3. JUSTICES OF THE PEACE (§ 184*)—JUDGMENT OF NONSUIT—POWER TO ENTER.

Under Code Civ. Proc. § 925, which declares justices' courts to be courts of limited jurisdiction, and under section 890, limiting the grounds for dismissing actions in such courts, a justice was not authorized to enter judgment of nonsuit for failure to prove material allegations of the complaint; and hence an appeal from a judgment of dismissal based on an order of nonsuit is not an appeal upon a question of law alone within the rule that, on appeal to the superior court on questions of law alone, the proper procedure is to allow a new trial for error or to affirm, in absence of error.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 715; Dec. Dig. § 184.*]

4. JUSTICES OF THE PEACE (§ 171*)—ERRONEOUS JUDGMENT—EFFECT.

Error of a justice of the peace in entering a judgment of dismissal for supposed failure by plaintiff to prove the material allegations of his complaint, instead of giving defendant judgment on the merits, does not deprive plaintiff's right to appeal upon questions of both law and fact so as to have his cause tried de novo in the superior court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 655-657; Dec. Dig. § 171.*]

In Bank. Petition by W. S. Peacock against the Superior Court of the State of California in and for the County of Solano and another for writ of mandate to compel vacation of an order dismissing an appeal from a justice's court. Mandate issued.

Byron Ball, of San Francisco, for petitioner. W. U. Goodman, of Fairfield, for respondents.

HENSHAW, J. [1] An action in a justice's court was brought and prosecuted by W. S. Peacock, petitioner herein, against Henry Goosen, defendant. Trial was had, oral and documentary evidence was introduced on behalf of the plaintiff, and, when plaintiff rested his case, the defense moved for a nonsuit upon the ground of his failure to prove the material allegations of his complaint. The justice granted the motion and dismissed the action. Peacock prosecuted in due form his appeal to the superior court from the judgment so rendered; his notice of appeal declaring that the appeal was taken on questions of both law and fact. In the superior court a motion to dismiss this appeal was made and granted. The grounds of the motion were that the appeal from a judgment of dismissal presents a question of law alone, and that, when a question of law alone is presented by an appeal from a justice's to the superior court, a statement is required, and that no such statement accompanied the appeal in this case. Code Civ. Proc. § 976. Thereupon petitioner has applied to this court for mandate seeking a vacation of the order of dismissal given by the superior court and a restoration of his appeal from the justice's court to the calendar of the superior court for trial. Petitioner is within his rights in thus seeking mandate. Golden Gate Tile Co. v. Superior Court, 159 Cal. 474, 114 Pac. 978; Edwards v. Superior Court, 159 Cal. 712, 115 Pac. 649.

[2, 3] To this petition respondent answers that petitioner's declaration in his notice of appeal that it is taken both upon questions of law and fact is not conclusive. This is true, for the mere declaration in a petition cannot have the effect of varying the facts. Thus, if an appeal be taken to the superior court after judgment upon demurrer sustained, it would still be an appeal upon questions of law alone, even though the notice of appeal contained the declaration that it was taken on questions both of law and fact. Next, respondent contends that an appeal from a judgment of dismissal even when, as here, the judgment of dismissal is based upon an order on nonsuit, is an appeal upon a question of law alone. And, finally, it is declared that, when an appeal to the superior court is based on questions of law alone, the proper procedure is to remand the cause for trial in the justice's court if the justice has fallen into error upon a material question of law, or to affirm the judgment of the justice's court if the justice has not erred. Myrick v. Superior Court, 68 Cal. 100, 8 Pac. 648; Maxson v. Superior Court, 124 Cal. 468, 57 Pac. 379.

The reasoning of respondent would have force if the justice were clothed with power and authority to render the judgment which he gave. The fundamental error in respondent's reasoning arises from the fact that the justice is not clothed with any such power. By the Code itself (Code Civ. Proc. § 925) justices' courts are declared to be courts of peculiar and limited jurisdiction, and only those provisions of the codes which are in their nature applicable to the organization, powers and course of proceedings in justices' courts, or which have been made applicable by special provisions, are so applicable. Turning briefly to the consideration of the powers of courts of record and of general jurisdiction, it is declared as to them (Code Civ. Proc. § 581) that "an action may be dismissed, or a judgment on nonsuit entered, in the following cases: (5) By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury." The corresponding section governing the procedure in justices' courts is found in section 890 of the same Code. That section authorizes a judgment of dismissal to be entered only in certain cases, denies by its silence the right of a justice to entertain a motion for a nonsuit, and omits entirely the provisions of subdivision 5 quoted above from section 581. The imperative conclusion to be drawn from a consideration of these two sections is that the Legislature as to justices' courts has limited the causes for which a judgment of dismissal may be entered by a justice, and that a failure by the plaintiff to establish his case by satisfactory evidence is not one of those causes. Further, that the Legislature has not intrusted to justices the right to pass upon and grant motions for nonsuit. The course of the justice is thus made plain. Where evidence has been introduced in a trial of a case before him and the plaintiff rests his case upon evidence which, to the mind of the justice, is not sufficient to entitle him to judgment, the result is that there has been a trial upon the merits, that the plaintiff has failed to establish his cause, and that judgment upon the merits should be rendered for the defendant. Such is the clear meaning of our law, and so it has been construed in 1 Cowdery's Justice Treatise, p. 664, § 1134.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[4] It follows from the foregoing that the justice erroneously entered a judgment of dismissal against plaintiff, when the sole judgment which he was authorized to render under the circumstances was a judgment for defendant upon the merits. But the erroneous form of the judgment which the justice actually rendered cannot deprive the plaintiff of his right to appeal upon questions both of law and fact (for under the circumstances and after a trial upon the merits questions of both law and fact are involved), and so to have his cause tried de novo in the superior court. Smith v. Superior Court, 2 Cal. App. 529, 84 Pac. 54, upon which respondent relies, was not brought under review before this court by any petition for rehearing. The basic error in the Smith Case is the same as has been here pointed out. It rests upon the unfounded assumption of the power of the justice to entertain a motion for a nonsuit, and to render a judgment of dismissal under the provisions of section 581 of the Code of Civil Procedure. But, as has been pointed out, the power of the justice's court in the matter of dismissal is circumscribed by and confined to the provisions of section 890 of the Code of Civil Procedure.

Let mandate issue as prayed for.

We concur: SLOSS, J.; ANGELLOTTI, J.; SHAW, J.; MELVIN, J.

PER CURIAM. The following words are hereby added to the opinion heretofore filed in the above entitled case: "And petitioner will recover his costs upon this application, to be taxed in accordance with law."

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163 Cal. 681

ELIZALDE v. MURPHY et al. (L. A. 3,020.)

(Supreme Court of California. Sept. 13, 1912. On Rehearing, Oct. 12, 1912.)

1. Limitation of Actions (§ 101*)—Administrators — Duty to Account — Limitations.

An administrator's duty to account being a continuing one, a plea of limitations is not open to the personal representative of a deceased administrator, or to the sureties on his official bond in an action for an accounting.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 494–510; Dec. Dig. § 101.*]

2. Executors and Administrators (§§ 473, 474*)—Accounting — Right to Relieve — —Fraud—Malversation—Nature of Proceedings.

The right of the beneficiary of a decedent's estate to an accounting by the personal representative does not rest upon, and is not affected by, allegations of fraud or malversation, and hence allegations in the bill for an accounting that the administrator wrongfully commingled the funds of the estate with his own funds, and wrongfully settled claims by taking notes of the debtor running to himself individually, etc., did not change the bill into an action for tort.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041–2060; Dec. Dig. §§ 473, 474.*]

3. Executors and Administrators (§§ 473, 474*)—Bill for Accounting—Requisites.

Where a bill against the personal representatives of a deceased administrator for an accounting alleged facts showing a fiduciary relation existing between the parties, it was not essential that it should also contain allegations of fraud or malversation on the part of the administrator; such facts being provable without allegation.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2041–2060; Dec. Dig. §§ 473, 474.*]

4. Executors and Administrators (§ 484*) —Accounting—Action on Bond.

In an action against the personal representatives of an administrator and his bondsman, personal loans or advances made by the administrator to one of the beneficiaries of the estate were chargeable only against the distributive share of the estate found due to such beneficiary, and were not available as a set-off to any sum found due the estate by such administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 763, 2067; Dec. Dig. § 484.*]

5. Executors and Administrators (§ 527*) —Bonds — Recitals — Conclusiveness on Surety.

A recital in an administrator's bond that it was given pursuant to an order of court at a specified date is conclusive on the surety.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2355–2374; Dec. Dig. § 527.*]

6. Executors and Administrators (§ 531*) —Action on Bond — Derelictions—Duty to Notify Surety.

Where alleged derelictions of an administrator were matters of record in the court at the time he was ordered to give an additional bond on which defendant M. was surety, and the beneficiaries of the estate had nothing to do with the procurement of M. as surety, he was not relieved from liability for a devastavit because of alleged failure on the part of beneficiaries to notify him promptly of their suspicions or belief in the administrator's misconduct.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2406–2430; Dec. Dig. § 531.*]

7. Executors and Administrators (§ 529*) —Bonds—Scope of Liability.

An administrator's bond in general terms, conditioned on the faithful performance by the administrator of the duties of his trust, was not limited to acts done after the execution of the bond, but covered breaches of trust of the administrator committed prior as well as subsequent to the bond.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2395–2403; Dec. Dig. § 529.*]

8. Executors and Administrators (§ 227*) —Claims—Sufficiency.

Where decedent was surety on an administrator's bond which had been breached, a claim filed against decedent's estate, alleging that decedent was indebted to cash due the estate secured by the bond by reason of decedent's becoming surety on the bond of the administrator, stating the liability at a specified sum and containing a separate charge for interest, was sufficient, though the exact amount of the claim could not be known until the termination of a pending suit for an accounting.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 811–818, 842; Dec. Dig. § 227.*]

In Bank. Appeal from Superior Court, Santa Barbara County; Robert M. Clarke, Judge.

Action by Elisa P. Elizalde, as administratrix of the estate of Marcos A. Elizalde, against P. W. Murphy and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Wm. Shipsey and S. V. Wright, both of San Luis Obispo, for appellants. B. F. Thomas, of Santa Barbara, and Louis Lamy, of San Luis Obispo, for respondent.

HENSHAW, J. Ernest Graves during his lifetime was the administrator of the estate of Marcos A. Elizalde, whose sole heirs at law were his widow, Victoria C., and his daughter, Elisa P. In July, 1898, the account of Graves as administrator was settled and approved. It showed in his possession funds of the estate to the amount of $4,633.50 above all credits allowed to him. Graves died July 15, 1900. The daughter, Elisa P. Elizalde, was appointed administratrix of her father's estate, and on April 8, 1901, this action to compel an accounting was instituted against the sureties upon the administrator's bonds given by Ernest Graves. Subsequently Lucinda Graves, as administratrix of the estate of Ernest Graves, was brought in as an additional defendant. Growing out of different phases and branches of the controversy, three appeals have already been taken. They will be found reported in 146 Cal. 168, 79 Pac. 866, 4 Cal. App. 114, 87 Pac. 245, and 11 Cal. App. 32, 103 Pac. 904. This appeal is taken by the defendants Marre and McAllister, sureties upon the bond of Ernest Graves, deceased, as administrator, from the judgment and from the order denying their motion for a new trial.

A reference to the opinion in 11 Cal. App. 32, 103 Pac. 904, will disclose that there came into the hands of Graves, as administrator, what is known as the Dargie note; that Graves did not collect this note, but did take from Dargie and his wife new notes executed to him, Graves, personally as payee. There was before the appellate court in that case the consideration of the question whether the conduct of Graves amounted to an appropriation or conversion of the original note, and, if it did, then the question of the allowance of interest; that court in this connection saying: "Upon the new trial there should be a finding of fact on the issue of the appropriation or conversion of the original note by Graves, as this is a mixed question of law and fact; so, also, in order that the court may determine whether or not the principal sum should bear interest, it is important that the trial court also make a finding of the good or bad faith of Graves in taking the notes in his own name, the latter finding being necessary to the determination of the right of the estate to interest, but having no application to the question of the conversion of the principal sum. Estate of Cousins, 111 Cal. 441, 44 Pac. 182; Matter of Bane, 120 Cal. 536, 52 Pac. 853, 65 Am. St. Rep. 197."

Before proceeding with the hearing of the questions thus presented, the trial court permitted plaintiff to file certain amendments to her complaint, charging that Ernest Graves, while administrator, mingled the balance of account mentioned in the original complaint and $420 subsequently collected by him as rent on part of the estate with his own funds so as to constitute himself in appearance the sole and absolute owner thereof, and used the same for his own personal benefit. A further amendment was permitted charging upon the conduct of Graves in taking notes of the Dargies to himself personally in substitution for the note due to the estate, and with commencing suit in his own name to collect the moneys due upon these notes, the continuance of this suit after Graves' death by Lucinda Graves, administratrix of his estate, and the compromise of this suit for the sum of $150, which sum was paid to Lucinda Graves as administratrix. It is further charged that Graves died insolvent, and it is finally charged that plaintiff did not discover the willful and wrongful commingling of the funds of the estate with the administrator's own funds until a very short time before the filing of the amendment. The amendment was filed March 21, 1910.

[1] Appellants complain that the court did not specifically find upon their plea of the statute of limitations; their plea being that "the recovery of said balance of account and said $420 of rent referred to in said twentieth paragraph of said complaint as amended and each and every item thereof is barred by the provisions of sections 337, 338 and 343 of the Code of Civil Procedure." But, as in an action such as this such a plea is not open to the defendants, a finding was unnecessary. The action was simply an action for an accounting—an action to compel the personal representative of a trustee after his death, and the sureties upon his bond as such trustee, to give an account of the property held by the trustee, and of his administration of the trust, to have that account audited and settled by the court and a balance struck. Osment v. McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17. The duty of the administrator to account was a continuing duty and does not become barred. Estate of Sander-

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

son, 74 Cal. 199, 15 Pac. 753; Cook v. Ceas, 147 Cal. 614, 82 Pac. 370.

[2] The right of the beneficiaries to seek an accounting does not rest upon, and is in no way dependent upon, any allegations of fraud or malversation. When those allegations are contained in a bill for an accounting, they do not change the bill into an action for tort. State v. Chadwick, 10 Or. 423; Segelken v. Meyer, 94 N. Y. 473. So in this case the amendments which plaintiff was permitted to file not only did not change the action but did not broaden its scope. It would have been permissible for plaintiff, without amendments, to prove everything which she charged as to the nature of the dealings of the administrator with the estate's property without specific allegations bearing thereon. [3] And, for the reason already indicated, that the action was for an accounting by a trustee, and that the realm of inquiry in such action is limited only by the meaning of the word itself, no plea of the statute of limitations could avail the defendants. "A bill for an account must show by specific allegations that there was a fiduciary relation between the parties or that the account is so complicated that it cannot be taken in an action at law. But no allegation beyond those which establish the fiduciary relation * * * is necessary." 1 Ency. Pl. & Pr. 98. In the case of a trustee only an unequivocal repudiation of the trust by him, with knowledge of this brought home to the beneficiaries of the trust, could set the statute of limitations in favor of the trustee in motion. Fox v. Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474; Hovey v. Bradbury, 112 Cal. 620, 44 Pac. 1077.

For the same reason, that portion of the finding to the effect that plaintiff did not until December, 1909, discover that Graves as administrator had commingled the estate's funds with his own, even if unsupported, has no bearing upon the controversy; for the essential fact to be found by the court upon the question of allowing or withholding interest and compounding the same was whether or not Graves had so commingled the funds, and the evidence upon this point abundantly establishes that he did. The discovery by the present administratrix, then but an heir, of such commingling, could not, we say, have any bearing upon this litigation, for the reason that, if she knew of such conversion, she could not have instituted against Graves as administrator an action therefor. Her sole right under the circumstances would have been to call the trustee to an account, as here she has done. After the judgment in accounting in her favor, then for the first time arises the right to take appropriate proceedings against the administrator to enforce such judgment. However, it may be added that while the testimony does disclose that the Elizalde heirs—mother and daughter—during the administration of Graves did suspect or think that he was improperly using the moneys of the estate, they had no actual knowledge of such misuse or malversation, and still less could they be charged with holding the conviction that when his account as administrator was settled he would not make good whatever sum was found due to the estate.

Defendants pleaded a release to the administrator, Graves, executed by the Elizalde heirs. The court pronounced this release a forgery. It is unnecessary to discuss the conflicting evidence upon this question, but suffice it to say in pointing out that the finding is sustained by the evidence that not only do the two heirs positively deny their signatures to the release and the execution of it by them, but upon a previous trial the court found this release to be a forgery, and the defendants acquiesced in the finding to the extent that no appeal was taken by them from the judgment which followed.

Numerous other objections are presented by appellants. For the most part, they are based upon the position which appellants take that because of the amendments to the bill charging misappropriations and conversions and commingling of the funds of the estate the cause of action has been changed from the equitable action for an accounting to a legal action in tort. This position, as we have already said, is untenable. To illustrate without elaboration, it is contended that appellants were entitled to a jury trial because the action was one at law. It is contended that the court erred in overruling appellants' demurrers because a cause of action for an accounting was joined with a legal action for conversion. It is contended that the statute of limitations had run in favor of appellants as to certain acts of conversion found by the court. These objections, one and all, have been sufficiently answered by what has previously been said. Certain other objections, even if containing merit, are of no essential value to appellants. Thus the court found that Dargie was solvent. His solvency or insolvency had no bearing upon the conduct of the administrator in his dealings with the Dargie matter, the taking of new notes in his own name for the old, the collection of one of these notes at maturity, and his failure to account to the estate for the proceeds of the collected note, and for the other notes which he took in his own name personally as payee.

[4] Again, it is said that the finding to the effect that "Ernest Graves has not as administrator advanced to Victoria Elizalde $3,000 or any sum or anything at all" is wholly unsupported. The finding, it is to be borne in mind, is that Graves did not as administrator make any such advances. The evidence does, in fact, show that Graves did pay over to Mrs. Elizalde certain sums of money. All of these payments but three were made before Mr. Graves became administrator, and after he became administra-

tor he did not claim in his statement of account that as administrator he had advanced Mrs. Elizalde anything. Therefore the court was justified in its finding, for the advancements were in the nature of personal loans, chargeable only against the distributive portion of the estate found to be due to Mrs. Elizalde. It is the law of the case that these payments or advances have no place in this action as a set-off to any sum found due to the estate by Graves as administrator. Elizalde v. Murphy, 4 Cal. App. 114, 87 Pac. 245.

Certain propositions are advanced upon behalf of appellant Marre growing out of the following facts: Graves as administrator had at different times given two bonds in the sum of $20,000 each. Subsequently he gave a third bond for $10,000, upon which bond one of the sureties was Luigi Marre. Luigi Marre has since died, and this appeal is prosecuted by Gaspar Marre, administrator with the will annexed of his estate. The first proposition advanced is that the bond was not made in pursuance of any order of court, notwithstanding that the findings declare that it was, and that it is therefore void.

[5] The facts are that the order of the court requiring Mr. Graves to give the additional bond could not be produced. The bond itself, however, recites the order and gives its date. This is conclusive upon the surety. Tartar v. Hall, 3 Cal. 263; Coles v. Soulsby, 21 Cal. 47; Moore v. Earl, 91 Cal. 632, 27 Pac. 1087.

[6] Appellants next contend that because the contract of suretyship imports entire good faith and confidence between the parties to the whole transaction, and because the Elizalde heirs knew or suspected misconduct upon the part of the administrator, Marre is exonerated because he was not informed by them of their suspicions or belief. In this, however, appellants entirely misconceive the meaning of the law. The heirs of the Elizalde estate had nothing whatsoever to do with the procurement of Graves' sureties, did not even know Marre, and did not even know that he was to become a surety. Still further, at the time that Marre became such surety, the petition of the heirs asking for the removal of Graves as administrator for these derelictions of duty was on file and a matter of record. So, also, was the court's order settling the account which Graves himself had presented, and charging him with having in his possession funds of the estate to the amount of several thousand dollars, which settled account really forms the basis of this action. There is therefore nothing in this proposition.

[7] And, finally, the bond executed by Marre does not in terms limit his liability to the acts of the administrator after the execution of the instrument. The bond is general in terms, conditioned upon the faithful performance by the administrator of the duties of his trust. It is settled beyond controversy that, under such circumstances, the surety upon the bond of an administrator becomes liable for the breaches of trust of the administrator committed prior to his becoming such surety, as well as for those committed subsequent thereto. Irwin v. Backus, 25 Cal. 223, 85 Am. Dec. 125; Powell v. Power, 48 Cal. 234; Chaquette v. Ortet, 60 Cal. 594; Lacoste v. Splivalo, 64 Cal. 35, 30 Pac. 571; Evans v. Gerken, 105 Cal. 313, 38 Pac. 725; Treweek v. Howard, 105 Cal. 434, 39 Pac. 20.

[8] The final contention on behalf of appellant Marre is that no sufficient claim was presented against the Marre estate. The form of the claim was as follows:

To cash due said estate of Marcos Elizalde, deceased, by reason of said Luigi Marre becoming surety on the bond of Ernest Graves as administrator of the estate of said Marcos A. Elizalde, deceased, the sum of..............................	$6163 65
Interest on said sum from Aug. 1, 1900, at 7 per cent. per annum......................	1063 90

It is, of course, apparent that the exact amount due from the estate of Marre could not be stated until this accounting was had. The purpose of presenting a claim is to advise the party against whom the claim is presented of its nature. The Code nowhere defines the precise form of such a claim. Sections 1493, 1497, 1502, Code Civ. Proc. In Pollitz v. Wickersham, 150 Cal. 238, 88 Pac. 911, it is said: "A claim against an estate is not required to state the facts with all the preciseness and detail required in a complaint, and its sufficiency is not to be tested by the rules of pleading." Assuming that the presentation of a claim against the estate of Marre was necessary under the circumstances here shown, we are clear that the claim which was in fact presented was sufficient to comply with the law, to convey notice of the nature of the claim, of the circumstances out of which it grew and its approximate amount, which manifestly was all that could be stated.

Certain errors in the admission and rejection of evidence are presented for consideration. It would unduly and unnecessarily extend this opinion to notice them. They have been examined and found without merit.

For the foregoing reasons, the judgment and order appealed from are affirmed.

We concur: LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.; SLOSS, J.; MELVIN, J.

On Rehearing.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, not for the reason that I differ with the court upon any of the questions discussed in their opinion, but because I think at least one of the questions presented by the record and in the briefs of counsel, but not discussed in the opinion, deserves further consideration.

MEMORANDUM DECISIONS

19 Cal. App. 500

Ex parte POTTER. (Cr. 249). (District Court of Appeal, Second District, California. July 19, 1912.) Application of E. S. Potter for a writ of habeas corpus. Petitioner remanded. Parker & Moote, of Los Angeles, for petitioner. John D. Fredericks, Dist. Atty., Guy Eddie, City Prosecutor, Frank W. Stafford, Asst. City Prosecutor, and L. H. Roseberry, Special Prosecutor, all of Los Angeles, for respondent.

PER CURIAM. The Justices of this court being unable to agree upon a decision of the questions involved in this proceeding, it follows that the petitioner must be remanded to the custody of the chief of police of Los Angeles city; and it is so ordered.

Ex parte POTTER. (Cr. 250.) (District Court of Appeal, Second District, California. July 19, 1912.) Application for habeas corpus by E. S. Potter. Petitioner remanded. Parker & Moote, of Los Angeles, for petitioner. John D. Fredericks, Dist. Atty., Guy Eddie, City Prosecutor, Frank W. Stafford, Asst. City Prosecutor, and L. H. Roseberry, Special Prosecutor, all of Los Angeles, for respondent.

PER CURIAM. The Justices of this court being unable to agree upon a decision of the questions involved in this proceeding, it follows that the petitioner must be remanded to the custody of the chief of police of Los Angeles city; and it is so ordered.

WEST KEY NUMBER SYSTEM